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Report of the International Law Commission  
on the work of its twenty-ninth session  
9 May–29 July 1977

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#### ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
IMF	International Monetary Fund
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J. Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J. Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements, Documents</i>
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization
World Bank	International Bank for Reconstruction and Development

*Note.* The term "billion" signifies 1,000 million.

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#### EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

## Chapter I

### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-ninth session at the United Nations Office at Geneva from 9 May to 29 July 1977. The work of the Commission during this session is described in the present report. Chapter II of the report, on State responsibility, contains a description of the Commission's work on that topic, together with twenty-two articles provisionally adopted so far, and commentaries to three of those articles, provisionally adopted at the twenty-ninth session. Chapter III, on succession of States in respect of matters other than treaties, contains a description of the Commission's work on that topic, together with twenty-two articles provisionally adopted so far, and commentaries to six of those articles, provisionally adopted at the twenty-ninth session. Chapter IV, on the question of treaties concluded between States and international organizations or between two or more international organizations, contains a description of the Commission's work on that topic, together with thirty-nine articles provisionally adopted so far, and commentaries to twenty-two of those articles and to one subparagraph to be added to the article concerning the use of terms, which were provisionally adopted at the twenty-ninth session. Finally, chapter V is concerned with the most-favoured-nation clause, the law of the non-navigational uses of international watercourses, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the second part of the topic "Relations between States and international organizations", the programme and methods of work of the Commission, and a number of administrative and other questions.

#### A. Membership and attendance

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy);  
Mr. Mohammed BEDJAQUI (Algeria);  
Mr. Juan José CALLE Y CALLE (Peru);  
Mr. Jorge CASTAÑEDA (Mexico);  
Mr. Emmanuel Kodjoe DADZIE (Ghana);  
Mr. Leonardo DIAZ GONZÁLEZ (Venezuela);  
Mr. Abdullah EL-ERIAN (Egypt);  
Mr. Laurel B. FRANCIS (Jamaica);  
Mr. S. P. JAGOTA (India);  
Mr. Frank X. J. C. NJENGA (Kenya);  
Mr. C. W. PINTO (Sri Lanka);  
Mr. R. Q. QUENTIN-BAXTER (New Zealand);  
Mr. Paul REUTER (France);  
Mr. Willem RIPHAGEN (Netherlands);  
Mr. Milan ŠAHOVIĆ (Yugoslavia);  
Mr. Stephen M. SCHWEBEL (United States of America);

Mr. José SETTE CÂMARA (Brazil);  
Mr. Sompong SUCHARITKUL (Thailand);  
Mr. Abdul Hakim TABIBI (Afghanistan);  
Mr. Doudou THIAM (Senegal);  
Mr. Senjin TSURUOKA (Japan);  
Mr. N. A. USHAKOV (Union of Soviet Socialist Republics);  
Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);  
Mr. Stephan VEROSTA (Austria);  
Mr. Alexander YANKOV (Bulgaria).

3. At its 1414th meeting, held on 9 May 1977, the Commission observed one minute's silence in tribute to the memory of Mr Edvard Hambro, who had served as a member of the Commission since 1972, and decided to hold a special meeting to honour his memory. The Commission devoted its 1419th meeting, held on 16 May 1977, to tributes to the memory of Mr. Hambro.

4. On 19 May 1977, the Commission elected Mr. Abdul Hakim Tabibi (Afghanistan) to fill the vacancy caused by the death of Mr. Edvard Hambro.

5. All members attended meetings during the twenty-ninth session of the Commission,

#### B. Officers

6. At its 1414th meeting, held on 9 May 1977, the Commission elected the following officers:

*Chairman:* Sir Francis Vallat;  
*First Vice-Chairman:* Mr. José Sette Câmara;  
*Second Vice-Chairman:* Mr. Alexander Yankov;  
*Chairman of the Drafting Committee:* Mr. Senjin Tsuruoka;  
*Rapporteur:* Mr. Mohammed Bedjaoui.

7. At the present session of the Commission, its Enlarged Bureau was composed of the officers of the session, former Chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the present session. On the recommendation of the Enlarged Bureau, the Commission, at its 1430th meeting, held on 31 May 1977, set up for the present session a Planning Group to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Chairman: Mr. José Sette Câmara; Members: Mr. Roberto Ago, Mr. Emmanuel Kodjoe Dadzie, Mr. Stephen M. Schwebel, Mr. Senjin Tsuruoka and Mr. N. A. Ushakov.

### C. Drafting Committee

8. At its 1424th meeting, held on 20 May 1977, the Commission appointed a Drafting Committee composed of the following members: Mr. Roberto Ago, Mr. Juan José Calle y Calle, Mr. Leonardo Díaz González, Mr. Frank X. J. C. Njenga, Mr. R. Q. Quentin-Baxter, Mr. Paul Reuter, Mr. Milan Šahović, Mr. Stephen M. Schwebel, Mr. Abdul Hakim Tabibi, Mr. N. A. Ushakov and Mr. Stephan Verosta. Mr. Senjin Tsuruoka was elected by the Commission to serve as Chairman of the Drafting Committee. Mr. Mohammed Bedjaoui also took part in the Committee's work in his capacity as Rapporteur of the Commission.

### D. Working Group on proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

9. At its 1425th meeting, held on 23 May 1977, the Commission set up a Working Group to study the ways and means of dealing with the item entitled: "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", referred to the Commission by paragraph 4 of General Assembly resolution 31/76 of 13 December 1976, and to report thereon to the Commission. The Working Group was composed as follows: Chairman: Mr. Abdullah El-Erian; Members: Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Laurel B. Francis, Mr. Willem Riphagen, Mr. Stephen M. Schwebel, Mr. Sompong Sucharitkul, Mr. N. A. Ushakov and Mr. Alexander Yankov.

### E. Secretariat

10. Mr. Erik Suy, Legal Counsel, attended the 1414th meeting, held on 9 May 1977, and represent-

ed the Secretary-General on that occasion. Mr. Yuri M. Rybakov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session and acted as Secretary to the Commission. Mr. Santiago Torres-Bernárdez acted as Deputy Secretary to the Commission and Mr. Eduardo Valencia-Ospina, Mr. Moritaka Hayashi and Mr. Larry D. Johnson served as Assistant Secretaries to the Commission.

### F. Agenda

11. At its 1414th meeting, held on 9 May 1977, the Commission adopted an agenda for its twenty-ninth session, consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76).
6. Most-favoured-nation clause.
7. The law of the non-navigational uses of international water-courses.
8. Long-term programme of work.
9. Organization of future work.
10. Co-operation with other bodies.
11. Date and place of the thirtieth session.
12. Other business.

12. The Commission considered all the items on its agenda. In the course of the session, the Commission held sixty public meetings (1414th to 1473rd meetings) and one private meeting (on 19 May 1977). In addition, the Drafting Committee held twenty-four meetings, the Enlarged Bureau of the Commission five meetings and the Planning Group two meetings. The Working Group on the diplomatic courier held three meetings.

## Chapter II

### STATE RESPONSIBILITY

#### A. Introduction

##### 1. HISTORICAL REVIEW OF THE WORK

13. The object of the current work of the International Law Commission on State responsibility is to codify the rules governing State responsibility as a general and independent topic. The work is proceed-

ing on the basis of the Commission's decisions: (a) not to limit its study of the topic to a particular field, such as responsibility for injuries to the person or property of aliens; and (b) in codifying the rules governing international responsibility, not to engage in the definition and codification of the "primary" rules, whose breach entails responsibility for an internationally wrongful act.

14. The historical aspects of the circumstances in which the International Law Commission came to resume the study of the topic of "State responsibility" from this new standpoint have been described in previous reports of the Commission.<sup>1</sup> Following the work of the Sub-Committee on State Responsibility, the members of the Commission agreed, in 1963, on the following general conclusions: (a) that, for the purposes of codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there could nevertheless be no question of neglecting the experience and material gathered in certain particular sectors, especially that of responsibility for injuries to the person or property of aliens; and (c) that careful attention should be paid to the possible repercussions which recent developments in international law might have had on State responsibility.

15. These conclusions having been approved by the members of the Sixth Committee and adopted by the General Assembly, the International Law Commission gave fresh impetus to the work of codifying the topic, in accordance with the recommendations of the General Assembly. In 1967, having before it a note on State responsibility submitted by Mr. Ago, the Special Rapporteur,<sup>2</sup> the Commission, as newly constituted, confirmed the instructions given him in 1963.<sup>3</sup> In 1969 and 1970, the Commission discussed the Special Rapporteur's first<sup>4</sup> and second<sup>5</sup> reports in detail. That general examination enabled the Commission to establish the plan for the study of the topic, the successive stages for the execution of the plan and the criteria to be adopted for the different parts of the draft. At the same time, the Commission reached a series of conclusions as to method, substance and terminology, which were essential for the continuation of its work on State responsibility.<sup>6</sup>

16. It is on the basis of these directives, which were generally approved by the members of the Sixth Committee and adopted by the General Assembly, that the International Law Commission is now preparing the draft articles under consideration. In its resolutions 3315 (XXIX) of 14 December 1974 and 3495 (XXX) of 15 December 1975, the General Assembly recommended the Commission to continue its work on State responsibility on a high-priority basis, with a view to completing the preparation of a first set of draft articles on responsibility of States for

internationally wrongful acts at the earliest possible time. Resolution 31/97, adopted by the General Assembly on 15 December 1976, recommends that the Commission should continue on a high-priority basis its work on State responsibility, taking into account relevant General Assembly resolutions adopted at previous sessions, with a view to completing the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts, if possible within the next term of office of the members of the International Law Commission.

## 2. SCOPE OF THE DRAFT ARTICLES UNDER STUDY

17. The draft articles under study—which are cast in such a form that they can be used as the basis for concluding a convention if so decided<sup>7</sup>—thus relate solely to the *responsibility of States for internationally wrongful acts*.<sup>8</sup> The Commission fully recognizes the importance, not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any harmful consequences arising out of certain lawful activities, especially those which, because of their nature, present certain risks. The Commission takes the view, however, that the latter category of questions cannot be treated jointly with the former. Because of the entirely different basis of the liability for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp.

18. Being obliged to accept any risks inherent in an activity which is itself lawful, and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation, are two different matters. It is only because of the relative poverty of legal language that the same term is sometimes used to designate both. The limitation of the present draft articles to the responsibility of States for internationally wrongful acts will not, of course, prevent the Commission from also undertaking, in due course, a study of the topic of international liability for injurious consequences arising out of certain acts not prohibited by international law, as recommended by the General Assembly in its resolutions 3071 (XXVIII) of 30 November 1973, 3315 (XXIX) of 14 December 1974, 3495 (XXX) of 15 December 1975 and 31/97 of 15 December 1976.<sup>9</sup>

<sup>1</sup> See, in particular, *Yearbook... 1969*, vol. II, p. 229, document A/7610/Rev.1, chap. IV.

<sup>2</sup> *Yearbook... 1967*, vol. II, p. 325, document A/CN.4/196.

<sup>3</sup> *Ibid.*, p. 368, document A/6709/Rev.1, para. 42.

<sup>4</sup> *Yearbook... 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1. In 1971, the Special Rapporteur submitted a second addendum to his first report (*Yearbook... 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2).

<sup>5</sup> *Yearbook... 1970*, vol. II, p. 177, document A/CN.4/233.

<sup>6</sup> *Yearbook... 1969*, vol. II, p. 233, document A/7610/Rev.1, paras. 80-84 and *Yearbook... 1970*, vol. II, pp. 307-309, document A/8010/Rev.1, paras. 70-83.

<sup>7</sup> The question of the final form to be given to the codification of State responsibility will obviously have to be settled later, when the Commission has completed the draft. The Commission will then formulate, in accordance with its Statute, the recommendation it considers appropriate.

<sup>8</sup> The Commission does not underestimate the importance of studying questions relating to the responsibility of subjects of international law other than States, but the overriding need for clarity in the examination of the topic, and the organic nature of the draft, clearly make it necessary to defer consideration of these other questions.

<sup>9</sup> For the study of this topic by the Commission, see paragraph 108 below.

What the Commission should not do is to deal in one and the same draft with two matters which, in spite of certain common aspects and characteristics, are quite distinct.

19. For reasons of this kind, the Commission considered it particularly necessary to adopt, for the definition of the principle stated in article 1 of the present draft, a formulation which, while indicating that the internationally wrongful act is a source of international responsibility, cannot be interpreted as automatically ruling out the existence of another possible source of "responsibility". At the same time, the Commission, while reserving for later consideration the question of the final title of the present draft, wishes to emphasize that the expression "State responsibility", which appears in the title of the draft articles, is to be understood as meaning only "responsibility of States for internationally wrongful acts".

20. It is appropriate to point out once again that the purpose of the present draft articles is not to define the rules imposing on States, in one sector or another of inter-State relations, obligations the breach of which can be a source of responsibility and which can, in a certain sense, be described as "primary". In preparing the draft, the Commission is, on the contrary, undertaking to define other rules which, in contradistinction to those mentioned above, may be described as "secondary" inasmuch as they purport to determine the legal consequences of failure to fulfil obligations established by the "primary" rules. Only these "secondary" rules fall within the sphere of responsibility proper. A strict distinction in this sphere is essential if the topic of international responsibility is to be placed in its proper perspective and viewed as a whole.

21. This does not mean that the content, nature and scope of the obligations imposed on the State by the "primary" rules of international law are of no significance in determining the rules governing responsibility. As the Commission has had occasion to note, especially during recent sessions, it is certainly necessary to distinguish, on these bases, between different categories of international obligations when studying the objective element of the internationally wrongful act. To be able to assess the gravity of the internationally wrongful act and to determine the consequences attributable to that act, it is undoubtedly necessary to take into consideration the fact that the importance attached by the international community to the fulfilment of some obligations—for example, those concerning the maintenance of peace and security—will be of quite a different order from the importance attached to the fulfilment of other obligations, precisely because of the content of the former. It is also necessary to distinguish some obligations from others according to their nature, if we are to be able to determine in each case whether or not there has been a breach of an international obligation and, if so, to fix the time when the internationally wrong-

ful act was committed and when the resulting international responsibility can be invoked. The draft must therefore bring out these different aspects of international obligations whenever it proves necessary for the purpose of codifying the rules governing international responsibility. The essential fact nevertheless remains that it is one thing to state a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what the consequences of the breach must be. Only this second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of successful codification.

22. The draft articles are thus concerned only with determination of the rules governing the international responsibility of the State for internationally wrongful acts: that is to say, the rules which govern all the new legal relationships to which an internationally wrongful act on the part of a State may give rise in different cases. They codify the rules governing the responsibility of States for internationally wrongful acts "in general", not only in certain particular sectors. The international responsibility of the State is made up of a set of legal situations which result from the breach of any international obligation, whether it is imposed by the rules governing one particular matter or by those governing another.

23. The Commission wishes to emphasize that international responsibility is one of those topics concerning which the development of law can play a particularly important part, especially as regards the distinction between different categories of international offence and the content and degree of responsibility. The roles to be assigned to the progressive development and codification of already accepted principles cannot, however, be planned in advance. They will depend on the specific solutions adopted for the various problems.

### 3. GENERAL STRUCTURE OF THE DRAFT

24. The general structure of the draft was described at length in the Commission's report on the work of its twenty-seventh session.<sup>10</sup> Under the general plan adopted by the Commission, *the origin of international responsibility* forms the subject of *part 1* of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. *Part 2* deals with the *content, forms and degrees of international responsibility*, that is to say, determination of the consequences which an internationally wrongful act of a State may have under international law on the basis of different hypotheses

<sup>10</sup> *Yearbook...* 1975, vol. II, pp. 55-59, document A/10010/Rev.I, paras. 38-51.

(reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may decide to add to the draft a *part 3* concerning the "implementation" ("mise en œuvre") of international responsibility and settlement of disputes. The Commission also considered that it would be better to postpone a decision on the question whether the draft articles on State responsibility should begin with an article giving definitions or an article enumerating the matters excluded from the scope of the draft. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure of the draft. It is advisable to avoid definitions or initial formulations which might prejudice solutions to be adopted later.

25. Subject to subsequent decisions of the Commission, *part 1* of the draft (*The origin of international responsibility*) is, in principle, divided into five chapters. *Chapter I (General principles)* is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements, subjective and objective, of an internationally wrongful act. *Chapter II (The "act of the State" under international law)* is concerned with the subjective element of the internationally wrongful act, that is to say, with determination of the conditions in which particular conduct must be considered as an "act of the State" under international law. *Chapter III (Breach of an international obligation)* deals with the various aspects of the objective element of the internationally wrongful act constituted by the breach of an international obligation. *Chapter IV (Participation by other States in the internationally wrongful act of a State)* covers certain specific problems (incitement, complicity, assistance of another State, indirect responsibility) raised by the possible participation of other States in the internationally wrongful act of a State. Lastly, *chapter V (Circumstances precluding wrongfulness and attenuating or aggravating circumstances)* defines the circumstances which may have the effect either of precluding wrongfulness (*force majeure* and fortuitous event; state of emergency; self-defence; legitimate application of a sanction; consent of the injured State, etc.) or of mitigating or aggravating the wrongfulness of the State's conduct.

#### 4. PROGRESS OF THE WORK

26. In 1973, at its twenty-fifth session, the Commission began the preparation of the draft articles on first reading. At that session it adopted, on the basis of proposals made by the Special Rapporteur in the relevant sections of his third report,<sup>11</sup> articles 1 to 4

of *chapter I* (General principles) and the first two articles (articles 5 and 6) of *chapter II* (The "act of the State" under international law) of *part 1* of the draft.<sup>12</sup> In 1974, at its twenty-sixth session, the Commission continued its examination of the provisions of *chapter II* and, on the basis of proposals contained in other sections of the Special Rapporteur's third report,<sup>13</sup> adopted articles 7 to 9 of that chapter.<sup>14</sup> At its twenty-seventh session, in 1975, the Commission completed its examination of *chapter II*, i.e. the provisions relating to the conditions for attribution to the State, as a subject of international law, of an act which can constitute a source of international responsibility, by adopting, on the basis of the proposals made by the Special Rapporteur in his fourth report,<sup>15</sup> articles 10 to 15.<sup>16</sup> In 1976, at its twenty-eighth session, the Commission began consideration of the various questions raised by *chapter III* (Breach of an international obligation) and adopted, on the basis of the proposals contained in the Special Rapporteur's fifth report,<sup>17</sup> draft articles 16 to 19 concerning the existence of a breach of an international obligation, the irrelevance of the origin of the international obligation breached, the requirement that the international obligation be in force for the State and the distinction to be made between international crimes and international delicts on the basis of the importance for the international community as a whole of the subject-matter of the international obligation breached.<sup>18</sup> The texts of these articles and the commentaries thereto have been reproduced in the reports of the Commission on the work of the sessions mentioned.

tions 1 to 3 of chapter II of the Special Rapporteur's third report were considered by the Commission at its 1202nd to 1213th and 1215th meetings (*Yearbook... 1973*, vol. I, pp. 5-59 and 65-66).

<sup>12</sup> *Yearbook... 1973*, vol. II, p. 173, document A/9010/Rev.1, chap. II, sect. B. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1225th and 1226th meetings (*ibid.*, vol. I, pp. 117-121).

<sup>13</sup> Sections 4 to 6 of chapter II of the Special Rapporteur's third report (see foot-note 11 above). These sections were considered by the Commission at its 1251st to 1253rd and 1255th to 1263rd meetings (*Yearbook... 1974*, vol. I, pp. 5-61).

<sup>14</sup> *Yearbook... 1974*, vol. II (Part One), p. 277, document A/9610/Rev.1, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1278th meeting (*ibid.*, vol. I, pp. 151-154).

<sup>15</sup> *Yearbook... 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1. The Commission considered the sections contained in the Special Rapporteur's report at its 1303rd to 1317th meetings (*Yearbook... 1975*, vol. I, pp. 3-72).

<sup>16</sup> *Yearbook... 1975*, vol. II, pp. 61 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1345th meeting (*ibid.*, vol. I, pp. 214-218).

<sup>17</sup> Sections 1 to 4 of chapter III of the Special Rapporteur's fifth report (*Yearbook... 1976*, vol. II (Part One); pp. 3 *et seq.*, document A/CN.4/291 and Add.1-2). The Commission considered these sections at its 1361st to 1376th meetings (*ibid.*, vol. I, pp. 6-91).

<sup>18</sup> *Ibid.*, vol. II (Part Two), pp. 75 *et seq.*, document A/31/10, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1401st to 1403rd meetings (*ibid.*, vol. I, pp. 235-253).

<sup>11</sup> *Yearbook... 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3. The sections of chapter I and sec-

27. At the present session, the Commission had before it the sixth report by the Special Rapporteur (A/CN.4/302 and Add.1-3),<sup>19</sup> which deals with the matters relating to *chapter III* that remain to be considered. The report contains three sections (sections 5 to 7) devoted to consideration of the consequences of the nature of an international obligation for the conditions of its breach and, more particularly: (a) the breach of an international obligation requiring the State to adopt a specific course of conduct (obligation "of conduct" or "of means"); (b) the breach of an international obligation requiring the State to achieve a particular result (obligation "of result"); (c) the requirement of the exhaustion of local remedies to establish a breach of such international obligations of result whose specific purpose is to guarantee a particular treatment to private individuals. This part of the report will be followed by other sections dealing with the breach of an international obligation, the purpose of which is such that, for it to be breached, an external event must be added to the conduct of the State, and with various problems relating to determination of the time and duration of the breach of an international obligation, i.e. what is called the *tempus commissi delicti*.

28. On the basis of the Special Rapporteur's sixth report, the Commission was able at the present session (1454th to 1457th, 1460th, 1461st, 1463rd and 1465th to 1468th meetings) to take up the questions dealt with in sections 5 to 7, and referred the articles contained in this report to the Drafting Committee. At its 1462nd and 1469th meetings, the Commission examined the texts of articles 20 to 22 proposed by the Drafting Committee and adopted the texts of those articles on first reading.

29. The Commission intends to continue its study of the topic at its thirtieth session, beginning where it left off at the present session. It proposes to examine, on the basis of the relevant sections of a future report by the Special Rapporteur, the questions relating to *chapter III* which remain to be considered and then to take up questions relating to participation by other States in the internationally wrongful act of a State, circumstances precluding wrongfulness and attenuating or aggravating circumstances, i.e. *chapters IV and V* of part 1 of the draft, which will complete that part.

30. At the end of the present session, the Commission received a Secretariat document<sup>20</sup> containing a comprehensive review of State practice, international jurisprudence and doctrine relating to "*force majeure*" and "fortuitous event" as circumstances precluding wrongfulness. This document was prepared by the Codification Division of the United Nations Office of Legal Affairs as part of the research on the subject undertaken at the request of the Commission and the Special Rapporteur.

<sup>19</sup> Reproduced in *Yearbook... 1977*, vol. II (Part One).

<sup>20</sup> ST/LEG/13 (A/CN.4/303).

## B. Draft articles on State responsibility<sup>21</sup>

31. The texts of articles 1 to 22, adopted by the Commission at its twenty-fifth, twenty-sixth, twenty-seventh and twenty-eighth sessions and at the present session, together with the texts of articles 20 to 22 and the commentaries thereto, adopted by the Commission at the present session, are reproduced below for the information of the General Assembly.

### 1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

#### CHAPTER I

#### GENERAL PRINCIPLES

##### *Article 1. Responsibility of a State for its internationally wrongful acts*

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

##### *Article 2. Possibility that every State may be held to have committed an internationally wrongful act*

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

##### *Article 3. Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when:

(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.

##### *Article 4. Characterization of an act of a State as internationally wrongful*

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

#### CHAPTER II

#### THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

##### *Article 5. Attribution to the State of the conduct of its organs*

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

<sup>21</sup> As stated above (para. 17), the draft articles relate only to the responsibility of States for internationally wrongful acts. The question of the final title of the draft will be considered by the Commission at a later date.

*Article 6. Irrelevance of the position of the organ in the organization of the State*

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

*Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority*

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

*Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State*

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

*Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization*

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

*Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity*

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

*Article 11. Conduct of persons not acting on behalf of the State*

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

*Article 12. Conduct of organs of another State*

1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

*Article 13. Conduct of organs of an international organization*

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

*Article 14. Conduct of organs of an insurrectional movement*

1. The conduct of an organ of an insurrectional movement, which is established in the territory of a State or in any other territory under its administration, shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

*Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State*

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

CHAPTER III

THE BREACH OF AN INTERNATIONAL OBLIGATION

*Article 16. Existence of a breach of an international obligation*

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

**Article 17. Irrelevance of the origin of the international obligation breached**

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.
2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

**Article 18. Requirement that the international obligation be in force for the State**

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.
2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.
3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.
4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.
5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

**Article 19. International crimes and international delicts**

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
  - (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
  - (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

**Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct**

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

**Article 21. Breach of an international obligation requiring the achievement of a specified result**

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

**Article 22. Exhaustion of local remedies**

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

2. TEXT OF ARTICLES 20 TO 22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION

**Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct**

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

### Commentary

(1) The breach by a State of any international obligation incumbent upon it always constitutes an internationally wrongful act which may engage the international responsibility of the State that breaches the obligation. However, the obligations prescribed by international law are not all identical. On the contrary, they present substantive differences which have diverse consequences as regards determination of the conditions in which they are breached and as regards the characterization of the acts of the State committed in breach of them. In the context of article 19 of the draft, the Commission has already found it necessary to distinguish between international "crimes" and international "delicts", on the basis of the degree of importance of the subject-matter of the international obligation breached for safeguarding the fundamental interests of the international community as a whole. As has been seen, the need for such a distinction derives from the fact that, in contemporary international law, different régimes of responsibility are attached to "international crimes" and "international delicts", as regards both the consequences of the internationally wrongful act for the State which committed it and the subjects authorized to "implement" those consequences. However, international obligations not only express duties pertaining to different sectors of inter-State relations and to matters of varying importance for the international community; they are also differently structured as regards determination of the ways and means by which the State is supposed to discharge them. For example, there are international obligations which require the State to perform or to refrain from a specifically determined action. There are other cases in which the international obligation only requires the State to bring about a certain situation or result, leaving it free to do so by whatever means it chooses. Obligations of the first kind are sometimes called obligations "of conduct" or "of means", and those of the second kind obligations "of result".<sup>22</sup>

(2) Questions of terminology aside,<sup>23</sup> it is obvious that international obligations have different struc-

<sup>22</sup> This terminology, which originates in systems of internal law, more particularly those deriving from Roman law, is also frequently employed in international law. It should be pointed out, however, that, while there is no doubt that international law recognizes obligations in both the above-mentioned categories, there would be some risk of confusion in seeking to liken the distinction and the related characterizations made in international law too closely to those which are familiar in private law systems and which are logically influenced by the characteristics of these other legal systems. In other words, while in most cases an obligation which is one "of conduct" or "of means" in international law is of the same kind in civil law, this is not always the case; and the same applies to obligations "of result".

<sup>23</sup> The distinction between these two types of obligation in international law was first stated explicitly by D. Donati, who made it a general principle (D. Donati, *I trattati internazionali nel diritto costituzionale* (Turin, UTET, 1906), vol. I, pp. 343 *et seq.*). This distinction had already been implicitly made by H. Triepel, when he emphasized the difference between directly ordered internal law and internationally necessary internal law (H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 299). It also follows from the passage from D. Anzilotti quoted in foot-note 27 below.

tures and impose their requirements on States in ways which are not always the same. In so far as it proves necessary for the purposes of the present articles, account must therefore be taken of these differences in the *nature* of international obligations. Admittedly, draft article 16 already states the general principle that there is a breach of an international obligation by a State when an "act" of that State is not in conformity with what is required of it by that obligation, but it does not say how it may be concluded that there exists an "act of the State" which is "not in conformity with what is required of it" by the obligation in question, when the structure of that obligation is of one kind rather than another. Now it is precisely in this respect that the nature of the obligation has a decisive effect for, in international law as in private law, the breach of an obligation formally requiring the use of specifically determined means is not occasioned in the same way as the breach of an obligation which leaves the subject free to choose between various means. In other words, in order to determine whether a certain conduct of the State constitutes a breach of an international obligation incumbent upon it, it is necessary to know whether the obligation is in the nature of an obligation "of conduct" or "of means" or, on the contrary, an obligation "of result".

(3) In view of these considerations, the Commission thought it necessary to make a distinction in this chapter of the draft between the breach of international obligations "of conduct" or "of means" and the breach of obligations "of result". It may be asked, and some members of the Commission did ask, whether the adoption of such a distinction is not likely to cause some uncertainty, since in their opinion it is not always easy in practice to identify a given obligation as one "of conduct" or "of means", or one "of result". For example, in certain countries of the Council of Europe, the question has arisen whether the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms<sup>24</sup> does or does not impose on the parties thereto an obligation "of conduct", namely, the obligation to enact certain legislation. It may also be that, within a system of rules governing an institution of international law, there are obligations "of conduct" or "of means" alongside other obligations which have the characteristics of an obligation "of result". For example, the general rules governing the right of innocent passage through the territorial sea, set out in article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone,<sup>25</sup> are formulated in terms of obligations "of result" rather than "of conduct" or "of means". But this does not prevent the same article from stating an obligation "of conduct" or "of means" in the particular case of the innocent passage of submarines through the territorial sea, these vessels being required to navigate on the surface and to show their flag.

<sup>24</sup> United Nations, *Treaty Series*, vol. 213, p. 221.

<sup>25</sup> *Ibid.*, vol. 516, p. 205.

(4) There are, indeed, cases in which problems of interpretation may arise. However, if in such a case an international dispute arises as to whether an international obligation is of one type rather than another, it will clearly be for the competent international law tribunals to settle the question. In the opinion of the Commission, the possible existence of specific problems of interpretation in certain cases, which are, moreover, marginal, is not in itself a sufficient reason to omit from the draft articles the distinction between the two types of the international obligation mentioned, since that distinction is of fundamental importance in determining how the breach of an international obligation is committed in any particular instance.<sup>26</sup> The normative and practical importance of the distinction between obligations “of conduct” or “of means” and obligations “of result” for the codification of the general rules governing international responsibility will appear, particularly, during the consideration of the various problems relating to the determination of the time and duration of the breach of an international obligation, i.e. what is called the *tempus commissi delicti*, which the Commission intends to take up in connexion with the last article of chapter III of the draft.

(5) To recognize the existence of two different types of international obligation according to their nature, and the importance of distinguishing between them in determining when and how the breach of each of these types of international obligation occurs, does not mean that it is necessary to specify, in the present draft articles, criteria for establishing the cases in which international law must impose on States obligations “of conduct” or “of means” and those in which it must confine itself to imposing obligations “of result”. It is at the stage of formation of the “primary” rules of international law that this legal system makes, as it were, an ideal choice between the cases in which it must confine itself to requiring a State to achieve a particular concrete result, while respecting its sovereign freedom to choose the means of doing so, and the cases in which the object in view leads it to require the State to adopt a particular course of conduct. What must be emphasized at the present stage is that the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or only requires it to achieve a certain result, while leaving it free to choose the means of doing so.

(6) Article 20 of the draft is concerned only with the breach of international obligations whose fulfilment

requires the use by the State of specifically determined means. Here, therefore, it is necessary to establish the conditions in which there is a breach of an international obligation requiring the State to take action which the obligation specifically determines or to refrain from such action. Obligations of this type are frequently encountered in international law where the action required of the State has to be taken at the level of direct relations between States. Obligations “of result”, on the other hand, the breach of which is the subject of article 21 of the draft, predominate where the State is required to bring about a certain situation within its system of internal law. In such cases, international law naturally respects the freedom of the State and confines itself to informing the State of the result to be achieved, leaving it free to choose the means to be used for that purpose.<sup>27</sup> Nevertheless, in this case too, it sometimes happens that international law enters, as it were, into the sphere of the State, to require the adoption of a particular course of conduct by some branch of the State machinery. Needless to say, obligations “of conduct” or “of means” are more frequently provided for by conventional international law than by customary law.

(7) The particular course of conduct which certain international obligations require of the State may be active conduct or conduct of omission. It may relate to different branches of State activity. For example, international obligations sometimes require an action or an omission by legislative or, more frequently, normative organs of the State—action consisting in adopting or abrogating a specific rule, whatever its form or denomination may be (law, decree, regulation, etc.), or, conversely, in not adopting or not abrogating certain specific rules. However, there are also international obligations which provide that the particular action or omission required of the State shall be undertaken by executive or judicial organs. The required action or omission may, moreover, be of a legal as well as of a purely physical nature.

(8) The distinction referred to above must not obscure the fact that every international obligation has an object or, one might say, a result, including the obligations called obligations “of conduct” or “of means”. Conversely, every international obligation, even if it is of the type called an obligation “of result”, requires of the obligated State a certain course of conduct. What distinguishes the first type of obligation from the second is not that obligations “of conduct” or “of means” do not have a particular ob-

<sup>26</sup> This distinction is not, moreover, the only one to be taken into consideration for the purpose of determining the conditions in which the breach of an international obligation takes place. In the context of a later article in this chapter of the draft, the Commission intends to take account of the difference between the case in which the breach of an international obligation is revealed by the mere conduct of the State and the case in which the breach only occurs when there is added to the conduct of the State an external event which it was, precisely, required to prevent (wrongful act constituted by an event).

<sup>27</sup> Attention was drawn to this characteristic of international obligations by D. Anzilotti (“La responsabilità internazionale des Etats à raison des dommages soufferts par des étrangers”, *Revue générale de droit international public* (Paris), vol. XIII, No. 1 (January–February 1906), p. 26). “It is for this reason”, he adds, “that in most cases the State carries out fewer acts prescribed by international law than acts which it has itself freely chosen as being the most appropriate for the performance of its duty towards other States” [translation by the Secretariat]. See also, by the same author, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. I, p. 117.

ject or result, but that their object or result must be achieved through action, conduct or means "specifically determined" by the international obligation itself, which is not true of international obligations "of result". This is the essential distinguishing criterion for characterizing an international obligation as an obligation "of conduct" or "of means". It is not sufficient, for example, for an obligation to provide, as does Article 33 of the Charter of the United Nations, that States shall settle their international disputes by "peaceful means", for it to be characterized forthwith as an obligation "of conduct" or "of means". In practice, as the same Article indicates, States remain free to choose the "peaceful means" which they consider most appropriate for settling the dispute between them. Moreover, the specific determination of the required action, which identifies an international obligation as an obligation "of conduct" or "of means", may vary in its degree of precision. For example, an international obligation may specify that the State shall enact "a law", or it may require the State to adopt "legislative measures". In the latter situation, the obligation, while remaining an obligation "of conduct" or "of means", nevertheless leaves the State some latitude, enabling it to proceed either by enacting a law proper or by some other normative means peculiar to its legal system. The content of the normative act required may also sometimes be defined in full detail and sometimes simply indicated in a much more summary fashion. Obviously, there is a difference between the international obligations imposed on States parties by "uniform law" conventions, for example, and those specified in the Geneva Conventions of 12 August 1949 for the protection of war victims, concerning the repression of abuses and infractions committed in breach of those Conventions, namely, that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.<sup>28</sup>

And yet there is no doubt that, in the first case as in the second, we are concerned with international obligations "of conduct" or "of means", since the action required of the State is always specifically determined as being the adoption of "rules".

(9) The fact that international obligations which are defined as obligations "of conduct" or "of means" require of the State specifically determined actions or omissions by some part of the State machinery—or, in other words, the fact that these obligations enter, as it were, into the sphere of the domestic jurisdiction of States to tell them how they must discharge the obligation in question—does not mean that the fulfilment of obligations of this kind produces effects only in the internal domain of the State. On the contrary, as has been noted above,<sup>29</sup> obligations of this nature are to be found mainly in the sphere of direct

inter-State relations. Thus, an obligation "of conduct" or "of means", such as one requiring that the armed forces or police forces of a country should not enter the territory of another country without its consent, is intended to produce its effects, not in the internal domain of the State, but entirely in the sphere of direct inter-State relations. The same applies, for example, to the obligation "of conduct" or "of means" concerning the procedure for the innocent passage of submarines through the territorial sea of a foreign State. In general, it should be noted that the sphere in which an international obligation "of conduct" or "of means" produces its effects depends, in the last analysis, on the international legal interests which the obligation is intended to protect. International obligations "of conduct" or "of means" may exist in any sector of international law; they do not belong to any particular sector of international law, even though they are, in fact, more common in some sectors than in others. In any case, the fact that the effects of the obligation manifest themselves within the State or directly at the inter-State level has no bearing on the question when and how a breach of this type of international obligation occurs. In both cases, the breach is established in the same way.

(10) The so-called "uniform law" international conventions offer one of the most typical examples of obligations requiring specifically determined action by "legislative" organs of the State. As has been noted, these obligations are not confined to providing that the State must take legislative action; they also specify the precise content of the legislation required. As a general rule, the State is bound by these obligations to reproduce in its legislation the actual text of the uniform law annexed to the international convention in question. For example, article 1, paragraph 1, of the Convention relating to a uniform law on the international sale of goods (The Hague, 1964) provides that:

Each Contracting State undertakes to incorporate into its own legislation, in accordance with its constitutional procedure, not later than the date of the entry into force of the present Convention in respect of that State, the Uniform Law on the International Sale of Goods ... forming the Annex to the present Convention.<sup>30</sup>

The Hague Conventions on Private International Law, some of the international labour conventions, some agreements on international sanitary regulations, the provisions drawn up by certain international organizations and agencies, etc. contain many similar formulas. A classic example is to be found in article 24 of the Convention instituting the definitive Statute of the Danube, which was signed at Paris on 23 July 1921 and laid down expressly that the Danube Commission should draw up navigation and police regulations and that:

Each State shall bring these regulations into force in its own territory by a legislative or administrative act ...<sup>31</sup>

<sup>28</sup> United Nations, *Treaty Series*, vol. 75, pp. 62, 116, 236 and 386.

<sup>29</sup> Para. 6.

<sup>30</sup> United Nations, *Treaty Series*, vol. 834, p. 107.

<sup>31</sup> League of Nations, *Treaty Series*, vol. XXVI, p. 173.

(11) Examples of international obligations requiring specific legislative action may also be found in international conventions having other purposes. For example, article 10, paragraph 1, of the State Treaty for the re-establishment of an independent and democratic Austria (Vienna, 15 May 1955) requires Austria "to codify and give effect to the principles set out in Articles 6, 8 and 9" of the Treaty.<sup>32</sup> Conversely, the same paragraph requires Austria "to repeal or amend all legislative and administrative measures adopted between 5th March, 1933 and 30th April, 1945, which conflict with the principles set forth in Articles 6, 8 and 9" of the Treaty. Article 2, paragraph 1 (c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination provides that:

Each State Party shall take effective measures ... to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.<sup>33</sup>

Similarly, under article 3 (a) of the 1960 Convention against discrimination in education, States undertake to "abrogate any statutory provisions and any administrative instructions ... which involve discrimination in education".<sup>34</sup>

(12) In addition to international obligations requiring specifically determined action by legislative organs, international law also knows obligations that require specifically determined action by the executive organs of the State. Examples which may be mentioned are the specific obligations to deliver arms and other objects, to deliver or scuttle ships and to dismantle fortifications, which appear so frequently in peace treaties. For example, article 115 of the Treaty of Versailles provides for the destruction of the fortifications, military establishments and harbours of the Island of Heligoland "by German labour and at the expense of Germany".<sup>35</sup> In articles 145, 195 and other articles of part V of the Treaty of Versailles, in articles 40, 41 and 42 of the Treaty of Peace with Italy, of 10 February 1947<sup>36</sup> and in similar provisions of other peace treaties concluded at the end of the Second World War, examples may also be found of international obligations requiring specific action by the executive organs of the State. The clauses in certain treaties requiring the parties to employ specifically determined means (negotiation, mediation, conciliation, arbitration, judicial settlement) for the settlement of disputes relating to the application or interpretation of the provisions of those treaties may also be cited as examples of international obligations requiring a particular course of active conduct by executive organs of the State.

(13) Lastly, there are international obligations requiring specifically determined action which must be

carried out by the judicial organs of the State. Typical examples of international obligations requiring specifically determined action by judicial organs are to be found in the provisions of peace treaties which, like annex XVII, section A, to the 1947 Treaty of Peace with Italy, require the competent authorities to revise certain decisions and orders of prize courts. Other examples are provided by some international conventions on jurisdiction, the recognition of foreign decisions and legal assistance; such examples include article 2, paragraph 1, and articles 31 and 32 of the European Communities Convention of 27 September 1968, on jurisdiction and the enforcement of civil and commercial judgments.<sup>37</sup>

(14) As indicated above,<sup>38</sup> the particular course of conduct required of a State by an international obligation may also be one of omission. Once again, the conduct in question may be required of the legislative organs of the State as well as of the executive or judicial organs. An example of an international obligation specifically requiring the State not to rescind certain laws is to be found in article 10 of the Austrian State Treaty mentioned above.<sup>39</sup> By the provisions of this article, Austria undertakes to maintain the laws already adopted for the liquidation of the remnants of the Nazi régime, as well as the law of 3 April 1919 concerning the House of Hapsburg-Lorraine.

(15) Conduct of omission by executive organs is also specifically required by some international obligations. There are many international obligations which require the administrative authorities, particularly the police, to refrain from entering certain premises which enjoy special protection, such as the premises of a diplomatic or consular mission or an international organization (see, for example, article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations)<sup>40</sup> or to refrain from subjecting certain specially protected individuals to arrest or detention (see, for example, article 29 of the same Convention). General international law imposes on the police forces and the armed forces of all countries an obligation not to enter the territory of another country without its consent, not to make arrests there, etc. International law also forbids the aircraft of a State to enter the air space of another State without its consent. Peace treaties sometimes even impose the specific obligation not to maintain or assemble armed forces in a specified region of a State's own territory. A well-known example of this type of obligation is article 43 of the Treaty of Versailles, which forbade Germany to maintain or assemble armed forces or execute military manoeuvres on the left bank

<sup>32</sup> United Nations, *Treaty Series*, vol. 217, p. 233.

<sup>33</sup> *Ibid.*, vol. 660, p. 195.

<sup>34</sup> *Ibid.*, vol. 429, p. 93.

<sup>35</sup> *British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), pp. 71-72.

<sup>36</sup> United Nations, *Treaty Series*, vol. 49, p. 3.

<sup>37</sup> Commission of the European Communities, *Conventions concluded by the Member States of the European Communities pursuant to EEC Treaty Article 220, Supplement to Bulletin No. 2—1969 of the European Communities*.

<sup>38</sup> See para. 7.

<sup>39</sup> See para. 11 above.

<sup>40</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

of the Rhine or to the west of a line 50 kilometres from the river on the right bank.<sup>41</sup>

(16) In other cases, it is the judicial organs of the State which are specifically required by the international obligation not to exercise their jurisdiction in respect of foreign States, certain of their organs or certain categories of disputes, etc. Thus, for example, article 43, paragraph 1, of the 1963 Vienna Convention on Consular Relations forbids the judicial authorities of the receiving State to exercise their jurisdiction over consular officers in respect of acts performed in the exercise of consular functions.<sup>42</sup> Article II, paragraph 3, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) requires the court of a contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, to refrain from any exercise of jurisdiction and to refer the parties to arbitration if one of them so requests.<sup>43</sup> Other international conventions provide for the obligation to suspend certain hearings during parallel proceedings in another State.

(17) Normally, international conventions state explicitly the particular course of conduct they require of a given branch of the State machinery. Occasionally, however, there are conventions which do not expressly lay down, or mention only in part, the requirement of a particular course of conduct, but this requirement may nevertheless be deduced from the context of the convention. This is the case, for example, as regards articles 1 and 2 of ILO Convention No. 55, concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen,<sup>44</sup> and article 2 of ILO Convention No. 123, concerning the Minimum Age for Admission to Employment Underground in Mines.<sup>45</sup> The forms addressed to States concerning observance of the provisions of these conventions confirm that they require certain "legislative" action by the States parties to the conventions in question.<sup>46</sup> The characterization of a conventional

obligation as an obligation "of conduct" or "of means", rather than as an obligation "of result", may therefore be the result of an interpretation. It goes without saying that, in the case of customary international obligations, such a characterization is possible only as a sequel to the normal process whereby the existence and subject-matter of any customary rule are established in international law.

(18) In the cases just considered, which, despite their diversity, are all characterized by the fact that the international obligation in question requires of the State a particular course of conduct in the form of an action or omission, the implications of this characteristic of the obligation for the determination of the existence of a possible breach are clear. It may always prove difficult, in any particular case, to determine what in fact was the conduct of the State organs, and questions may always arise regarding the verification of the exact content of the obligation incumbent on the State. On the other hand, in the opinion of the Commission, there can be no doubt about the conclusion that, where the action or omission found to have occurred is in fact not in conformity with the conduct specifically required of the organ responsible for the action or omission, there is a direct breach of the obligation in question, without any other condition being required for such a finding. This finding cannot be influenced by the fact that the non-conformity of the conduct adopted with the conduct which should have been adopted did or did not have consequences that were actually harmful. If, for example, as in the case of article 10, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on 16 December 1966,<sup>47</sup> an international convention imposes on a State an obligation to recognize that the employment of children and young persons "in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be *punishable by law*", this obligation is breached simply by the fact that a law providing for punishment of such practices has not been enacted, even if no specific instance of the employment of children in such work has been found in the country concerned. Similarly, if, as in the case of article 2, paragraph 1(c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,<sup>48</sup> a convention obliges a State to rescind legislative provisions which have the effect of creating such discrimination, this obligation is breached simply by the fact that the provisions in question have not officially been rescinded, even if they would never actually have been applied or no longer could be.

(19) State practice and international jurisprudence confirm the validity of the above conclusion. It follows from this practice and jurisprudence that, where the international obligation requires from the State a particular course of conduct in the form of an action

<sup>41</sup> For reference, see foot-note 35 above.

<sup>42</sup> United Nations, *Treaty Series*, vol. 596, p. 261.

<sup>43</sup> *Ibid.*, vol. 330, p. 3.

<sup>44</sup> *Conventions and Recommendations adopted by the International Labour Conference, 1919-1966* (Geneva, ILO, 1966), p. 333.

<sup>45</sup> *Ibid.*, p. 1117.

<sup>46</sup> For example, the form relating to ILO Convention No. 55 contains the following injunction: "Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation...". In reply to a question put on the subject by the Government of the United States, the ILO replied, on 13 November 1950, that "the competent bodies of the International Labour Organisation have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organisation in the light of its constitutional practice and its existing law". The reference to constitutional practice clearly related to those cases in which, by virtue of that practice, the ratification of a convention automatically incorporates the provisions of the convention into "the law of the land", thus in fact giving the instrument of ratification the force of a domestic legislative enactment. See *The International Labour Code, 1951* (Geneva, ILO, 1952), vol. I, pp. 863 *et seq.*

<sup>47</sup> Resolution 2200 A (XXI), annex.

<sup>48</sup> See foot-note 33 above.

or omission on the part of one of its organs, the conduct of a State organ which is not in conformity with that required of it by the obligation in question is sufficient to constitute a breach of the obligation. The most accurate formulation of this principle was given by the Swiss Government in its reply to point III, No. 1, of the request for information addressed to States by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), which included the following passage:

Failure to enact legislation may of itself involve the international responsibility of the State if some agreement to which the State is a party expressly obliges the contracting parties to enact certain legislation. On the other hand, in the absence of a contractual provision of this kind, it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations.<sup>49</sup>

The distinction between the two ways in which an international obligation may be breached, depending on the varying nature of the obligation, is clearly brought out in this explicit statement. In particular, with regard to the case to which this article refers, the Swiss Government clearly favours the view that, where the international obligation specifically requires the State to adopt a certain measure, in this case a law, the mere negative fact of not adopting that measure constitutes in itself a breach of the international obligation in question and, if there is nothing to prevent it, engages the responsibility of the State.

(20) There is no doubt either about the applicability of the principle thus stated to practical cases. In this connexion, it is particularly interesting to consider cases involving the violation of certain international labour conventions, for example, where one of the States which ratified a convention has not enacted the legislative provisions required by the convention or, especially, has not rescinded the laws which the convention expressly obliged it to rescind. The report of the Commission appointed under article 26 of the Constitution of the International Labour Organisation to examine the complaint filed by the Government of Ghana concerning the observance by the Government of Portugal of Convention No. 105 concerning the Abolition of Forced Labour, 1957 stressed in particular that the international obligations placed on the State by certain conventions require the formal res-

cision of a particular legislative provision and that "A situation in which a legal provision inconsistent with the requirements of the Convention subsists but is regarded as obsolete" or as being superseded *de facto* cannot be considered satisfactory for the purposes of the application of the Convention. The Commission of Inquiry emphasizes that "Full conformity of the law with the requirements of the Convention is therefore essential", but taken alone is not enough since it is also necessary "that the law should be fully and strictly applied in practice".<sup>50</sup> The report of the Commission appointed under article 26 of the Constitution of the International Labour Organisation to examine the complaint filed by the Government of Portugal concerning the observance by the Government of Liberia of Convention No. 29 concerning Forced or Compulsory Labour 1930 shows that the Commission of Inquiry which dealt with this case endorsed the opinion expressed by the Commission which heard the complaint referred to above. In applying and referring specifically to article 23 of the Convention, which requires the competent authorities of the State to "issue complete and precise regulations governing the use of forced or compulsory labour", the Commission concluded that "the legislation of Liberia until 31 August 1961, the date of filing of the complaint, was inconsistent with the obligation of Liberia under the Constitution of the Organisation to give effect to the provisions of the Convention in law and in fact and with the specific requirements of Articles 23 to 25 of the Convention".<sup>51, 52</sup>

(21) In other concrete cases, it has not been a breach of the specific obligation to enact or abrogate a legislative provision which has been the subject of a dispute between States, but rather failure to observe the equally specific obligation to perform a certain act of an administrative nature or, especially, to refrain from it, such as the obligation not to enter the premises of a diplomatic mission or the private residence of a foreign diplomatic agent,<sup>53</sup> or the premises of a foreign consulate.<sup>54</sup> In still other situations, the dispute has been caused by a breach of the obligation to respect the immunity from jurisdiction

<sup>49</sup> Point III, No. 1, of the request for information by the Preparatory Committee read as follows:

"Does the State become responsible in the following circumstances:

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

It was in connexion with the second question that the Swiss Government expressed the views stated above. See League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), pp. 25 and 29.

<sup>50</sup> ILO, *Official Bulletin*, vol. XLV, No. 2, supplement II, April 1962, para. 716, p. 231. The Commission of Inquiry was composed of Mr. P. Ruegger, Mr. E. Armand-Ugon and Mr. I. Forster.

<sup>51</sup> ILO, *Official Bulletin*, vol. XLVI, No. 2, supplement II, April 1963, para. 416, pp. 164-165. The Commission of Inquiry in this case was composed of Mr. E. Armand-Ugon, Mr. T. P. P. Goonetilleke and Mr. E. Castrén.

<sup>52</sup> Article 25 of the Convention supplements article 23 by requiring that the illegal exaction of forced or compulsory labour shall be punishable as a criminal offence.

<sup>53</sup> On this subject, see the cases cited by G. H. Hackworth in *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1942), vol. IV, pp. 562 *et seq.*

<sup>54</sup> See G. H. Hackworth, *op. cit.*, pp. 716 *et seq.*; A. C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1965), vol. III, pp. 408 *et seq.*; S.I.O.I.-C.N.R., *La prassi italiana di diritto internazionale* (Dobbs Ferry, (N.Y.), Oceana, 1970), 1st series (1861-1887), vol. I, pp. 469-470.

of diplomatic agents.<sup>55</sup> In all these cases, the basic principle applied has been the same, namely, that the adoption by any administrative or judicial authority of conduct different from that specifically required by the international obligation has been considered as directly constituting a breach of that obligation.

(22) The positions taken by the authors of learned works dealing with the question examined here coincide with those which derive from the logic of the relevant principles and which State practice and international jurisprudence confirm. Triepel expressly deduced from the distinction he had made concerning the possible influence of international law on internal law that, where a rule of international law or a treaty imposes on the State the duty to *have* a particular law, the non-adoption or the abrogation of that law constitutes a breach of international law or of the treaty; this obtains even if, despite the non-adoption or the abrogation of the internationally required internal law, the State is in a position "effectively to carry out everything which can or should be carried out under the law" and intends to do so.<sup>56</sup> More recently, several writers have studied the question in greater detail and have shown the effect which the nature of an international obligation necessarily has on the determination of the existence of a breach of the obligation. These writers have stressed, in particular, that where the obligation requires a State to adopt conduct (in the form of an action or omission) which must necessarily be carried out in certain ways and by specific bodies, any conduct adopted by the State which is not in conformity with that specifically required constitutes as such a direct breach of the existing international legal obligation, so that, if all the other requisite conditions are fulfilled, an internationally wrongful act exists.<sup>57</sup>

(23) In the light of the above considerations, the Commission is of the opinion that, where an international obligation requires the adoption of a particular course of conduct by a given branch of the State machinery, the obligation will be fulfilled if the conduct specifically required by the obligation is adopted; if not, it must be held that the obligation has

<sup>55</sup> See the cases cited by G. H. Hackworth, *op. cit.*, pp. 533 *et seq.*; A. C. Kiss, *op. cit.*, pp. 340-341; S.I.O.I.-C.N.R., *op. cit.*, pp. 384 *et seq.*

<sup>56</sup> H. Triepel, *op. cit.*, p. 299.

<sup>57</sup> See R. Ago, "La regola del previo esaurimento dei ricorsi interni in tema di responsabilità internazionale", *Archivio di diritto pubblico*, May-August 1938-XVI (Padua, CEDAM, 1938), vol. 3, fasc. 2, pp. 231 *et seq.*; and "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1939-II (Paris, Sirey, 1947), vol. 68, pp. 508 *et seq.* See also, in particular, G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 332; P. Reuter, "La responsabilité internationale", *Droit international public (cours)* (Paris, Les Nouvelles Institutes, 1955-1956), pp. 56 *et seq.*; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III, pp. 1533 *et seq.* For an analysis of particular aspects of the question related to the legislative activity of the State, see Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, p. 97; E. Vitta, *La responsabilità internazionale dello Stato per atti legislativi* (Milan, Giuffrè, 1953), pp. 87 *et seq.*; A. S. Bilge, *La responsabilité internationale des Etats et son application en matière d'actes législatifs* (thesis No. 417) (Istanbul, Tsitouris, 1950), pp. 101 *et seq.*

been breached. *Article 20* therefore provides that there is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct in fact adopted by that State is not in conformity with that required by the obligation. The principle whereby, in international law, the breach of an obligation "of conduct" or "of means" occurs, by virtue of the non-conformity of the conduct adopted with the conduct required by the obligation, is thus clearly affirmed.

(24) The Commission considered it advisable to refer in the text of the article to a "particular" course of conduct in order to make it quite clear what kind of international obligation is referred to in the article, since, for an international obligation to be characterizable as an obligation "of conduct" or "of means", it is not enough for the obligation to require of the State a course of conduct determined in some un-specific manner. The determination must, on the contrary, be extremely precise, in other words, the obligation must determine in a "particular" manner what is required of a given branch of the State machinery. The Commission also thought it better to use the comprehensive term "course of conduct", rather than the twofold expression "action or omission", since there are cases, such as that of an obligation requiring the State to refrain from a specifically determined "practice", in which the course of conduct adopted by the State in breach of the obligation consists of a "series" of actions of the same kind rather than of one separate action. Lastly, the Commission decided that the phrase "when the conduct of that State is not in conformity with that required of it by that obligation"—which closely follows the wording of draft article 16—is the most suitable formula for indicating when a breach of an obligation "of conduct" or "of means" may be held to occur. This wording was found preferable to others, such as "simply by virtue of the adoption of a course of conduct different from that specifically required", because in the Commission's view it expresses more accurately the idea that the conduct adopted may fail to correspond absolutely, as it were, to the conduct required by the obligation, without there being any real ground for asserting that the obligation has been breached. The action or omission of the State might, for example, even go beyond the requirements of the obligation. In a case of that kind, if the requirements of the obligation were fully satisfied by the conduct in fact adopted by the State, it would certainly not be possible to infer a breach of the obligation.

#### **Article 21. Breach of an international obligation requiring the achievement of a specified result**

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

### Commentary

(1) The purpose of article 21 is to establish how to determine if there has been a breach of an international obligation which merely requires the State to ensure a particular situation—a specified result—and leaves it free to do so by means of its own choice. Such obligations, called obligations “of result”, are much more common in international law than in internal law, by reason of the specific nature of the subjects of the law of nations. As the commentary to article 20 makes clear, the commands of international law in many cases, especially where they have to be enforced through the State’s internal system, stop short at the outer boundaries of the State machinery. Often, out of respect for the internal freedom of the State, international obligations of this nature merely require it to achieve the result they seek, without specifying the acts or omissions by which that result is to be achieved.

(2) International obligations “of result” thus do not require a particular course of conduct on the part of the State or, in other words, a course of conduct on the part of specified State organs. This being said, it is always possible, within the wide and varied range of international obligations “of result”, to make further distinctions according to the different degrees of permissiveness of these obligations in regard to the achievement of the result they require. This permissiveness may, first of all, take the form of an initial freedom of choice. In some cases, the international obligation gives no indication whatsoever of the means the State may use to achieve the required result, but in others the obligation, although not expressly requiring recourse to a particular means, indicates a preference for a certain means as the most likely to achieve the result required of the State. For present purposes, that distinction is of no consequence. In both cases, although the freedom left to the State relates only to the initial choice of the means to be used, it is obvious that, once that choice has been made, either the result required by the obligation will have been achieved or there will have been a final breach of that obligation.

(3) However, the permissiveness as to means, which is characteristic of international obligations “of result”, sometimes extends to giving the State an opportunity to apply a remedy *a posteriori* to the effects of an initial course of conduct which has led to a situation incompatible with the result required by the obligation. It is thus possible that international law may require only a final result, not only leaving the

State free to choose the means it will use initially but also allowing it, if it has not achieved the result by the first means chosen, to resort to other means to that end. Under all obligations belonging to this second group of obligations “of result”, the State which initially adopted a course of conduct consisting in acts or omissions incompatible with the result required of it is allowed a fresh opportunity to discharge its obligation. In other words, under certain conditions and in so far as the required result has not been rendered permanently unattainable by the initial conduct, such obligations allow the State to remedy the situation temporarily created and to ensure the same result, albeit belatedly, by adopting as an exceptional measure a different course of conduct capable of obliterating the consequences of the initial conduct.

(4) In the cases mentioned, the possibility of applying a remedy *a posteriori* to the adverse effects of a State’s initial conduct is coupled with initial freedom in the choice of means. But that is not always so. In other cases, the opportunity of still achieving a result in conformity with that required by the international obligation by remedying, through different means, the incompatible result temporarily brought about is not accorded to the State solely where it has had initial freedom to choose between various normal means of discharging the obligation. The State may be given that opportunity even where it had no such initial freedom of choice. In such a case, it is, precisely, the faculty of subsequently making good, by different conduct, the consequences of the initial action or omission which marks the latitude allowed to the State; it is this subsequent faculty which, even if the content of the obligation has left the matter in doubt, places the obligation among those “of result”, not among those “of conduct” or “of means”.<sup>58</sup>

(5) Then, there are even international obligations “of result” so liberal that they allow the State not only to achieve the result they require by remedying, through different conduct, the temporarily unacceptable consequences of its initial conduct, but even to discharge its obligation by achieving an alternative result. In such a case, the faculty which the obligation gives the State of applying a remedy *a posteriori* is not, as in the previous cases, limited to the belated achievement of the same result, but comprises the possibility of discharging the obligation by achieving a result considered, as it were, equivalent to that which the State’s initial conduct has rendered unattainable.

<sup>58</sup> It is rather rare for rules—even treaty rules—which lay international obligations upon the State to mention explicitly that it is open to the State, in certain circumstances, to remedy *ex post facto* a situation that may have been created initially by an action or omission by its organs running counter to the internationally required result. The question whether a given obligation may or may not be fulfilled, exceptionally, by some other course of conduct, where the conduct initially adopted has failed to produce the required result, will normally be decided by interpreting the relevant clause according to the provisions of the treaty as a whole, in accordance with its *ratio* and spirit, or in the light of the applicable rules of customary international law.

(6) In seeking examples, the first case to consider is that in which all that the obligation provides for is initial freedom to choose the means of discharging it. Sometimes the text of the treaty itself, in imposing certain obligations, expressly states that it is left to the State to choose the means of achieving their purpose. Article 14 of the Treaty instituting the European Coal and Steel Community, for example, provides that:

Recommendations shall be binding with respect to the objectives which they specify but shall leave to those to whom they are directed the choice of appropriate means for attaining these objectives.<sup>59</sup>

Similarly, the third paragraph of article 189 of the Treaty establishing the European Economic Community provides that:

Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.<sup>60</sup>

Again, the full freedom of choice enjoyed by the State sometimes derives from the fact that the international obligation generally requires the States bound by it to take "all appropriate measures" to achieve a given result, without giving any indication of what the appropriate measures may be. For example, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, provides in article 2, paragraph 1, that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms ...<sup>61</sup>

Similarly, with regard to the protection of the representative organs of other States, the 1961 Vienna Convention on Diplomatic Relations provides in article 22, paragraph 2, that:

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

Article 29 of the same Convention provides that "the receiving State ... shall take all appropriate steps to prevent any attack on [a diplomatic agent's] person, freedom or dignity".<sup>62</sup> Almost identical language is to be found in article 31, paragraph 3, and article 40 of the 1963 Vienna Convention on Consular Relations;<sup>63</sup> in article 25, paragraph 2, and article 29 of the 1969 Convention on Special Missions;<sup>64</sup> and in article 23, paragraph 2 (a), and article 28 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>65</sup>

<sup>59</sup> United Nations, *Treaty Series*, vol. 261, p. 140.

<sup>60</sup> *Ibid.*, vol. 298, p. 3.

<sup>61</sup> For reference, see foot-note 33 above.

<sup>62</sup> *Idem.*, foot-note 40.

<sup>63</sup> *Idem.*, foot-note 42.

<sup>64</sup> General Assembly resolution 2530 (XXIV), annex.

<sup>65</sup> *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

(7) In perhaps a larger number of cases, the freedom of choice accorded to the State is implicit in the fact that the international obligation only specifies the result to be achieved, the text imposing the obligation making no reference at all to the means of achieving it. Examples are to be found in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms<sup>66</sup> and in certain international labour conventions. Many other texts contain provisions of the same kind. For example, treaty provisions binding States to extend most-favoured-nation treatment to other States in an agreed field of relations are normally confined to stating the object to be achieved, without specifying the means to be employed to achieve it. The situation referred to here is normal for international obligations of customary origin, as well as international treaty obligations concerning the protection of aliens,<sup>67</sup> the performance and the breach of which have certain additional special aspects, which are dealt with in article 22 of the draft.

(8) There is also no lack in international law of obligations which, although not requiring recourse to a specified means, nevertheless indicate a preference for one means or another. By way of example, it will suffice to refer to article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, which provides that:

Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>68</sup>

Article 2, paragraph 2, of the International Covenant on Civil and Political Rights provides that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt

<sup>66</sup> For reference, see foot-note 24 above.

Article 1 of the Convention provides that:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

Now the articles in Section I read as follows: "No one shall be held in slavery or servitude" (article 4, paragraph (1)); "No one shall be required to perform forced or compulsory labour" (article 4, paragraph (2)); "Everyone has the right to liberty and security of person" (article 5, paragraph (1)), and so on. It is implicit in these provisions that the State is free to choose whatever means it considers best calculated to ensure that no one can be held in slavery, that everyone's security is assured, etc.

<sup>67</sup> For example, the Memorial of the Italian Government in the *Phosphates in Morocco* case (Preliminary Objections) states that:

"The Protecting Power has the choice of these means; it may choose whatever means it deems most appropriate for the organization of the public authorities of the Protectorate, but they must be calculated to assure aliens of treatment in conformity with international conventions and acquired rights." [Translation by the Secretariat]. See *Répertoire des décisions et des documents de la procédure écrite et orale de la Cour Permanente de Justice Internationale et de la Cour Internationale de Justice*, published under the direction of Paul Guggenheim, *Série I, Cour permanente de justice internationale*, vol. I, *Droit international et droit interne*, by Krystyna Marek (Geneva, Droz, 1961), p. 679.

<sup>68</sup> General Assembly resolution 2200 (XXI), annex.

such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>69</sup>

There can be no doubt that, in these cases, legislative means are expressly indicated at the international level as being the most normal and appropriate for achieving the purposes of the Covenant in question, though recourse to such means is not specifically or exclusively required. The State is free to employ some other means if it so desires, provided that those means also enable it to achieve *in concreto* the full realization of the individual rights provided for by the Covenant. All these examples, like those cited in previous paragraphs of this commentary, are of cases in which the obligation leaves the State at least an initial freedom of choice of the means to be used to achieve the result required by the obligation.

(9) Other examples illustrate the case of an international obligation which the State may, in exceptional circumstances, still discharge by resorting to different means of achieving the required result if the course of conduct initially adopted has failed. The first cases of this kind which should be mentioned are those in which this further degree of permissiveness is merely an addition to the normal initial freedom of choice of the means to be used to fulfil the obligation. Such initial freedom of choice, as we have seen, is characteristic of, for example, the majority of international obligations concerning the protection of human rights. When the International Covenant on Civil and Political Rights provides that "Everyone shall be free to leave any country, including his own" (article 12, paragraph 2), that "Everyone shall have the right to recognition everywhere as a person before the law" (article 16), or that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests" (article 22, paragraph 1), the first conclusion to be drawn from the very object of these provisions and from their formulation is that the State is free to adopt whatever measures it deems most appropriate, in its own particular case, to guarantee these freedoms and rights to individuals. In the extreme case, it may refrain from adopting any measures at all, provided that the result is achieved in practice, i.e. that any man or woman who wishes to leave the country is in fact free to go, that he or she is not denied recognition as a person before the law, that his or her freedom of association is not obstructed, and so on. But the Covenant as a whole points to another conclusion. Assuming, for example, that the State has chosen to fulfil its obligations by the administrative means, an adverse decision concerning the right of an individual taken by the first authority called upon to rule in his case does not normally make it definitively impossible for the State to achieve the result internationally required of it. That result may be considered to have been achieved even if a higher authority has had to intervene and set aside the first authority's decision, and

only this subsequent action has secured, for the individual, recognition of the right he sought to exercise.<sup>70</sup>

(10) In the absence of any express provision on the subject, this conclusion might follow from the context of the agreement, its spirit, its object and purpose or, lastly, from the customary rules in the context of which the agreement is to be interpreted. Let us take, as another example, article III, paragraph 1, of GATT, which reads:

The contracting parties recognize that internal taxes and other internal charges ... should not be applied to imported or domestic products so as to afford protection to domestic production.

Paragraph 2 of the same article provides that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.<sup>71</sup>

These provisions are not accompanied by any clause providing expressly for the conclusion stated above. But their purpose, the reason for their existence, is to prevent domestic products from ultimately enjoying protection in practice at the expense of like foreign products. What is required of the State party to the Agreement is that it should ensure, in the final result, that foreign products are not placed at a disadvantage on the domestic market because their price is burdened by heavier taxation than domestic products. Hence, the provisions cited cannot be interpreted as requiring absolute prevention of any act, even provisional, by which a foreign product is wrongly taxed. If, at a given moment, one of these products becomes subject to a tariff different from that applicable to a like national product and if the duty is improperly collected, the result referred to by the obligations set out in the articles cited will also be achieved if the State takes steps to cancel or duly reduce the discriminatory taxation and refund the amounts wrongly collected. The desired purpose of equality of treatment of foreign and domestic prod-

<sup>70</sup> If any doubt should persist as to the soundness of this conclusion, the fact that the Covenant contains a clause concerning the exhaustion of domestic remedies (article 41, paragraph 1 (c)) would suffice to remove it. A similar conclusion naturally holds good for all obligations imposed by conventions which contain an explicit clause of this kind, such as the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (article 26) [for reference, see foot-note 24 above] and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (article 11, paragraph 3, and article 14, paragraph 7 (a)) (for reference, see foot-note 33 above). The effect of this clause is, precisely, to prevent the establishment of final failure to achieve the result required of the State by the obligation which the clause accompanies, so long as it is still possible to obtain that result by one of the other means at the State's disposal. It would, however, be wrong to believe that the conclusion stated is justified only in cases covered by the specific provisions of article 22 of the present draft, where the agreement from which certain obligations derive contains a clause expressly providing that the State cannot be charged at the international level with not having fulfilled its obligations so long as the available local remedies have not been exhausted.

<sup>71</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).

<sup>69</sup> *Ibid.*

ucts will thus also be achieved.<sup>72</sup> In other fields, let us consider one of the many agreements providing for judicial assistance between States or for the extradition of persons guilty of certain crimes, or the conventions which require the punishment of those responsible for the practice of slavery or *apartheid*, of the perpetrators of an act of genocide, terrorism and so on. It is obvious that an omission on the part of a first administrative or judicial authority, which has refused the agreed assistance or due extradition or has failed to apply the prescribed punishment, does not necessarily represent a final breach of the obligations in question. The result required by those obligations will still be deemed to have been achieved if a higher authority intervenes to remedy the effects of the conduct of the first State authority to intervene in the case.

(11) The examples given above<sup>73</sup> of international obligations which allow the State to remedy by subsequent conduct consequences not in conformity with the obligation resulting from an initial course of conduct all relate to obligations prescribed by international conventions. Needless to say, however, equally valid examples can be found among international obligations of customary origin: for example, the customary obligation which requires a State to arrest and punish persons guilty of assaulting a foreign official in its territory or of attacking the premises of a diplomatic mission, or persons who by their writings have insulted a foreign Head of State. It would obviously be going too far to say that these obligations will forthwith be regarded as unfulfilled if, for example, the guilty parties are allowed to escape by members of the local police force or acquitted by a court of first instance. The result required by these customary international obligations is that justice should ultimately overtake the guilty persons, whether with the aid of the local police or of the central police taking over when the local police have failed, and that they should be duly punished, even if only by a court of second or third instance. In other words, the result required by the obligation will still be considered to have been achieved, even if an initial measure incompatible with that result has been corrected

<sup>72</sup> The international obligation referred to here should be compared from this point of view with, for example, the obligation stated in article 34 of the Vienna Convention on Diplomatic Relations, which provides that "A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, . . ." (for reference, see foot-note 40 above). Here the *ratio* of the obligation is quite different. What the Convention requires is that, in the fundamental interests of the unhindered exercise of the functions entrusted to him, the diplomatic agent shall not be hampered in his activity by the application of fiscal measures, just as he must not be hampered by the application of police measures, judicial measures, etc. Unlike the obligation considered in the text, this is one of the obligations which require the State to adopt a specific conduct of forbearance. It is one of the obligations dealt with in article 20: the State cannot consider that it has correctly performed its international duty merely on the grounds that it has subsequently refunded to the diplomatic agent the sums unduly demanded of him, or that it has released a diplomatic agent who was improperly arrested, etc.

<sup>73</sup> See paras. 9-10.

by a later measure capable of obliterating the consequences of the first.

(12) International obligations which require only the achievement of a certain result may take an even more permissive form than that of leaving the State free initial choice of the means of achieving the required result, or that of allowing the State to reach that result subsequently by completely obliterating, through new conduct, the consequences of an initial course of conduct incompatible with the achievement of the result. There are cases in which, when the initial conduct has made the main required result henceforth unattainable, the international obligation allows the State to consider itself discharged by achieving an alternative result. Let us take for example the obligation of customary international law which requires the State to exercise a certain vigilance to prevent unlawful attacks against the person or property of foreigners. If, in a specific case, the State has been unable to prevent an attack of this kind, it can still discharge its obligation by offering compensation for the damage suffered by the foreigner who was attacked. A similar conclusion may be reached in regard to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that "No one shall be subjected to arbitrary arrest or detention".<sup>74</sup> The obligation here set out should be read in conjunction with paragraphs 4 and 5 of the same article, which provide respectively that:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful,

and that

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

This juxtaposition of provisions shows that the State can consider that it has acted in conformity with its international duties even if, having failed to achieve the main result required by the obligation stated in article 9, it has nevertheless achieved the alternative result of making reparation for the injury caused to the person who suffered wrongful arrest or detention.<sup>75</sup>

(13) Having established the existence of a wide range of international obligations "of result", we have now to examine how, in the various hypothetical cases described, the breach of such an obligation

<sup>74</sup> General Assembly resolution 2200 A (XXI), annex.

<sup>75</sup> In addition, as noted above (see foot-note 70), the Covenant contains in article 41, paragraph 1(c), a general provision making the exhaustion of domestic remedies a condition for consideration by the Committee on Human Rights of "communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant". Now any domestic remedy may put an end to arbitrary arrest or detention or provide reparation for injury suffered, but it certainly cannot prevent the arbitrary arrest or detention from having taken place. Reparation for the injury caused is clearly only an alternative result, achieved instead of the main required result of preventing arbitrary arrest or detention.

is determined in international law. This task is far less simple than in the case of the obligations "of conduct" or "of means" dealt with in article 20, where the existence of a breach is shown by simply comparing the conduct in fact adopted by the State with the conduct it was specifically required to adopt in the case in point. In the case of the international obligations considered in the present article, it is necessary, instead, to compare the result required by the international obligation with the result finally attained in practice through the course or courses of conduct adopted by the State. However, in order to determine how the existence of a breach of an obligation "of result" is established in international law, we must look once again to State practice and international judicial decisions on the subject and to the opinions expressed on it by learned writers.

(14) In this connexion, the positions adopted by States as to the possibility of concluding that an international obligation has been breached by the performance or non-performance of a legislative act prove once again to be particularly enlightening. For example, certain States which, like Switzerland and Poland, expressed their opinion on the matter in their replies to point III, No. 1, of the request for information addressed to them by the Preparatory Committee of the 1930 Codification Conference, specifically pointed out that, in the case where an international obligation merely required the State to ensure a given result by whatever conduct it chose, the enactment or non-enactment of a law having a specific content was only one means among others of achieving a result which alone was decisive for the purpose of concluding that the obligation had been breached.<sup>76</sup> The replies of the Swiss and Polish Governments also confirm that, so long as the State has not failed to achieve *in concreto* the result required by an international obligation, the fact that it has not taken a certain measure which would have seemed especially suitable for that purpose—in particular, that it has not enacted a law—cannot be held against it as a breach of that obligation.<sup>77</sup>

<sup>76</sup> As stated above (paragraph (19) of the commentary to article 20), the Swiss Government emphasized the need to qualify its reply to the question whether international responsibility was engaged by the failure of a State "to enact legislation necessary for the purpose of implementing" its obligations. It replied in the affirmative only as regards the case in which an international agreement expressly required the parties to take specific legislative measures. It observed that in the other cases "it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations", which constitutes the breach of the obligation. (League of Nations, *op. cit.*, pp. 25 and 29.)

The Polish Government, in its reply, distinguished between the "entirely exceptional and very rare case of a State which has assumed an international undertaking to enact provisions before the expiry of a certain period" and "all other cases". It indicated that only in the first case did the fact that the provisions had not been enacted within that period constitute an offence, whereas in the other cases "the mere fact of not enacting legislation does not involve international responsibility..." (*ibid.*, pp. 28–29.)

<sup>77</sup> In the Swiss Government's reply we read that "... even in the absence of a law by which the State could immediately fulfil its obligations, we will not be confronted with a fact or act contrary to international law unless some circumstance arises by

(15) Other statements of position drawn from international practice also confirm the soundness of the conclusion that, if the internationally required result is achieved by the State, it matters little whether the State has arrived at it by enacting a law or by any other means. Mention may be made, in this connexion, of the letter dated 18 October 1929 sent by Albert Thomas, the Director of the ILO, to the Government of the Irish Free State, in reply to that Government's question whether, since a rest period of 24 hours was already granted to industrial workers in Irish practice, the enactment of a law was specifically necessary in order to give effect to the requirements of articles 2, 3 and 4 of Convention No. 14 concerning the Application of the Weekly Rest in Industrial Undertakings. While pointing out that the course most usually adopted to secure the effective application of the Convention was that of passing legislation, the letter from the Director of the ILO emphasized that Ireland was free to follow whatever method seemed most appropriate in its particular case, provided only that that method would in fact ensure effective application of the provisions of the Convention.<sup>78</sup>

(16) Learned writers have also concentrated their attention on the problem as it arises in relation to the taking of, or failure to take, legislative action. They state very emphatically that, in their view, no State

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which the rights of other States are prejudiced" (*ibid.*, p. 29). In the continuation of the Polish Government's reply, it is stated that responsibility: "... ensues only if the State authorities or tribunals refuse, in the absence of relevant municipal provisions, to give effect to rights arising out of international undertakings. Until this has occurred, there is nothing to show that such provisions are required, that the authorities and tribunals, for example, will give decisions incompatible with the international undertakings of the State; it should be left to the State to decide whether the promulgation of a special law, decree or circular is necessary" (*ibid.*). The reply of the British Government to the same point in the request for information made by the Preparatory Committee of the 1930 Conference gave examples of obligations for the fulfilment of which the adoption of legislative measures constituted the appropriate and probably essential means. But it clearly brought out that, in view of the nature of the obligations, which required only the achievement of a certain result, failure to adopt such legislative measures should not be regarded as in itself a breach of the obligations. The breach would be established only if, probably through lack of appropriate provisions, the State showed itself unable in practice to achieve the result required by its obligation.

<sup>78</sup> Mr. A. Thomas' letter stated:

"The Convention leaves considerable latitude to the Governments which ratify it ... A Government is therefore free to apply under the Convention any system which meets with its approval; and the existing practice in the Irish Free State would undoubtedly fulfil the requirements of the Convention ... it is for the Government which undertakes international responsibility as a party to a Convention to judge what is the action which in its view will secure the Convention's effective application ... The course most usually adopted is that of passing legislation to make the application of the weekly rest compulsory in industrial undertakings ... It would, however, suffice that legislation should be adopted which would be confined to giving the force of law to the existing practice ... It is for the Government of the Irish Free State to appreciate which of these methods is the best adapted to its requirements. Any of them would ... secure the effective fulfilment of the Convention." (ILO, *Official Bulletin*, vol. XIV No. 3, 31 December 1929, pp. 125–126.) See also *The International Labour Code 1951 (op. cit.)*, pp. 277–278, note 464.

which has in fact ensured the result required of it by an international obligation can be accused of breaching that obligation on the ground that it achieved the result without enacting a law, and, more generally, that failure to take legislative action does not in itself warrant the conclusion that the obligation has been breached, unless it can be affirmed that the State has specifically failed to ensure the result in question.<sup>79</sup> Some writers have explicitly stated that these principles are merely the necessary consequence of a distinction between obligations requiring the State to adopt a particular course of conduct and obligations which merely require it to achieve a particular result.<sup>80</sup>

(17) As to the question whether the adoption by the State of a measure which would seem to obstruct the achievement of the result required by the international obligation would not in itself suffice to show that the obligation had been breached, State practice does not provide many explicit statements of position. The replies from Governments to point III, No. 1, of the request for information by the Preparatory Committee of the 1930 Conference were inevitably influenced on this point by the form in which the question was put. Many countries accordingly confined themselves to answering in the affirmative, without giving any information as to the extent of the agreement they were expressing. It would be quite wrong, however, to believe that by such answers the Governments concerned meant to express the conviction that, in the event of legislative action by the State, its international responsibility would immediately and in all cases be engaged by the promulgation of the law. On the contrary, the reply of the South African Government, for example,<sup>81</sup> shows that it regarded the request submitted to it as referring to the application, not the promulgation, of the law. The British and Swiss Governments, indeed, explicitly stated that, in their view, the mere fact of the adoption of a measure, such as the promulgation of a law, which constituted an obstacle to the fulfilment of the obligation, would not in itself warrant the conclusion that there was a breach of an international obligation.<sup>82</sup> The view expressed by these two Governments, like the request for information to which they were replying, related only to responsibility for the breach of obligations concerning the

<sup>79</sup> See, in particular, Triepel, *op. cit.*, pp. 301-302; de Visscher, *loc. cit.*, p. 97; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, Sørensen ed. (London, MacMillan, 1968), p. 545.

<sup>80</sup> See, e.g., Bilge, *op. cit.*, pp. 103-104; and Vitta, *op. cit.*, pp. 95 *et seq.*

<sup>81</sup> The Government at Pretoria stated that the "enforcement of legislation incompatible with the provisions of a treaty concluded with another State or with its other international obligations" engaged the responsibility of a State. League of Nations, *op. cit.*, p. 25.

<sup>82</sup> The British Government stated that "It is not the enactment but the enforcement of the legislation so enacted which engages the responsibility of the State" (*ibid.*, p. 27), while the Swiss Government held that "Generally speaking, we should not consult the various laws as such in order to ascertain and establish international responsibility, but rather the facts deriving from these laws, which affect the rights of other States" (*ibid.*, p. 29).

treatment of foreigners, which are in fact obligations requiring only the achievement of a particular result. If their replies had related to the breach of obligations relating to any sphere in general, they would no doubt have been more qualified.<sup>83</sup> It can therefore be accepted that the codification work of 1929-1930 does not provide sufficient evidence to establish with certainty what States considered, at that time, to be the answer to the question raised in this paragraph. Nevertheless, the results of that work are certainly not incompatible with the conclusion that, where an international obligation requires only the achievement of a specific result by the State, it cannot be held that this obligation has been breached merely because the State has enacted a law which may be an obstacle to the attainment of the required result.

(18) In reality, the difficulties experienced in this connexion by certain learned writers seem to be due to the fact that they have not always borne in mind the distinction to be made between the different types of obligation, but have considered, indiscriminately in regard to all obligations, the question whether the enactment of a law "contrary to international law" is in itself a breach of its obligation by the State, or whether the breach only occurs later, when the law is applied in practice. It is therefore logical that those among such writers who had mainly in mind obligations specifically requiring the State to enact or not to enact a certain law should have reached the conclusion that the breach occurs when the law is promulgated<sup>84</sup> and that, conversely, those who were thinking mainly of obligations requiring only the achievement of a specific result should have reached the conclusion that the breach occurs only when the law is applied to a specific case.<sup>85</sup> However, most writers have found it necessary to make a distinction between different situations and have maintained that either conclusion could be justified, depending on the content of the obligation<sup>86</sup> and the

<sup>83</sup> The fact that the Preparatory Committee proposed as a "basis of discussion", in the light of the replies received, a text which affirms that "A State is responsible for damage suffered by a foreigner as the result ... of the enactment of legislation incompatible with its international obligations" (basis No. 2) (*ibid.*, p. 30, and *Yearbook... 1956*, vol. II, p. 223, document A/CN.4/96, annex 2) does not prove that, in the Committee's view, responsibility would always arise from the mere enactment of the "incompatible" legislative provisions. This also applies to article 6, which was adopted on first reading by the Third Committee of the Conference, and which reproduces the text of basis No. 2.

<sup>84</sup> This applies, for example, to U. Scheuner, who nevertheless qualifies this assertion by the words "as a general rule" ("L'influence du droit interne sur la formation du droit international", *Recueil des cours... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 121 *et seq.*).

<sup>85</sup> See L. Kopelmanas, "Du conflit entre le traité international et la loi interne", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XVIII, No. 1; (1937), pp. 118 and 122; and G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 787.

<sup>86</sup> B. Cheng, for example, observes that the answer to the question raised here "depends upon what is in fact prohibited by the particular rule of international law and upon whether the municipal law actually contravenes it or merely enables some other organ of the State to do so" (*General Principles of Law as applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 174-175).

circumstances of the particular case.<sup>87</sup> Nevertheless, the criteria put forward on either side for establishing in which specific cases the mere fact of having passed a law with a particular content constitutes a breach of an international obligation, and in which cases the opposite conclusion is warranted, vary and do not always seem pertinent.<sup>88</sup> The writers who have based their solution of the problem on the distinction between the breach of obligations "of conduct" or "of means" and the breach of obligations "of result" are no doubt those who have provided the valid criterion for deciding the question.<sup>89</sup>

(19) In connexion with this question, it is interesting to note the positions taken by the Governments of the United States and Great Britain in the controversy which arose between the two countries in 1912-1913 concerning *Tolls on the Panama Canal*. In 1912, the United States Congress passed an Act regulating tolls on the Canal on the basis of criteria considered by Great Britain to be incompatible with the provisions of article III, paragraph 1, of the Hay-Pauncefote Treaty of 18 November 1901, which provided for equality of treatment for the flags of all nations parties to the Treaty without discrimination.<sup>90</sup> Invoking article 1 of the Arbitration Treaty of 1908, the Government in London therefore proposed that the question should be submitted to arbitration. The United States Government did not go into the substance of the matter, but opposed the British proposal.<sup>91</sup> In the end, there was no arbitration in this case

since the United States agreed to amend the law which had given rise to the exchange of notes. But it is nevertheless interesting to consider the positions taken by the two Governments. The United States view was consistent with the principle that the conclusion that there has been a breach of an obligation requiring a State to achieve a particular result *in concreto* cannot be reached on the ground that the State has taken a legislative or other measure which has not yet had the effect of creating a specific situation definitively incompatible with the desired result, even if such a measure introduces an obstacle to the attainment of that result. The British view, on the other hand, seemed to contradict that principle.<sup>92</sup> It may, however, be noted that the measure taken by the United States Government in this case amounted, not to imposing higher tolls on British vessels than those levied on United States vessels, but to exempting United States vessels from the tolls which continued to be levied on the vessels of other nations. It could therefore be maintained with some justification that the situation which resulted for British vessels was indeed a discriminatory situation *in concreto*, which was unlawful under the Treaty; hence President Wilson's prompt action to change the situation by the 1914 Act of Congress. Moreover, the purpose of the British protest and proposal for arbitration seems to have been to prevent an internationally wrongful act from occurring rather than to invoke the consequences of a wrongful act already committed.<sup>93</sup>

<sup>87</sup> This applies to G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 614-615.

<sup>88</sup> Some writers make a distinction according to whether the law can be applied direct or requires the issue of regulations for its application (e.g., P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 7-8). Others base the distinction on the fact that the law "directly infringes existing rights or rules", as in a case of illegal revocation of a concession granted to a foreign company, or that it produces wrongful effects only when there is "implementation *in concreto*", as in the case of a law laying down directives for future nationalizations (see J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), vol. VI, pp. 621-622, 641-642). Others again emphasize that, in the case of injury to a State, the promulgation of the law may be sufficient in itself, whereas, in the case of injury to foreign individuals, responsibility generally arises at the time of application of the law (Jiménez de Aréchaga, *loc. cit.*, pp. 547-548; I. Brownlie, *Principles of Public International Law*, 2nd ed. (London, Oxford University Press, 1973), pp. 435-436).

<sup>89</sup> These are, in particular, the writers who have published monographs on the question of State responsibility for the acts of legislative organs. See Bilge, *op. cit.*, pp. 101 *et seq.*; and Vitta, *op. cit.*, pp. 89 *et seq.* See also Sereni, *op. cit.*, pp. 1538-1539; and A. Favre, *Principes du droit des gens* (Paris, Librairie de droit et de jurisprudence, 1974), pp. 650-651.

<sup>90</sup> The relevant paragraph read:

"The Canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable." (*British and Foreign State Papers*, vol. XCIV, p. 47, article III, para. 1).

<sup>91</sup> The United States Government observed that:

"When and if, complaint is made by Great Britain that the effect of the act and the proclamation together will be to subject British vessels as a matter of fact to inequality of treatment, or to unjust and inequitable tolls in conflict with the terms of the

Hay-Pauncefote Treaty, the question will then be raised as to whether the United States is bound by the Treaty both to take into account and to collect tolls from American vessels, and also whether under the obligations of that Treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States. Until these objections rest upon something more substantial than mere possibility, it is not believed that they should be submitted to arbitration." (Instructions of Secretary of State Knox to the United States Chargé d'affaires in London, dated 17 January 1913.) (G. H. Hackworth, *op. cit.*, 1943, vol. VI, p. 59.)

<sup>92</sup> The British Government expressed itself in the following terms:

"... international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that a nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a conclusive instance has been taken, which in the present instance would, according to your argument, seem to mean until tolls have been actually levied upon British vessels from which vessels owned by citizens of the United States have been exempted.

... the Act of Congress, when it declared that no tolls should be levied on ships engaged in the coasting trade of the United States, and when, in further directing the President to fix those tolls within certain limits, it distinguished between the vessels of citizens of the United States and other vessels, was in itself, and apart from any action which may be taken under it, inconsistent with the provisions of the Hay-Pauncefote Treaty for the equal treatment of the vessels of all nations." (Note from the British Ambassador at Washington to United States Secretary of State Knox, dated 28 February 1913.) (A. D. McNair, *The Law of Treaties*, 2nd ed. (Oxford, Clarendon Press, 1961), pp. 548-549).

<sup>93</sup> As stated in Lord McNair's comment on the British Note: "... the British Note did not go so far as to allege that a violation

(20) As regards international judicial decisions, mention may be made of the decision reached on 27 June 1933 by the United States–Panama General Claims Commission, constituted under the Claims Convention of 28 July 1926, in the *Mariposa Development Company* case. It stated that:

The Commission does not assert that legislation might not be passed of such a character that its mere enactment would destroy the marketability of private property, render it valueless and give rise forthwith to an international claim, but it is the opinion of the Commission that ordinarily, and in this case, a claim for the expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible.

Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a *locus penitentiae* for diplomatic representation and executive forbearance, and claims should arise only when actual confiscation follows.<sup>94</sup>

In the case submitted to the Commission, the intended result was clearly respect for the property of foreigners. In the Commission's view, it could not be maintained *a priori* that that result had not been achieved, merely because a law had been enacted which would permit future confiscations of property belonging to foreigners. It could not be held that there had been failure to achieve a result, and consequent breach of an obligation, unless there had been actual interference with the property of a foreigner. As the Commission pointed out, the only case in which, from another standpoint, the required result could be regarded as frustrated as soon as the law authorizing expropriation was enacted would be that in which the enactment of the law seriously reduced the commercial value of the foreigner's property.<sup>95</sup> Otherwise, in the Commission's view, a breach would occur when the foreigner was deprived of his property *in concreto*, not when a measure had been adopted merely making such deprivation possible *in abstracto*.

(21) In other international judicial decisions, acceptance of this principle is implicit. This is so, for example, where the Permanent Court of International Justice, called upon to rule on whether a particular law constituted a breach of an international obligation or not—an obligation requiring the achievement

of a particular result by the State, not the adoption of a particular course of conduct—refers to the *application* of this law, not to its *enactment*. In its very well-known judgment of 25 May 1926, in the case concerning *Certain German interests in Polish Upper Silesia (the merits)*, the Court stated that:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case ... The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.<sup>96</sup>

The European Court of Human Rights appears to endorse the same criterion in its judgment of 27 March 1962 in the *De Becker* case.<sup>97</sup> Very similar statements of position may also be noted in a series of decisions of the European Commission on Human Rights.<sup>98</sup>

(22) To sum up, our analysis of State practice, international judicial decisions and the positions taken by learned writers confirms that, in the case of international obligations requiring the State to achieve a result *in concreto* but leaving it free to do so by means of its own choice, the fact that a State bound by such an obligation has adopted a measure or, in particular, enacted a law constituting *in abstracto* an obstacle to the achievement of the required result, is not yet a breach or even the beginning of a breach of the obligation in question.<sup>99</sup> There will be a breach only if the State is found to have failed *in concreto* to achieve the result required by the obligation.

<sup>96</sup> *PCIJ*, series A, No. 7, p. 19. In the advisory opinion of 4 February 1932 concerning the Treatment of Polish nationals in Danzig (*ibid.*, series A/B, No. 44, p. 24) the Court also considered that:

"The application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig ..."

<sup>97</sup> The Court states in its judgment that:

"... the Court is not called upon, under articles 19 and 25 of the Convention, to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on the specific case of the application of such an Act to the Applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention ..." (*Yearbook... of the European Convention on Human Rights*, 1962 (The Hague), vol. 5, 1963, pp. 334 and 336).

<sup>98</sup> The decisions on applications No. 290/57 against Ireland and No. 867/60 against Norway contain the following statement:

"... the Commission can examine the compatibility of domestic legislation with the Convention only with respect to its application to a person, non-governmental organization or group of individuals and only in so far as its application is alleged to constitute a violation of the Convention in regard to the applicant person, organization or group in question; ..." (*Yearbook of the European Convention on Human Rights*, 1960 (The Hague), vol. 3, 1961, p. 221; *Yearbook of the European Convention on Human Rights*, 1961 (The Hague), vol. 4, 1962; p. 276.)

<sup>99</sup> Except, of course, in cases such as that referred to by the General Claims Commission in the *Mariposa Development Company* case, where the law in question would itself create a specific situation totally incompatible with the internationally required result.

(Foot-note 93 continued.)

of the Treaty had already occurred, and ... the following paragraphs are rather in the nature of the assertion of a right, *quia timet*, to protest and demand arbitration" (*ibid.*, p. 548). A note of protest and a proposal that the existence of a right should be established by an objective authority may very well be justified as a means of preventing an internationally wrongful act. See Schwarzenberger, *op. cit.*, p. 614; Vitta, *op. cit.*, p. 95; and Favre, *op. cit.*, p. 651. As noted in paragraph (17) above, however, in 1929, the British Government was to adhere firmly to the principle that it is not the law as such which gives rise to State responsibility, "but the facts deriving from that law".

<sup>94</sup> United Nations, *Reports of International Arbitral Awards*, vol. VI. (United Nations publication, Sales No. 1955.V.3) pp. 340–341.

<sup>95</sup> On this point, see Reuter, *loc. cit.*, pp. 95–96.

(23) This analysis also shows—as do logic and common sense—that the State, having failed to achieve the result required by an international obligation of this kind, cannot escape the charge of not having fulfilled its obligation by claiming that it did nevertheless adopt measures by which *it hoped* to achieve the result required of it. What matters is that the result required by the obligation should in fact be achieved; if it is not, a breach has been committed, whatever measures are taken by the State. We have seen for example that article 2, paragraph 1, of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination provides that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms....<sup>100</sup>

Now it is obvious that, if the administrative authorities of a State party to the Convention in fact commit acts of racial discrimination, the State will not escape the consequence of being charged with a breach of the Convention by taking refuge behind some law which it may have enacted prohibiting such acts.<sup>101</sup> It is not sufficient to enact a law because, if a practice contrary to the obligation is continued in, the result intended by the obligation is not achieved *in concreto*.

(24) It should also be made clear that, in cases in which an international obligation leaves the State only an initial freedom of choice of the means to be used to achieve the result required by that obligation, if, through the active or omissive conduct it adopts in taking one of the courses open to it, the State arrives at a situation incompatible with the result required by its international obligation, it thus forfeits the chance to fulfil its obligation. It is not allowed to remedy the effects of its conduct *ex post facto* or to change the situation it has created by recourse to other means. This limitation on the discretion given to the State for the fulfilment of its obligation may be expressly imposed by the text of the instrument establishing the obligation, but it is more often implicit in the very nature of the result required by the international obligation, which is such that the mere creation of a situation incompatible with that result makes it definitively unattainable.

(25) Thus, for example, article 22, paragraph 2 of the Vienna Convention on Diplomatic Relations requires the receiving State “to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any distur-

bance of the peace of the mission or impairment of its dignity”.<sup>102</sup> As to international obligations of customary origin relating to the status of foreigners in general, let us also consider the case of the obligation requiring the State to establish a minimum security system to protect foreigners against attacks due, for example, to an outbreak of xenophobia. There can be no doubt that both these obligations are confined to prescribing for the State the result to be achieved, and that the State has some initial freedom in choosing the means of establishing the required system of protection. However, when, irrespective of the means chosen for providing protection, its manifest inadequacy leads to an invasion of the premises of an embassy, the lynching of a foreigner or the massacre of nationals of a particular country by a mob, it can only be concluded that the State has failed irremediably in its task and that there is no further possibility of using other means to restore a situation compatible *ab initio* with the result required by the international obligation. It must then be recognized that the result to be achieved by the State has not been and will not be achieved, and that the State has thus committed a breach of its obligation.

(26) To sum up, for the purposes of establishing the fulfilment or breach of an international obligation “of result”, characterized by the *initial freedom of choice* of the State as to the means to be employed to obtain the required result, what counts is whether that result has or has not in fact been achieved by the State. The fact that the State has not taken the measure which theoretically would have seemed most likely to lead to the result required by the obligation is not in itself sufficient to warrant the conclusion that the State has breached the obligation. The same conclusion applies where the State has adopted a measure which is likely in principle to obstruct the achievement of the result required by the obligation, but which does not in itself create a specific situation incompatible with that result. On the other hand, where it is found that the situation created *in concreto* by the State, by taking one or other of the courses between which it had the initial choice, is incompatible with the result required by the obligation, the State will obviously not be able to claim that it has discharged its obligation through, for example, the adoption of measures by which it hoped to achieve the result required by the international obligation.

(27) Obligations which leave the State only an initial freedom of choice as to the means of achieving the result they require of it form only a smallish group, however, within the general category of international obligations “of result”. As has been seen, there are many international obligations “of result” which give the State a degree of discretion with regard to their fulfilment that goes beyond a mere initial freedom of choice. So long as the required result has not become finally unattainable for the sole reason that the initial course of conduct adopted by the State failed to achieve it, international law does not, gen-

<sup>100</sup> See paragraph (6) above.

<sup>101</sup> It should also be noted that, even where an obligation specifically requires the State to enact a law with a certain content, the obligation is usually accompanied by an obligation to apply that law. The fact of having enacted the prescribed law then constitutes fulfilment of the first obligation, but any failure to apply that law in practice constitutes a breach of the second obligation. See, in this connexion, the position stated at the end of the passage from the report of the Ghana-Portugal Inquiry Commission cited above (paragraph (20) of the commentary to article 20) regarding violation of ILO Convention No. 105 concerning the Abolition of Forced Labour.

<sup>102</sup> For reference, see foot-note 40 above.

erally speaking, deprive a State whose organ has created a situation incompatible with the result required by an international obligation of the possibility of still achieving the required result through a *new course of conduct by State organs* which would obliterate that situation and replace it by another, compatible *ab initio* with that result. In this case, the possibility of subsequent action open to the State is added to, and supplements, its initial freedom of choice; and the latitude left to the State with regard to the fulfilment of its obligation is *defined in its entirety*. The possibility of remedying *a posteriori* the consequences of an initial course of conduct incompatible with the result required by an international obligation may also exist even in cases where, originally, the particular nature of the result to be achieved did not permit of a real choice between different means of action, since the result could at first be achieved in only one way.

(28) In regard to the cases described, however, one reservation must be made concerning the determination of the conditions for recognizing the existence of a breach of an international obligation. It may well be that, at the international level, there is nothing to prevent the State from still fulfilling its obligation by remedying *ex post facto*, by a new course of conduct, a situation which is incompatible with the internationally required result and which was created by its initial conduct. But it is also possible that the State may encounter in its own system of internal law an obstacle to the use of this opportunity. This applies in particular where the situation incompatible with the internationally required result has been created by means whose effects cannot be cancelled. For example, if the situation has been created by the enactment and effective application of a law, there will in most cases be no hope of finding in the internal legal system any means of changing this situation retroactively and thus still achieving the result to which those measures ran counter. It would be otherwise only if the machinery of the State included a judicial authority empowered to declare legislative acts null and void and to cancel their effects retroactively. The obligation imposed by some treaties to respect the property of foreigners is a typical example of an obligation which requires the State to achieve a certain result but leaves it complete latitude as to the means of doing so. But if the State passes a law providing for uncompensated expropriation of certain classes of foreigners or certain kinds of property belonging to them, and applies that law to the property of individuals covered by such a treaty, it cannot reasonably be expected that the obligation imposed by the treaty can still be fulfilled since it is hard to see what organs or authorities would have the power to fulfil it. The same conclusion applies in cases where the action that has created a situation incompatible with the required result takes the form of a measure by the executive power which can be neither rescinded nor amended by another State organ, or that of a judicial decision against which there is no appeal or again that of an administrative or judicial measure

which has merely correctly applied a mandatory legislative provision.

(29) It should be made clear that the impossibility of rectifying the adverse consequences of the initial course of conduct by a new course of conduct which cancels them may be due, not only to a real lack of means to that end under the internal legal system, but also to the fact that the availability of such means is a pure formality because, at least in the case in point, they hold out no real prospect of achieving the required result. In all these cases, the impediment which makes it impossible to remedy the situation created by the action or omission of the first organ to intervene thus has the same paralysing effects as the impediment which arises when the initial action or omission of the State has made it impossible *de facto* to achieve the result required by the international obligation. In both these cases, the State has no real means of cancelling the consequences of its initial conduct. Hence it can only be concluded that the result which the international obligation required the State to achieve has not been and will not be achieved. The existence of a breach of the obligation will thus inevitably be established.

(30) Thus, if the situation created by the initial conduct of an organ of the State and incompatible with the result required by an international obligation is not in itself to constitute a complete and final breach of that obligation, three conditions must be met: (a) the obligation itself must in principle leave the State the necessary latitude to pursue the achievement of the required result, even after a situation incompatible with that result has been created by an action or omission of one of its organs; (b) the required result must not have become finally unattainable in fact by reason of that action or omission; and (c) the internal legal system must not place any formal or real obstacles in the way of subsequent efforts to fulfil the obligation in spite of everything. If all these conditions are satisfied, it clearly cannot yet be concluded that the State has finally failed to achieve the result which can legitimately be expected of it. The fact that the organ which first intervened in the case created, by its action or omission, a situation incompatible with the required result is only a beginning or adumbration of a breach of the international obligation, since the State has not yet exhausted all its available means of action to achieve that result. Moreover, even this adumbration will come to nothing if the State can seize the opportunity still open to it fully to achieve the required result by new conduct which eliminates entirely and *ab initio* the incompatible situation created by its previous conduct.

(31) Many examples could be given here. To mention only the necessary minimum, let us suppose that, contrary to the requirements of the international conventions on human rights, the police authorities of a State deny certain persons freedom to reside in the place of their choice, freedom of association, freedom to profess their religion, or the like. In each of these cases, the State can still, if it wishes, create

a situation compatible with the internationally required result, provided that the country has a higher administrative authority or an administrative or civil court, which is competent and materially able to revoke the prohibition of residence or association or to remove the obstacles to the practice of the chosen religion. Or again, let us suppose that, contrary to a well-established international customary obligation, a court acquits persons known to have committed a crime against the representative of a foreign Government or against some foreigner. The State will still be able to fulfil its obligations, provided that there is a higher authority able to reverse the decision impugned and thus create a situation compatible in every respect with the internationally required result.

(32) In this case, the initial conduct of a State organ which has created a situation incompatible with the internationally required result becomes a breach of the international obligation only if the State, despite the possibility open to it, refrains from correcting that situation or confirms it by further action. It will be on the grounds of this later action or omission that the existence of the breach will be finally established and the responsibility of the State automatically engaged. However, since the course of conduct first adopted will not have been cancelled but, on the contrary, completed by the State's subsequent conduct, the breach will finally be brought about by a "complex" act made up of all the successive actions or omissions of the State in the case in question.<sup>103</sup>

(33) Lastly, as we have seen, there are international obligations "of result" characterized by an even greater degree of permissiveness as regards the latitude left to the State for their fulfilment. By reason of their nature, purpose and field of application, these obligations permit that, where the initial conduct of the State bound by the obligation has not only created a situation incompatible with the result required by the international obligation but has also made the attainment of that result materially impossible, the State may still have a last opportunity of discharging its international duties. It is allowed, as an exception, to produce an alternative result instead of that originally required—a result which is thus different from that aimed at by the obligation, but in a way *equivalent* to it. The conclusion as to the recognition of a

breach of one of these obligations is self-evident. For example, a State cannot be charged with a final breach of the obligation to exercise vigilance to prevent unlawful attacks against the person and property of foreigners, or of the obligation to protect every person against arbitrary arrest or detention, merely because it has not been able to prevent the commission of such misdeeds. If the State is to be found guilty of such a breach, it must have failed to achieve not only the priority result but also the alternative result: that is to say, it must have failed to ensure that the victims of these misdeeds receive full and complete compensation for the injury sustained.<sup>104</sup> It is this second failure which, added to the first, transforms it into a complete and final breach. And, as in the case previously considered, the breach is constituted by a "complex" act of the State.

(34) The conclusion which follows from the arguments advanced in paragraphs (27) to (33) above seems equally obvious. Where an international obligation permits a State whose initial conduct has led to a situation incompatible with the result required by the obligation *to rectify the situation*, either by achieving through new conduct the result originally required or by achieving an equivalent result in its place, a breach of the obligation finally occurs only if, in addition, the State has failed to take the subsequent opportunity of rectifying the incompatible situation created by its initial conduct.

(35) In the light of the foregoing considerations, there is, in the Commission's view, no doubt that, for the purpose of establishing how an international obligation which can be characterized in general terms as an obligation "of result" is breached, what counts is the result actually achieved by the State as compared with the result required by the obligation. If the two results coincide, the obligation has been fulfilled; otherwise it must be concluded that the obligation has been breached. In other words, a comparison of the result achieved with the result which the State ought to have achieved is the only general and basic criterion for establishing whether an obligation "of result" has been breached. The existence of a breach of an obligation of this kind is thus determined in international law in a completely different way from that followed in the case of an obligation "of conduct" or "of means" where, as indicated in connexion with article 20, the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State. Having reached this conclusion, the Commission also agreed upon the need to draw a distinction, in formulating the relevant rule, between, on the one hand, the application of such a general criterion in the case of in-

<sup>103</sup> The concept of a "complex" act of the State has been illustrated by the Commission in article 18, paragraph 5, of its draft articles and in paragraph (23) of the commentary thereto (*Yearbook... 1976*, vol. II (Part Two), pp. 74 and 94, document A/31/10, chap. III, sect. B, subsect. 2).

Article 18, paragraph 5, of the draft reads as follows:

"5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period."

A "complex" act thus implies that two or more organs of the State intervene successively or that a single organ intervenes on two or more occasions in the same matter with, in all cases, a plurality of actions or omissions.

<sup>104</sup> In such a case, "compensation" is merely an alternative result provided for by the "primary" obligation in question. Such compensation has nothing to do with the "reparation" of an internationally wrongful act. On the contrary, its specific purpose is to avert any breach of the primary obligation and the commission of an internationally wrongful act.

ternational obligations characterized by the fact that they leave the State initial freedom of choice of the means to be used to achieve the internationally required result and, on the other, the application of the same criterion in the case of international obligations permitting the State to rectify a situation which is incompatible with the required result and which has been created by an initial course of conduct, by means of subsequent conduct achieving that result or an equivalent result.

(36) For the first of these two cases, *paragraph 1* of the article provides that there is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted within the latitude allowed it, the State does not achieve the result required by that obligation. For the second case, *paragraph 2* of the article provides that, when the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may still be achieved by subsequent conduct of the State, there is a breach of the obligation only if the new conduct of the State does not achieve the required result either.

(37) The result which the State has to achieve in the case of *paragraph 1* as well as in that of *paragraph 2* must, of course, be the "specified result" required of the State by the international obligation or, where this is allowed, the "equivalent result" provided for by that obligation and nothing else. Hence, the precise content of the "primary" obligation in question must always be kept in mind.

#### *Article 22. Exhaustion of local remedies*

**When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.**

#### *Commentary*

(1) Article 21 of the draft states the basic rules defining the conditions in which it may be considered that a breach of an international obligation "of result" has been committed, whether in cases where the State only has freedom of choice of means at the outset or in cases where the State, having created by its conduct a situation incompatible with the result required by the obligation, has the faculty to remedy that situation and still fulfil its obligation by subse-

quent conduct. Article 22 is concerned to establish, in the last-mentioned cases, the specific conditions of a breach of obligations "of result" falling within a given category, namely, obligations which are designed to protect individuals, natural or juridical persons, and which, at the international level, formulate certain requirements and establish certain guarantees concerning the treatment to be accorded by States, at the internal level, to the persons in question and to their property. For the purpose of determining whether a breach of an obligation in this category has been committed, a further condition is then added to the conditions generally required for a breach of the other international obligations "of result".

(2) To be able to conclude that there is a breach of an international obligation "of result" concerning the treatment of individuals, and particularly foreign individuals, it is first necessary to establish that the individuals who consider themselves injured through being placed in a situation incompatible with the internationally required result have not succeeded, even after exhausting all the remedies available to them at the internal level, in getting the situation duly rectified; for it is only if these remedies fail that the result sought by the international obligation will become definitively unattainable by reason of the act of the State. If, for various reasons, individuals who should and could set the necessary machinery in motion neglect to do so, the State cannot normally be blamed for having failed to take the initiative to obliterate the concrete situation created by initial conduct attributable to it and militating against the achievement of the internationally required result—provided, of course, that the State itself is not responsible for the inaction of the individuals.

(3) If the individuals concerned take no action, the situation created by the initial conduct of the State running counter to the internationally desired result cannot be rectified by subsequent action of the State capable of replacing that situation by one in conformity with the result required by the obligation. However, the fact that there has been no corrective action cannot, of course, be attributed to the State, but only to lack of the required initiative on the part of those on whom it was incumbent to take it. The case here is quite different from that in which, despite the necessary initiative having been taken by the individuals concerned to obtain redress, the situation created by the initial conduct is confirmed by a new course of conduct of the State, which is likewise incompatible with the internationally required result. Thus, in the case of the international obligations considered here, the initiative of the individuals concerned appears to be a prior and necessary condition which must have been fulfilled before it can be concluded that there has been a breach of its obligation by the State. Failure to fulfil this condition therefore has the effect of excluding the wrongfulness of the failure to achieve the internationally required result. In this case, therefore, no international responsibility can arise for the State. That is what is meant by stating the condition known as the "exhaustion of local remedies".

(4) This additional condition, which must be satisfied before a breach of an international obligation "of result" concerning the treatment accorded to individuals can be established, is justified, in the final analysis, by the object and the very nature of such an obligation and by the characterization it receives by reason of the fact that individuals are the direct beneficiaries of its provisions. For where the result the State is required to achieve is prescribed mainly in the interests of individuals and affects their situation in the internal legal order of the State on which the obligation is laid, it is normal that the collaboration of the persons concerned should be enlisted to ensure that the State complies with the provisions established in their interests by the international obligation. It is only natural that, in the event of difficulties, it should be incumbent on such persons to seek State action to rectify any effects of an initial action or omission by an organ of the State machinery which is attributable to the State and runs counter to the achievement of the result required by the international obligation. Conversely, where the result to be achieved is required in the direct interest of another State, it can only be the State on which the obligation rests, if it still has the means to remedy, through internal action, the effects of initial conduct incompatible with the result, which can be required to initiate the action by which it can still fulfil its obligation. It would be unreasonable to require another State, a subject of international law, to initiate such action at the level of the internal legal order of the State.

(a) *Exhaustion of local remedies, a principle of general international law*

(5) The principle establishing the condition known as the "exhaustion of local remedies" is expressly stated in a growing number of international conventions: for example, in establishment and other treaties which prescribe the treatment to be accorded to natural or juridical persons of one of the contracting States in the territory of the other; in international treaties having as their general or particular object to guarantee all individuals, without distinction as to nationality, the enjoyment of certain basic rights of the human person; in treaties regulating recourse by States to international arbitral or judicial tribunals following offences committed in one of the above-mentioned fields, etc. However, the confirmation and development of this principle in treaty law should not obscure the fact that the principle of the exhaustion of local remedies has its roots in international custom, and that it was recognized by custom long before being formulated in written instruments of a conventional nature. It is, first and foremost, a general principle of unwritten law.

(6) As has just been said, the principle of the exhaustion of local remedies is really one of those which command recognition as the logical consequence of the nature of international obligations whose purpose and specific object is the protection of individuals. It is true that many conventions state

and confirm the principle and specify its scope and effect as regards the obligations for which they provide. The principle may thus be extended or restricted, and its application to certain treaty obligations may even be excluded. But treaty law does all this precisely on the assumption that the requirement of the exhaustion of local remedies existed previously, as a principle of general application, albeit subject to derogation, and as a principle which has its roots in custom or, better still, in the very logic of the mode of fulfilment of a certain type of international obligation and is therefore certainly not of purely conventional origin. There are even some international treaties, multilateral and bilateral, which expressly refer to the principle of the exhaustion of local remedies as a general principle of international law. Article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms, for example, refers to the exhaustion of local remedies "according to the generally recognised rules of international law".<sup>105</sup> So far as bilateral instruments are concerned, article V of the General Claims Convention between the United States and Mexico, of 8 September 1923, speaks of "the general principle of international law that the legal remedies must be exhausted".<sup>106</sup>

(7) There would appear to be no doubt that, in general international law, the principle of the exhaustion of local remedies is closely related to the development of international obligations regarding the treatment accorded by a State to foreign natural or juridical persons and the prevention of injury to such persons and their property. A perusal of the decisions handed down by the Permanent Court of International Justice shows that, in its judgment in the *Mavrommatis Palestine Concessions* case (1924), the Court described the requirement that aliens injured by acts of the State which are contrary to international law should seek to "obtain satisfaction through the ordinary channels" as "an elementary principle of international law",<sup>107</sup> while, in its judgment in the *Panevezys-Saldutiskis Railway* case (1939), it noted that the two parties recognized the existence of "the rule of international law requiring the exhaustion of the remedies afforded by municipal law".<sup>108</sup> In its judgment in the *Interhandel* case (1959), the International Court of Justice took a definite position on the matter when it affirmed that: "The rule that local remedies must be exhausted ... is a well-established rule of customary international law".<sup>109</sup> International arbitration case-law clearly follows this line. In his award in the *British Property in Spanish Morocco* case, rendered in 1925, Max Huber, the arbitrator, held the requirement of the exhaustion of local remedies to be "a recognized principle of international law";<sup>110</sup> in its

<sup>105</sup> For reference, see foot-note 24 above.

<sup>106</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 13.

<sup>107</sup> *P.C.I.J.*, Series A, No. 2, p. 12.

<sup>108</sup> *P.C.I.J.*, Series A/B, No. 76, p. 18.

<sup>109</sup> *I.C.J. Reports* 1959, p. 27.

<sup>110</sup> United Nations, *Reports of International Arbitral Awards*, vol. II, (United Nations publication, Sales No. 1949.V.1), p. 731 [translation by the Secretariat].

decision of 1930 in the *Mexican Union Railway* case, the British/Mexican Claims Commission stated that the principle in question was "one of the recognized rules of international law";<sup>111</sup> in its award of 1956 in the *Ambatielos Claim* case the Greece/United Kingdom Commission of Arbitration described the requirement of the full utilization of local remedies as a rule "well established in international law";<sup>112</sup> and, in its decision of 1958, the tribunal set up by Switzerland and the Federal Republic of Germany for the *Agreement on German External Debts* affirmed that: "There can be no doubt that the rule of exhaustion of local remedies ... is ... a generally accepted rule of international law".<sup>113</sup> International jurisprudence is thus unanimous in recognizing the existence of the principle of the exhaustion of local remedies in general international law, independently of any special provisions embodied in treaty instruments. At the same time, it is a fact that all the specific cases considered by international courts in which they indicated that they recognized this principle are cases involving the breach or alleged breach of international obligations concerning the treatment accorded by a State in its territory to aliens or their property.

(8) There are just as many statements of position on the matter to be found in State practice, and States are virtually unanimous in recognizing the general character of the principle of the exhaustion of local remedies. This is clear from an examination of the opinions expressed by representatives of Governments in the course of codification work concerning the responsibility of States for damage caused in their territory to the person or property of aliens. It also emerges from the convictions expressed by Governments in disputes involving the breach of an international obligation relating to the treatment of nationals of another State. During the attempt at codification in 1930, no Government expressed the slightest doubt that the rule which it was sought to codify was first and foremost a rule of general international law. The scope of the rule had been determined in advance by the limits of the subject-matter of the Codification Conference. The replies of Governments to the request for information addressed to them by the Preparatory Committee,<sup>114</sup> the statements by delegations in the Third Committee of the Conference and the proposals made during its delib-

erations,<sup>115</sup> and the text of article 4, paragraph 1, approved on first reading at the close of the discussions,<sup>116</sup> were all based on a fundamental conviction that the principle of the exhaustion of local remedies existed as a rule of general international law. The limitations placed on the principle in the text adopted,<sup>117</sup> as well as those proposed by certain representatives, were grounded in the same conviction.

(9) With regard to the positions taken by Governments in the many cases in which the problem of the non-exhaustion of local remedies arose in a particular dispute, the most interesting feature is the convergence of views, not only of respondent Governments but also of claimant Governments, concerning recognition of the principle in question as a general rule of international law. The inevitable divergences related only to the problem of the applicability of the principle in the particular circumstances of a specific case. In any event, it was never maintained that the requirement of the prior exhaustion of local remedies could be invoked only if specifically provided for in a convention. To mention only the most explicit statements before the Permanent Court of International Justice or the International Court of Justice, in the case concerning the *Administration of the Prince von Pless*, the Polish Government expressed the view, which was never challenged by the German Government, that it regarded the requirement of the exhaustion of local remedies as "a generally accepted principle of international relations";<sup>118</sup> in the *Losinger & Co.* case, the Yugoslav Government referred to a "universally admitted rule" and the Swiss Government stated that it was not unaware of that "rule of international law";<sup>119</sup> in the *Phosphates in Morocco* case, the French Government affirmed that it was "a well-established rule of international law" and the Italian Government stated that it "did not intend to challenge the existence of that rule";<sup>120</sup> in the *Panvezys-Saldutiskis Railway* case, the Lithuanian Government maintained, without opposition from the Estonian Government, that "The rule of the exhaustion of local remedies is ... firmly established in the positive international law of our time";<sup>121</sup> in the *Anglo-Iranian Oil Company* case, the Iranian Government referred to the "prior exhaustion of local remedies" as a condition to be met "in accordance with general

<sup>111</sup> *Ibid.*, vol. V (Sales No. 1952.V.3), p. 122.

<sup>112</sup> *Ibid.*, vol. XII (Sales No. 63.V.3), pp. 118-119.

<sup>113</sup> *International Law Reports*, 1958-I (London), vol. 25 (1963), p. 42.

<sup>114</sup> Point XII of the request for information addressed to Governments by the Preparatory Committee of the Conference reads as follows:

"Is it the case that the enforcement of the responsibility of the State under international law is subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?" (League of Nations, *op. cit.*, p. 136.)

For the replies of Governments, see *ibid.*, pp. 136 *et seq.*, and *Supplement to vol. III* (C.75(a).M.69(a).1929.V), pp. 4 and 23.

Basis for Discussion No. 27, drafted by the Committee on the basis of these replies, is reproduced below in paragraph (18).

<sup>115</sup> For the statements made during the debates, see League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March-12 April 1930), vol. IV, *Minutes of the Third Committee* (C.351(c).M.145(c).1930.V), pp. 63 *et seq.*, 162 *et seq.*; for proposals and amendments, see *ibid.*, pp. 209 *et seq.*, 217, 220, 227 *et seq.*, and 230.

<sup>116</sup> See paragraph (19) above.

<sup>117</sup> The limitations on the application of the principle provided for in article 4, paragraph 2, concerned self-evident cases in which the judicial authorities had definitively refused to administer justice or had rendered final judgments.

<sup>118</sup> *P.C.I.J.*, Series C., No. 70, pp. 134 and 182. [Translation by the Secretariat.]

<sup>119</sup> *Ibid.*, No. 78, pp. 129 and 156. [Translation by the Secretariat.]

<sup>120</sup> *Ibid.*, No. 84, pp. 209 and 440. [Translation by the Secretariat.]

<sup>121</sup> *Ibid.*, No. 86, p. 143. [Translation by the Secretariat.]

international law", and the British Government recognized that it was "in general a condition";<sup>122</sup> in the *Interhandel* case, the United States invoked the "well-established principle of international law requiring the exhaustion of local remedies" and the Swiss Government replied that it in no way contested that assertion;<sup>123</sup> finally, in the case of the *Aerial Incident of 27 July 1955*, the Bulgarian Government emphasized the "incontestable" nature of the "rule of the prior exhaustion of local remedies", without being challenged on that point by the Governments of the United States and Israel.<sup>124</sup> Similar positions were implicit in many other cases.<sup>125</sup>

(10) The positions taken by Governments parties to disputes referred to other international tribunals are equally conclusive. For example, it is clear from the arbitral award in the *Central Rhodope Forests* case (merits) that the Bulgarian Government based its argument on "the well-known principle of international law of prior exhaustion of local judicial remedies" and that the Greek Government did not challenge the applicability of that principle to the case.<sup>126</sup> There was one occasion when the existence of the rule as part of general international law was contested, and that was the initial challenge by the Finnish Government in the *Finnish Vessels* case, which was referred to the Council of the League of Nations in 1931. When the British Government reiterated that the rule was an undisputed principle of international law, however, the Helsinki Government accepted that view and agreed to refer to arbitration the question whether, in the case in point, local remedies had been exhausted.<sup>127</sup>

(11) Significant positions have been taken by Governments on other occasions. A particularly interesting example is that taken by the Swiss Government during the 1967 debate in the Federal Assembly on approval of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States. Commenting on article 26 of the Convention, the Federal Council referred to the exhaustion of local remedies as a general principle of international law.<sup>128</sup> Moreover, the practice of certain Governments, particularly the

United States and Canadian Governments, of considering themselves as precluded from taking over claims by their nationals until the latter have exhausted the local remedies, attests to their firm belief in the existence of the principle as one of general application.<sup>129</sup>

(12) The character of the principle as one of general international law is also recognized by virtually all the learned writers who have considered the question. With rare exceptions, they cast no doubt on the view that exhaustion of local remedies is part of general international law.<sup>130</sup> It is as a principle applicable under general international law that the condition of the exhaustion of local remedies was taken into consideration in the resolution adopted in 1956 by the Institute of International Law.<sup>131</sup> And it was on the same understanding that the principle stating this condition was included in the codification drafts on the international responsibility of States for injury caused in their territory to the person or property of aliens, adopted under the auspices of international organizations<sup>132</sup> or by private learned associations.<sup>133</sup>

<sup>129</sup> For an example of United States practice, see M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967), vol. 8, pp. 769 *et seq.*, 906 *et seq.*; for an example of Canadian practice, see *Canadian Yearbook of International Law, 1968* (Vancouver), vol. VI, pp. 262 *et seq.*

<sup>130</sup> C. G. Ténékidès did express doubts on the subject in an article published in 1933 ("L'épuisement des voies de recours internes comme condition préalable de l'instance internationale", *Revue de droit international et de législation comparée* (Brussels, 3rd series, vol. XIV (1933), pp. 514 *et seq.*), but later changed his opinion ("Les jugements nationaux 'manifestement injustes' envisagés comme sources de la responsabilité internationale des Etats", *Revue générale de droit international public* (Paris), 3rd series, vol. XIII, No. 4 (July-August 1939), p. 376). W. Friedmann, in his article "Epuisement des voies de recours internes", *Revue de droit international et de législation comparée* (*op. cit.*), pp. 318 *et seq.*, denied the existence of the principle of exhaustion of local remedies in general international law, but this article now seems out of date. J. H. W. Verzijl, in his report to the Institute of International Law entitled "La règle de l'épuisement des recours internes" (*Annuaire de l'Institut de droit international, 1954* (Basel), vol. 45-1, pp. 5 *et seq.* and in particular pp. 22-23), agreed that the rule was a principle of general international law, but greatly restricted its scope. In his opinion, it would be justified only in the event of a denial of justice in the true sense. In other cases, the possibility open to the State of avoiding international responsibility by referring a foreigner who has suffered injury to its national courts can be explained only "on grounds of expediency". G. Strozzi has very recently expressed the view that, except in a very few cases, the principle of exhaustion of local remedies derives only from treaties. The only value which he attributes to the principle, about which he expresses very restrictive ideas in general, is as a condition for the institution of proceedings before an international tribunal (*Interessi statali e interessi privati nell'ordinamento internazionale; la funzione del previo esaurimento dei ricorsi interni* (Milan, Giuffrè, 1977)).

<sup>131</sup> See *Annuaire de l'Institut de droit international, 1956* (Basel), vol. 46, p. 364.

<sup>132</sup> In addition to articles 4 and 9 adopted on first reading in 1930 by the Third Committee of the Hague Codification Conference (*Yearbook... 1956*, vol. II, pp. 225-226, document A/CN.4/96, annex 3), see article 15 of the draft prepared in 1958 by F. V. García Amador (*Yearbook... 1958*, vol. II, p. 72, document A/CN.4/111, annex) and article 18 of the revised draft prepared in 1961 (*Yearbook... 1961*, vol. II, p. 48, document A/CN.4/134 and Add. 1, addendum), paragraph 3 of the resolution adopted in 1933 at the Seventh International Conference of American States (*Yearbook... 1956*, vol. II, p. 226, document

(Continued on next page.)

<sup>122</sup> *I.C.J. Pleadings, Anglo-Iranian Oil Company*, pp. 291 [translation by the Secretariat] and 155.

<sup>123</sup> *Ibid.*, *Interhandel*, pp. 315 and 402.

<sup>124</sup> *Ibid.*, *Aerial Incident of 27 July 1955*, pp. 276-277, 326, 154.

<sup>125</sup> In only one case has a Government expressed any doubts concerning the existence of the principle as a general rule; this was the Belgian Government, in the Borchgrave case (*P.C.I.J.*, Series C, No. 83, p. 65). However, the Belgian Government later took a clearly positive attitude, in the case concerning the Electricity Company of Sofia (*ibid.*, No. 88, p. 37) and in the case concerning the Barcelona Traction (*I.C.J. Pleadings, Barcelona Traction, Light and Power Company Limited* (New application: 1962), vol. I, pp. 215 *et seq.*).

<sup>126</sup> United Nations, *Reports of International Arbitral Awards*, vol. III, (United Nations publication, Sales No. 1949.V.2), p. 1419. [Translation by the Secretariat.]

<sup>127</sup> *Ibid.*, p. 1482.

<sup>128</sup> See the message of the Federal Council of 15 December 1967 in the *Annuaire suisse de droit international, 1968* (Zurich), vol. XXV, p. 271.

The principle is also included in drafts on the international responsibility of States for wrongful acts generally.<sup>134</sup>

(b) *Relationship between the principle and the determination of the existence of a breach of an international obligation relating to the treatment of private individuals*

(13) As regards the explanation and justification of the principle of general international law establishing the requirement of the exhaustion of local remedies, there is no clearly dominant opinion to be found among the authors of works on international law. Those who have dealt with this subject have frequently taken different viewpoints in considering and expounding the significance of the principle. Differences of opinion have accordingly emerged, in particular between those who regard the principle in question simply as a "practical" rule or a purely procedural one,<sup>135</sup> relating to the implementation (*mise en*

*œuvre*) of international responsibility, and those who consider that the main proposition of the principle expresses a "substantive rule" concerning the genesis of international responsibility, but at the same time do not deny the procedural aspects as a logical corollary of the main proposition.<sup>136</sup> Nor can it be overlooked that there is a third school of thought, according to which the rule concerns the origin of responsibility in cases where the breach of the international obligation derives exclusively from the action of judicial organs which have failed in their duty to provide a private individual with the internationally required judicial protection against injuries sustained in breach of purely internal law. In other cases, however, the rule only concerns the procedures for the implementation (*mise en œuvre*) of responsibility.<sup>137</sup> Yet to speak of schools of thought is scarcely appropriate, since the arguments advanced for or against a

*dies in the Case Law of International Courts and Tribunals* (Leyden, Sijthoff, 1968), pp. 92 *et seq.* and 131 *et seq.*; J. Chappetz, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972), pp. 9 *et seq.*; and G. Strozzi, *op. cit.*, p. 104.

(Foot-note 132 continued)

A/CN.96, annex 6); number VIII of the principles adopted in 1962 by the Inter-American Juridical Committee referring to the opinion of Latin American countries (*Yearbook... 1969*, vol. II, p. 153, document A/CN.4/217 and Add.1, annex XIV); and number IX of the principles adopted in 1965 by the same Committee, referring to the opinion of the United States (*ibid.*, p. 154, annex XV).

<sup>133</sup> See article XII of the resolution prepared in 1927 by the Institute of International Law (*Yearbook... 1956*, vol. II, p. 228, document A/CN.4/96, annex 8); articles 6 and 7 of the draft prepared in 1929 by the Harvard Law School (*ibid.*, p. 229, annex 9), article 13 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht (*Yearbook... 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII); article 1, paragraph 2, and article 19 of the draft prepared in 1961 by the Harvard Law School (*ibid.*, pp. 143 and 146, document A/CN.4/217 and Add.1, annex VII); and paragraphs 206-210 of the restatement adopted in 1965 by the American Law Institute (*Yearbook... 1971*, vol. II (Part One), pp. 197-198, document A/CN.4/217/Add.2). See also articles III and IV of the draft on diplomatic protection prepared in 1925 by the American Institute of International Law (*Yearbook... 1956*, vol. II, p. 227, document A/CN.4/96, annex 7).

<sup>134</sup> This applies to the bases for discussion on the international responsibility of States prepared in 1956 by F. V. García Amador (Basis No. V, para. 2) (*Yearbook... 1956*, vol. II, p. 220, document A/CN.4/96, para. 241) and the draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932 (article 9) (*Yearbook... 1969*, vol. II, p. 152, document A/CN.4/217 and Add.1, annex X). The drafts prepared by K. Strupp (*ibid.*, p. 151, annex IX) and by B. Graefrath and P. A. Steiniger ("Kodifikation, der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin, 1973), No. 8, p. 227), which also deal with the international responsibility of States in general, do not mention the rule.

<sup>135</sup> See in particular Ch. de Visscher, "Note sur la responsabilité internationale des Etats et la protection diplomatique, d'après quelques documents récents", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VIII (1927), pp. 245 *et seq.* and "Le déni de justice en droit international", *Recueil des cours... 1935-II* (Paris, Sirey, 1936), vol. 52, pp. 421 *et seq.*; C. P. Panayotakos, *La règle de l'épuisement des voies de recours internes, en théorie et en pratique* (Marseille, Mouillot, Imp., 1952), pp. 29 *et seq.*, 113; H. Urbanek, "Das völkerrechtsverletzende nationale Urteil", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. IX, fasc. 2 (1958-1959), pp. 213 *et seq.*; C. H. P. Law, *The Local Remedies Rule in International Law* (Geneva, Droz, 1961), pp. 32 *et seq.* and 131 *et seq.*; C. F. Amerasinghe, "The formal character of the rule of local remedies", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart) vol. 25, fasc. 3, (1965), pp. 445 *et seq.*; T. Hoesler, *The Exhaustion of Local Reme-*

<sup>136</sup> Among the authors who explain the principle of the exhaustion of local remedies mainly in terms of the genesis of international responsibility, see in particular E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, Banks Law Publishing, 1928), pp. 817 *et seq.*, "Theoretical aspects of the international responsibility of States", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin), vol. I, part I, 1929, pp. 233 *et seq.* and 239 *et seq.*, and "La responsabilité des Etats à la Conférence de codification de La Haye", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XII, 1931, pp. 47 *et seq.*; L. Strisower, report entitled "La responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne ou aux biens des étrangers" *Annuaire de l'Institut de droit international, 1927-I* (Paris), vol. 33, pp. 492 and 498; R. Ago, "La regola del previo esaurimento...", *loc. cit.*, pp. 181 *et seq.* and in particular pp. 239 *et seq.*; "Le délit international", *loc. cit.*, pp. 514 *et seq.*; and "Observations au sujet de l'exposé préliminaire de J. H. W. Verzijl", *Annuaire de l'Institut de droit international, 1954* (Basel), vol. 45-I, pp. 34 *et seq.*; G. Pau, "Responsabilità internazionale dello Stato per atti di giurisdizione", *Istituto di scienze giuridiche, economiche e politiche dell'Università di Cagliari, Studi economico-giuridici*, vol. XXXIII, 1949-1950 (Rome, Pinnarò, 1956), pp. 45 *et seq.*; F. Durante, *Ricorsi individuali a organi internazionali* (Milan, Giuffrè, 1958), p. 137; B. Donner, "Kotázce nutnosti vyčerpaní vnitrostátních právních postředků před diplomatickým zákrokem" (concerning the exhaustion of local remedies prior to diplomatic representations), *Studie z mezinárodního práva* (Prague, 1958), vol. IV, pp. 5 *et seq.*; J. L. Simpson and H. Fox, *International Arbitration Law and Practice* (New York, Praeger, 1959), pp. 111-112; A. P. Sereni, *op. cit.*, p. 1534; G. Morelli, *op. cit.*, p. 350; M. Giuliano, *Diritto internazionale* (Milan, Giuffrè, 1974), vol. I, p. 593; G. Gaja, *L'esaurimento dei ricorsi interni nel diritto internazionale* (Milan, Giuffrè, 1967), pp. 5 *et seq.*; and H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1975), pp. 660 *et seq.*

<sup>137</sup> See C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 95 *et seq.* and "Une théorie au sujet du commencement de la responsabilité internationale", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XI, No. 2, 1930, pp. 643 *et seq.*; C. T. Eustathiades, *La responsabilité internationale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Paris, Pedone, 1936), pp. 243 *et seq.* and 331 *et seq.*; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans Green, 1938), pp. 407-408; J. E. S. Fawcett, "The exhaustion of local remedies: substance or procedure?", *The British Year Book of International Law, 1954* (London), vol. 31, pp. 452 *et seq.*; J. H. W. Verzijl, "La règle de l'épuisement des recours internes" (*loc. cit.*), pp. 23 *et seq.* and 30 *et seq.*, and *International Law... (loc. cit.)*, p. 635.

particular thesis vary so greatly from one author to another that writers sometimes arrive at similar conclusions from virtually opposite directions. It is mainly these theoretical differences which account for the inconclusive results reached on this subject by the Institute of International Law in 1927, 1954 and 1956.<sup>138</sup> The same differences are reflected in the codification drafts on the international responsibility of States prepared by jurists and learned organizations.<sup>139</sup>

(14) A careful examination shows these differences of learned opinion to be of theoretical rather than practical interest. Above all, they are more apparent than real. Furthermore, they are attributable in some cases to the fact that the question has been approached from a narrow viewpoint, or that the specific framework within which the problem has been considered has suggested conclusions which would probably not have been reached if the analysis had been carried out in a broader context. For no one denies that the principle of recourse to local remedies by private individuals who consider themselves injured by measures or decisions not in conformity with the treatment which international law requires them to be accorded makes such recourse, in the last resort, a condition for the implementation (*mise en œuvre*) of responsibility. That is so whether such implementation takes the form of the submission of a claim through diplomatic channels or the lodging of

an appeal to an international judicial or arbitral body. It is thus quite clear that the principle has a real effect on the possibility of recourse to the procedures for implementation of responsibility. However, this does not warrant the conclusion that the principle itself is merely a "rule of practice" or a "rule of procedure", as some maintain, even though they disagree as to whether this "rule" should apply to diplomatic protection in general or only to the procedure for instituting proceedings before an international tribunal. Before having, as it does, obvious consequences in regard to the procedure for claims, the principle of the exhaustion of local remedies necessarily operates at the level of the actual mechanism of fulfilment of an international obligation and, consequently, at the level of determination of the existence of a breach of an international obligation.

(15) It should be recalled that the fact of establishing that a State has committed, for example, a breach of an obligation laid on it by a treaty to accord a certain treatment to a national of another State, and has thus infringed the right of the other State that its national shall be accorded the treatment provided for in the treaty, is tantamount to saying that the first State has incurred, if all conditions for this are satisfied, an international responsibility towards the second State. And generation of an international responsibility is equivalent, in the example we have taken, to the creation of a new right of the injured State: the right to reparation for infringement of the right accorded to it by the treaty. But it would be difficult to conceive that this new right, attributed to the injured State by the international legal order, should depend on the result of proceedings instituted by a private individual at the internal level, which may lead to the restoration of the right of that individual, but not to the restoration of a right which belongs to the State at the international level and has been infringed at that level. If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred. At this moment, therefore, the international responsibility, which, in our case, is reflected precisely in the right of the State to reparation of the injury suffered by it, has not yet arisen. In other words, the finding that the right of the State to demand reparation exists only after the final rejection of the claims of the private individuals concerned inevitably leads to the conclusion that the breach of the international concerned inevitably leads to the conclusion that the breach of the international obligation has not been completed before those remedies are exhausted, that is to say, before the negative effects of the new conduct of the State in regard to those remedies have been added to those of the initial conduct adopted by the State in the case in point, thereby rendering the

<sup>138</sup> *Annuaire de l'Institut de droit international*, 1927 (Brussels), vol. 33-I, pp. 455 *et seq.* and vol. 33-III, pp. 81 *et seq.*; *Annuaire de l'Institut de droit international*, 1954 (Basel), vol. 45-I, pp. 5 *et seq.*; *Annuaire de l'Institut de droit international*, 1956 (Basel), vol. 46, pp. 1 *et seq.* and 265 *et seq.*

<sup>139</sup> Articles 6, 7 and 8 of the draft prepared in 1929 by the Harvard Law School, under the influence of E. M. Borchard, present the exhaustion of local remedies very clearly as a requirement for the genesis of State responsibility (*Yearbook... 1956*, vol. II, p. 229, document A/CN.4/96, annex 9). The same can be said of article IX of the draft prepared by G. O. Murdock and approved in 1965 by the Inter-American Juridical Committee as reflecting the views of the United States (*Yearbook... 1969*, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV).

Other drafts, on the other hand, treat the exhaustion of local remedies from the point of view of its effects on the exercise of diplomatic protection: the 1927 draft of the Institute of International Law (article XII) (*Yearbook... 1956*, vol. II, p. 228, document A/CN.4/96, annex 8); the 1930 draft of the Deutsche Gesellschaft für Völkerrecht (article 13) (*Yearbook... 1969*, vol. II, pp. 150-151, document A/CN.4/217 and Add.1, annex VIII); the draft prepared by A. Roth in 1932 (article 9) (*ibid.*, p. 152, annex X); the 1956 resolution of the Institute of International Law, specifically concerned with the rule of the exhaustion of local remedies (*ibid.*, p. 142, annex IV); the draft prepared for the International Law Commission in 1958 by F. V. García Amador (article 15) (*Yearbook... 1958*, vol. II, p. 72, document A/CN.4/111, annex) and the revised draft which he prepared in 1961 (article 18) (*Yearbook... 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum); the draft prepared by Sohn and Baxter for the Harvard Law School in 1961 (article 1) (*Yearbook... 1969*, vol. II, pp. 142-143, document A/CN.4/217 and Add.1, annex VII) and the *Restatement* drawn up in 1965 by the American Law Institute (paragraph 206) (*Yearbook... 1971*, vol. II, (Part One), pp. 197-198, document A/CN.4/217/Add.2). In the latter draft, the character attributed to the principle does not emerge very clearly from the text of paragraph 206, but it is explained in the commentary (American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1965), p. 612).

result required by the international obligation definitively impossible of achievement.

(16) In view of the uncertainty which prevails in legal doctrine, it seems evident that one should turn rather to international jurisprudence and State practice in order to determine how the principle of the "exhaustion of local remedies" should be understood, justified and interpreted as regards both its precise scope and that of its corollaries. And in the light of the foregoing considerations, it will not be surprising to find that an examination of State practice and international jurisprudence shows, on the whole, that the principle that the exhaustion of local remedies is a prerequisite operates, first, at the level of the determination of the fulfilment or breach of international obligations relating to the treatment accorded by the State to private individuals and, hence, at the level of the generation of international responsibility, even before it has any effects at the level of implementation (*mise en œuvre*) of this responsibility.

(17) With regard to the positions taken by States, it seems desirable first to consider the general opinions they have expressed in the abstract, without relation to the specific disputes in which these States have been involved. The question whether the exhaustion of local remedies is, if certain other conditions exist, a *sine qua non* for the generation of international responsibility or simply for the implementation of this responsibility through the diplomatic channel or by legal proceedings was considered at the Conference for the Codification of International Law (The Hague, 1930). The terms of the request for information addressed to Governments by the Preparatory Committee of the Conference were not very clear on this point.<sup>140</sup> The choice of the wording seems to reflect a concern not to prejudge the question. It is not surprising, therefore, that the replies from Governments are not always formulated in such a way as to give a clear idea of their opinion on the question. It is evident, however, that Austria, Belgium, Bulgaria, Czechoslovakia, Germany and Poland<sup>141</sup> considered that international responsibility did not come into being until after the unsuccessful exhaustion of local remedies. On the other hand, Great Britain seems to have expressed the opinion that only the enforcement of an already established responsibility was subject to the exhaustion of local remedies.<sup>142</sup>

(18) In the light of the replies, the Preparatory Committee of the Conference formulated the following basis for discussion:

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts),

<sup>140</sup> For the text of point XII, see foot-note 114 above.

<sup>141</sup> *League of Nations, Bases for Discussion ... (op. cit.)*, pp. 136 and 139.

<sup>142</sup> *Ibid.*, p. 137. Norway (*ibid.*, p. 138) distinguished between two cases: damage caused to a foreigner as a result of an act contrary to national law, and damage caused by an act in breach of a treaty or some other indisputable obligation of international law. The Norwegian Government considered that, in the first case, international responsibility did not come into being until all internal remedies had been exhausted and that, in the second, the principle of exhaustion was not applicable.

the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision ...<sup>143</sup>

This text seems to have been drafted to provoke discussion, and it certainly did. During the discussion at the Conference,<sup>144</sup> some representatives, namely, those of Egypt, Spain, Mexico, Colombia and Romania,<sup>145</sup> expressed the opinion that the exhaustion of local remedies was a prerequisite for the generation of responsibility. Other, though fewer, representatives, like those of Italy and Germany,<sup>146</sup> expressed a contrary opinion without, however, taking up such a clear and well-substantiated position. The representatives of the United States and Norway were of the opinion that the exhaustion of local remedies was sometimes a prerequisite for responsibility and sometimes a prerequisite for its implementation.<sup>147</sup>

(19) At the end of the discussion, the delegations agreed on the adoption of a formula that did not take any position on the question whether international responsibility came into being before or after the exhaustion of local remedies. The proposal of the subcommittee dealing with the question and adopted by the Third Committee on first reading was embodied in article 4, paragraph 1, and read as follows:

The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.<sup>148</sup>

<sup>143</sup> Basis No. 27 (*ibid.*, p. 139).

<sup>144</sup> The discussion on this basis for discussion is to be found in *League of Nations, Acts of the Conference ... (op. cit.)*, pp. 63 *et seq.* and 162 *et seq.*

<sup>145</sup> *Ibid.*, pp. 64-65, 72, 76 and 78. It is particularly interesting to read the views on this subject expressed by the delegate of Romania, whose statement of position was distinguished by the clarity and precision of the ideas expressed and language used:

"The responsibility of the State arises from the disregard of an international obligation. It is therefore proportionate or subordinate to the measure of the non-fulfilment of that obligation.

"So long, however, as some organ of the State is in a position to fulfil the obligation, its non-fulfilment is not proved. Accordingly, the condition for the coming into being of such responsibility—namely, the evidence of non-fulfilment—does not exist ...

"Consequently, it is quite correct to say that responsibility itself comes into being only after it has become patent that there has been no fulfilment—i.e. that the international requirement or obligation has not been met ...

"So long as there is a possibility of its fulfilment by some internal means of redress, it cannot be said that the international obligation has not been fulfilled" (*ibid.*, p. 77). The Egyptian Government proposed an amendment to the text on the lines advocated by it (*ibid.*, p. 210). The Mexican Government also proposed an amendment (*ibid.*, p. 223).

<sup>146</sup> *Ibid.*, pp. 74-75 and 79-80. It should be noted that, in its reply to the request for information, Germany supported the view that responsibility does not come into being until after all local remedies have been exhausted.

<sup>147</sup> *Ibid.*, pp. 73-74 and 76.

<sup>148</sup> *Ibid.*, p. 236. Several delegations acquiesced in that solution in the belief that the problem was of no major practical consequence. See the statements by the representatives of Greece (*ibid.*, pp. 66-67), Belgium (p. 69), Great Britain (pp. 69-71), United States (pp. 73-74), Mexico (pp. 72-73), Colombia (p. 78), and Germany (pp. 79-80). The participants in the Conference do not seem to have weighed all the consequences which the adoption of one

(Continued on next page.)

The formula thus finally adopted was deliberately ambiguous and, indeed, proponents of each of the theses disputed in the discussion subsequently relied on it in support of their own point of view. Consequently, no clear and final conclusions can be drawn from the work of the 1930 Codification Conference on this point. That does not prevent us from noting, however, that the majority of representatives of Governments who expressed their views on the subject considered that the exhaustion of local remedies, in cases where that is provided for, amounts to fulfilment of a condition for the breach of an international obligation to occur and thus for international responsibility to come into being, not merely a condition justifying the initiation of procedure for the implementation of an already existing responsibility.

(20) With regard to the more significant positions taken up on other occasions by State organs or international tribunals, particularly in the case of disputes over concrete cases, a preliminary remark is called for. Only statements flatly denying that the principle of exhaustion of local remedies can affect the formation of international responsibility would lend real support to the opinion that this principle is of a "purely practical and procedural" character. It would, therefore, be wrong to regard as evidence of the validity of this opinion the fact that, in various cases, international courts, in their decisions, and Governments, in the positions they have adopted, have relied on the exhaustion of local remedies as a condition for the exercise of diplomatic protection of certain persons or of the faculty to submit claims on their behalf to an international tribunal. It must be remembered that the aim of the State invoking failure to employ local remedies against a claim asserted against it before an international court is mainly to block consideration of the substance of the claim by a plea of inadmissibility. And conversely, the aim of the State submitting the claim, when it contests the existence of such failure or its effect in the case in point, is precisely to remove the preliminary obstacle thus placed in the way of consideration of the substance of its claim. Thus both States take into consideration the principle of the exhaustion of local remedies from the point of view of its effect, not on the formation of responsibility, but on the admissibility of the claim. The distinction now generally made between the procedure relating to preliminary objections and that relating to substance also means that the international court called on to pronounce on the question within the framework of the former procedure cannot but approach it from the same point of view. Moreover, discussion on this point usually cen-

tres on interpretation of the agreement establishing the jurisdiction of the international tribunal and its scope; consequently, if the agreement mentions the principle of the exhaustion of local remedies when defining the conditions in which a claim may be held as admissible by the tribunal, the latter will necessarily settle the question whether or not local remedies have been exhausted from the point of view of the existence of a condition of admissibility of the claim, rather than from that of the existence of a condition of the international responsibility of the respondent State. It is obvious, however, that any assertion of the effect of failure to exhaust local remedies on the admissibility of an international claim in no way implies an intention to deny the effect of such failure on the substantive question of the generation of international responsibility.<sup>149</sup>

(21) All that can be taken into account, therefore, in support of the argument that the exhaustion of local remedies is only a condition for the exercise of diplomatic and legal protection, are statements of position clearly to this effect. Now, it must be said that such statements are very hard to find and, in view of the circumstances in which they are encountered, far less conclusive than those supporting the opposite thesis. On the other hand, there are statements by Governments and international tribunals stating explicitly that the exhaustion of local remedies is a condition for the generation of international responsibility on occasions when they were actually faced with the question of the possible effect of the exhaustion of local remedies on the generation of the international responsibility of the State. For example, decision No. 21 of February 1930 of the British-Mexican Claims Commission, set up by the Convention of 19 November 1926, in the case of the *Mexican Union Railway*, contains the statement that:

... the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.<sup>150</sup>

(22) On the occasion of the proceedings instituted by Germany before the Permanent Court of International Justice in the case concerning the *Administration of the Prince von Pless*, the Polish Government raised a preliminary objection in which, after opposing the action of the German Government, which amounted to bringing a claim "to an international

(Foot-note 148 continued.)

point of view rather than another might have on such matters as the determination of the moment at which an internationally wrongful act is committed and the duration of the commission of the act. The practical implications of the reply to these questions may be decisive as regards such important points as knowing whether the dispute arising out of a particular act is or is not one which an international tribunal is competent to judge, or knowing from what moment any damage caused should be taken into consideration for the purposes of assessing the amount of reparation.

<sup>149</sup> It is moreover a fact that, in many cases, the condition of prior exhaustion of local remedies is simultaneously invoked at two levels: directly, as a condition for the existence of international responsibility and indirectly only as a condition for the legitimate assertion of an international claim. This is the case every time that the internationally wrongful act complained of in the claim is a denial of justice to a private person who has previously suffered only injustice in breach of internal law. The use of local remedies is thus presented both as the condition for the existence of a denial of justice—a clear example of an internationally wrongful act—and as the condition for the submission of a claim to invoke the international responsibility generated by this wrongful act. Obviously, the second aspect presupposes the first, from which it logically derives.

<sup>150</sup> United Nations, *Reports of International Arbitral Awards*, vol. V (*op. cit.*), p. 122.

court when the person concerned possesses a means of recourse to national courts where he may find satisfaction", it argued that:

... until the legal means made available by internal legislation to individuals to defend their interests have been exhausted, there can be no question of the international responsibility of the State.<sup>151</sup>

Thus the Polish Government clearly took the position that the principle that the exhaustion of local remedies is a prerequisite directly concerns the existence of international responsibility, even though at the same time it asserted the corollary of that principle, relating to the formal possibility of referring a claim to an international court. It should also be noted that the German Government maintained that, by reason of a conventional derogation therefrom, the principle of the exhaustion of local remedies was inapplicable in that particular case, though it in no way contested the Polish Government's definition of the principle.

(23) Interpretation of the arbitral award in the *Finnish Vessels* case is less easy. The British Government, in its memorandum to the Council of the League of Nations, had invoked the principle of the exhaustion of local remedies for the purpose of blocking the submission by the Finnish Government of the diplomatic protest it had made to the British Government. Invocation of the principle for that purpose in no way excluded the possibility of invoking it for other purposes also, particularly that of challenging the existence, in a specific case, of a completed breach of an international obligation and thus of international responsibility already established against the respondent State. The Finnish Government, on the other hand, had questioned the very existence of the principle which Great Britain regarded as unchallenged. As a result of the discussion before the Council, the parties submitted the following concrete question to arbitration: "Have the Finnish shipowners or have they not exhausted the means of recourse placed at their disposal by British law?"<sup>152</sup>

(24) This was the question that the Arbitrator, A. Bagge, had to decide, and he began by noting that the Finnish Government did not claim that the breach of international law alleged by it was represented by the rejection by the British courts of the claim by the Finnish shipowners, but by the "initial breach of international law"<sup>153</sup> constituted, in its view, by the seizure and use without payment of the vessels belonging to them. Having said this, the Arbitrator concentrated on determining what points of law and fact should be submitted by the claimants to the municipal courts in a case of that kind. He commented that, where "an initial breach of international law" was alleged, the sole *raison d'être* of the principle of the exhaustion of local remedies was to

enable the municipal courts, up to the last competent instance, to inquire into and decide all questions of law and of fact alleged by the claimant State in international proceedings to prove that a breach had occurred. The purpose of this was to afford the respondent State the opportunity of doing justice "in their own, ordinary way". Without entering here into the substance of the question, we note first that, by the very fact of taking into consideration the possibility that the principle requiring the exhaustion of local remedies was applicable to cases where the claimant alleges an "initial breach" of international law, the Arbitrator seemed to be inclining towards the idea that the principle in question did not state a condition for the generation of responsibility,<sup>154</sup> but only a condition for recourse to a claims procedure. Nevertheless, immediately afterwards, the Arbitrator declared that he was aware of the fact that, in learned works, at the conferences of the Institut de Droit International and, especially at the 1930 Codification Conference, the proposition had been advanced:

that no responsibility of the State can come into existence until the private claim has been rejected by the local courts, whether the basis brought forward for the international claim may be a failure of the local courts of law to fulfil the requirements of international law, or the basis is an initial breach of international law,

and he finally concluded that:

If this proposition means that the responsibility of the State does not come into existence until the grounds upon which the claimant Government in the international procedure base their contention of an initial breach of international law have been rejected by the municipal courts, this proposition does not seem to result in any difference as to the question which contentions of fact or propositions of law should be considered under the local remedies rule.<sup>155</sup>

Arbitrator Bagge thus maintained a sort of neutrality between the two approaches to the requirement of the exhaustion of local remedies, since both led to the same conclusion on the point he had to decide. It would thus be quite arbitrary to regard his considerations as a clear, reasoned stand in favour of rejection of the theory that, in cases where the principle of the exhaustion of local remedies comes into play, such exhaustion is a condition for the genesis of international responsibility.

(25) The two theories as to the function attributed to the exhaustion of local remedies by the principle which states that condition came face to face in the *Phosphates in Morocco* case between Italy and France. In its preliminary application of 30 March 1932 to the Permanent Court of International Justice, the Italian Government asked the Court to judge and declare that the decision of the Mines Department dated

<sup>151</sup> *P.C.I.J.*, Series C, No. 70, pp. 134-135 (translation by the Secretariat).

<sup>152</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Buske, 1933), 3rd series, vol. XXVIII, p. 116.

<sup>153</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1502.

<sup>154</sup> The expression "initial breach of international law", in the language used by the Arbitrator, A. Bagge, probably meant a breach of international law committed at the beginning of the case. The expression is ambiguous, however, since it might also mean the "beginning, inception or first stage of a breach of international law. It would then express a different idea.

<sup>155</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1502.

8 January 1925<sup>156</sup> and the denial of justice which had followed it were inconsistent with the international obligation incumbent upon France to respect the rights acquired by the Italian company *Miniere e Fosfati*.<sup>157</sup> The French Government had accepted the compulsory jurisdiction of the Court by a declaration dated 25 April 1931, for "any disputes which may arise after the ratification of the present declaration with regard to *situations or facts subsequent to such ratification*".<sup>158</sup> The question thus arose whether the internationally wrongful act of which the Italian Government was complaining could or could not be regarded as a "fact subsequent" to the critical date. The Italian Government contended that the breach of an international obligation initiated by the decision of 1925 only became a completed breach following certain acts subsequent to 1931, in particular a note of 28 January 1933 from the French Ministry for Foreign Affairs to the Italian Embassy and a letter of the same date sent by the same Ministry to the Italian individual concerned. The Italian Government saw that note and that letter as an official interpretation of the acquired rights of Italian nationals which was inconsistent with the international obligations of France. It saw in them a confirmation of the denial of justice to the Italian nationals concerned, constituted by the refusal of the French Resident-General to permit them to submit to him a petition for redress in accordance with the terms of article 8 of the *dahir* of 12 August 1913. The new denial of justice now consisted in the final refusal of the French Government to make available to the claimants an extraordinary means of recourse, whether administrative or other, in view of the lack of ordinary means.<sup>159</sup> On the basis of these facts, the Italian Government clearly opted for the thesis that an internationally wrongful act, though begun by initial State conduct contrary to the result required by an international obligation, is completed only when the injured individuals have resorted without success to all existing appropriate and effective remedies. It was thus from that moment that, in its view, the responsibility came into being.<sup>160</sup>

(26) In opposition to the Italian Government, the French Government maintained that, if, as the former affirmed, the decision of 1925 by the Mines Department really merited the criticisms made against it—breach of treaties, breach of international law in general—it was at that date that the breach by France of its international obligations had been committed and completed, and at that date that the alleged internationally wrongful act had taken place. The French representative affirmed:

<sup>156</sup> This decision had rejected the claim of an Italian citizen, Mr. Tassara, to be recognized as the discoverer of the phosphate deposits in Morocco.

<sup>157</sup> *P.C.I.J.*, Series A/B, No. 74, p. 15.

<sup>158</sup> *Ibid.*, p. 22.

<sup>159</sup> *Ibid.*, pp. 27–28.

<sup>160</sup> The Italian Government's argument was developed mainly in its oral statement of 12 May 1938 (*ibid.*, Series C, No. 85, pp. 1231–1232), but was taken up again in its statement of 16 May (*ibid.*, pp. 1332–1333).

Here, therefore, the rule of the exhaustion of local remedies is *no more* than a rule of procedure. The international responsibility is already in being; but it cannot be enforced through the diplomatic channel or by recourse to an international tribunal or appeal to the Permanent Court of International Justice unless local remedies have first been exhausted.<sup>161</sup>

(27) In its judgment of 14 June 1938, the Court indicated that it did not discern in the action of the French Government subsequent to the decision of 1925 any new factor giving rise to the dispute in question, and that the refusal by the French Government to accede to the request to submit the dispute to extraordinary judges did not constitute an unlawful international act giving rise to a new dispute. The Court went on to say:

The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act, because that decision was inspired by the will to get rid of the foreign holding and because it therefore constituted a violation of the vested rights placed under the protection of the international conventions. That being so, it is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly involve international responsibility. ... In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.<sup>162</sup>

(28) According to the Court, the decision taken in 1925 by the Department of Mines, against which there was in fact no legal or other redress,<sup>163</sup> was, *by that very fact*, a *definitive* breach of the international obligation to grant Italian nationals full equality of treatment in respect of mining concessions. Consequently, the Court did not accept that the "unlawful international act" attributed to France by the Italian Government had culminated in an alleged "denial of justice" in the form of the French Government's note of 28 January 1933, which merely confirmed at the diplomatic level that there was no redress against the decision of 1925. Nor did it accept that the request by the individuals to the French Government, to make available to them extraordinary legal means not provided for by law, could be regarded as a "local remedy" within the meaning of the principle. Finally, the Court did not concede that the "unlawful international act", alleged by the Italian Government to have commenced in 1925, had been dependent upon the note of 1933 for its completion. This point of view although it necessarily leads to the rejection of the Italian application, does not constitute a rejection of the opinion put forward by the Italian Government as a general principle, concerning the effect of local remedies—where they are available—on the

<sup>161</sup> The French Government's argument was set out in its oral pleading of 5 May 1938 (*ibid.*, Series C, No. 85, p. 1048).

<sup>162</sup> *Ibid.*, Series A/B, No. 74, p. 28.

<sup>163</sup> Clearly, the Court did not consider that the "petition for redress" to the French Resident-General in Morocco could be regarded as a real remedy.

establishment of the definitive nature of a breach of an international obligation and, as a consequence, on the genesis of international responsibility.

(29) After the *Phosphates in Morocco* case, neither the Permanent Court of International Justice nor, subsequently, the International Court of Justice had any further occasion to pronounce on the question under discussion here.<sup>164</sup> On the other hand, the European Commission of Human Rights has several times had occasion to pronounce on the principle of exhaustion of local remedies. In the case-law of the Commission, we find from time to time affirmations of the need to allow the State "an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done ...".<sup>165</sup> Here, the Commission is obviously referring to the wrong done to the individual and is not claiming that such a wrong in itself constitutes a definitive breach of an international obligation. Such affirmations therefore form part of the series already considered,<sup>166</sup> which, while they illustrate the effect of failure to resort to local remedies on the admissibility of an international claim, are certainly not intended to deny the effect of such failure on the creation of international responsibility. Moreover, the justice of this observation is, if need be, further borne out by the Commission itself, which, in its decision of 10 June 1958 on Application No. 235/56, stated that: "... the responsibility of a State under the Human Rights Convention does not exist until, in conformity with Article 26, all domestic remedies have been exhausted ...".<sup>167</sup> Although the above statement was made in regard to a particularly clear case of the application of the principle in question,<sup>168</sup> it is couched in terms which obviously cover all pos-

sible cases of application of article 26 of the Convention, in which the rule requiring the exhaustion of local remedies is set out in the most general terms. There cannot, therefore, be the slightest doubt that this decision may be regarded as a general interpretation of the principle of the exhaustion of local remedies as essentially laying down a condition for generation of the international responsibility of the State.

(30) Before concluding the analysis of the positions adopted by official representatives of States as well as by tribunals and other international courts on the point in question, it may be useful to note the views expressed in separate or dissenting opinions by judges of the International Court of Justice and its predecessor, the Permanent Court of International Justice. These opinions are all the more interesting because the Court itself did not take a direct and clear stand on the matter in the cases to which they are related. Some of the opinions can be interpreted in different ways.<sup>169</sup> The separate opinion of Judge Tanaka in the case of the *Barcelona Traction, Light and Power Company, Limited (second phase)* stresses the idea that the local remedies rule possesses a procedural character in that it states a condition for the State to be able to espouse, before an international tribunal, the claim of the person it seeks to protect. But the fact that Judge Tanaka mentioned the procedural aspect which the principle in question assumes in relation to the exercise of diplomatic and judicial protection does not seem to indicate that he intended to exclude the substantive aspect which the principle assumes in relation to the genesis of international responsibility.<sup>170</sup> Clear opinions, all to the effect that the principle of the exhaustion of local remedies lays down a condition for generation of the international responsibility of the State, were expressed by three other judges, namely, Judge Hudson in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case,<sup>171</sup> Judge Cordoba in his separate opin-

<sup>164</sup> The Court cannot be regarded as having taken a position on the question in the passage of its judgment of 21 March 1959 in the *Interhandel* case where, after stating that the exhaustion of local remedies was provided for by "a well-established rule of customary international law; ... generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law", it goes on to say: "Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system" (*I.C.J. Reports 1959*, p. 27). It is quite clear that the term "violation" used by the Court was intended to refer to the violation of the individual's rights under internal law and not to a violation of the State's rights under international law. The principle so succinctly stated by the Court is therefore perfectly compatible with the idea that a violation by a State of its international obligation, justifying an appeal to an international tribunal, is only completed upon the State's refusal of redress, within the framework of its domestic legal system, for the injury caused by its initial conduct to the rights of an individual.

<sup>165</sup> Application 343/57, *Yearbook of the European Convention on Human Rights, 1958-1959* (The Hague), vol. 2 (1960), p. 438. Almost identical affirmations are to be found in decisions rendered in subsequent years.

<sup>166</sup> See para. (14) above.

<sup>167</sup> *Yearbook of the European Convention on Human Rights (op. cit.)*, p. 304.

<sup>168</sup> It was a case of maladministration of justice, and almost everyone agrees that in such cases the rule requiring the exhaustion of local remedies amounts to a substantive principle.

<sup>169</sup> See, for example, the dissenting opinion of Judge Armand-Ugon in the *Interhandel* case, in which it is stated that:

"The purpose of the local remedies rule is simply to allow the national tribunals in the first stage of the case to examine the international responsibility of the defendant State as presented in the Application; that examination would of course have to be made by a national court." (*I.C.J. Reports 1959*, pp. 88-89.)

<sup>170</sup> Judge Tanaka expressed himself as follows:

"There can be no doubt that the local remedies rule possesses a procedural character in that it requires the person who is to be protected by his government to exhaust local remedies which are available to him in the State concerned, before his government espouses the claim before an international tribunal." (*I.C.J. Reports 1970*, p. 143.)

<sup>171</sup> Judge Hudson wrote:

"It is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is part of the substantive law as to international, i.e. State-to-State, responsibility. If adequate redress for the injury is available to the person who suffered it, if such a person has only to reach out to avail himself of such redress, there is no basis for a claim to be espoused by the State of which such person is a national. Until the available means of local redress have been exhausted, no international responsibility can arise." (*P.C.I.J. Series A/B*, No. 76, p. 47.)

ion in the *Interhandel* case,<sup>172</sup> and Judge Morelli in his dissenting opinion in the case of the *Barcelona Traction, Light and Power Company, Limited (preliminary objections)*.<sup>173</sup>

(31) The positions of government representatives and international judges which have been examined thus appear, on the whole and after the exact meaning of certain statements has been sought, to lend solid support to the theory that the principle of the exhaustion of local remedies lays down, primarily, a condition for the existence of a breach of international obligations concerning the treatment of foreign individuals. Some additional considerations will enable us to dismiss certain objections to our conclusions which may have been suggested by various premises. For instance, it has been asserted that, when a State complains of a breach by another State of an international obligation concerning the treatment to be accorded to private individuals, the injury for which it asks reparation is that caused by the original conduct of the State, not that caused by the denial of local remedies sought by the injured individuals. This is put forward as evidence that international responsibility irrevocably arises from the initial conduct of the State and thus before the exhaustion of local remedies by the individuals concerned. In this connexion, it should be recalled that, as the Commission has emphasized in its commentaries to other articles of the draft, conclusions as to the determination of the existence of an internationally wrongful act, its constituent elements and its effects cannot be drawn from the "damage" element and the criteria for determining its existence and amount.<sup>174</sup> The obligation

to make reparation which devolves on a State in consequence of an internationally wrongful act relates to reparation for the failure of the State to fulfil its own obligations towards another State. The reparation which may be requested and obtained by a State injured in its right to the fulfilment of international obligations concerning the treatment to be accorded to individuals who are its nationals is one thing; the reparation which one of those individuals, whose enjoyment of his rights has been impaired by the conduct of organs of a State acting in a manner contrary to the result required by an international obligation, may request and obtain from a national tribunal of that State, is another. Such reparations have different bases and are at different levels. Even if the amount of the reparation claimed by the State at the international level coincided materially with that of the reparation claimed by the individual at the national level, and even if the former was actually assessed on the basis of the latter, the difference in nature between the two reparations would still remain.

(32) Apart from these considerations of principle, the objection examined here obviously does not take account of the complex situation brought about for the State by the breach of an international obligation in cases where the requirement that local remedies be exhausted comes into play. When the individual injured by conduct of a State incompatible with the result required by an international obligation seeks a remedy by using and exhausting unsuccessfully the means of redress available to him under internal law, the breach of the international obligation is not constituted solely by the last stage in the process of its perpetration, any more than it is constituted solely by the first stage. It results from the whole series of successive acts of State conduct, from the first which sets it in motion to the last which completes it and renders it final; so that the injury suffered by the individual, which may eventually be used as a criterion for assessing the amount of reparation which the State in its capacity as diplomatic or judicial protector may demand, is that caused to the individual by the aggregate of State conduct conflicting with the internationally required result. Even if the only basis adopted in fact was the injury caused by the original conduct, that would be because the subsequent conduct had added nothing to that injury, not because the process of commission of the internationally wrongful act had been completed with the first stage. Conversely, even if only the last act was considered as constituting the breach of the international obligation and, consequently, as being the source of international responsibility, there is no reason why its reparation which the State might claim for this breach should be established on the basis of the injury caused to the individual by the last act. In view of the criteria of justice and equity which normally gov-

<sup>172</sup> Judge Cordova expressed himself as follows:

"The right of the State ... to protect its national ... for an alleged wrongful act of a foreign government ... does not legally arise until the judicial authorities of the latter decide irrevocably upon such wrongful act through a decision of its judicial authorities. Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated. This principle informs all systems of law—civil as well as criminal, local as well as international." (*I.C.J. Reports, 1959*, pp. 45–46.)

<sup>173</sup> Judge Morelli gave a thorough definition of the principle of the exhaustion of local remedies in the following terms:

"However, the local remedies rule, as a rule of general international law, is in my view substantive and not procedural. It is indeed a rule which is supplementary to other rules which also themselves possess the character of substantive rules, namely the rules concerning the treatment of foreigners.

"Those rules require from the States to which they are directed a particular final result in respect of the treatment of foreign nationals, leaving the State which is under the obligation free as regards the means to be used. Consequently, if an organ of the State which is under the obligation performs an act contrary to the desired result, the existence of an internationally unlawful act and of the international responsibility of the State cannot be asserted so long as the foreign national has a possibility of securing, through the means provided by the municipal legal system, the result required by the international rule." (*I.C.J. Reports 1964*, p. 114.)

<sup>174</sup> See the Report of the International Law Commission on the work of its twenty-fifth session, concerning the conditions for the existence of an internationally wrongful act (*Yearbook... 1973*, vol. II, pp. 183–184, document A/9010/Rev.1, chap. II, sect. B, art. 3, para. 12 of the commentary). See also the Report of the Commission on the work of its twenty-seventh session, concern-

ing the error of relying on the criteria used in specific cases to determine the amount of reparation due, to draw conclusions concerning determination of the act to be attributed to the State as a source of responsibility (*Yearbook... 1975*, vol. II, pp. 72–73, document A/10010/Rev.1, chap. II, sect. B, subsect. 2, art. 11, paras. 9–10 of the commentary).

ern the determination of the amount of reparation for internationally wrongful acts, it may be permissible to take as a basis for this purpose the injury caused by the first act, without excluding those cases in which it is only subsequent acts that are incompatible with the requirements of an international obligation, as when the internationally wrongful act attributed to the State is exclusively a denial of justice. In that case, an estimate has to be made of the extent to which the determination of the reparation due for the breach of an international obligation is independent of the determination of the "damage" and, especially, of the economic damage directly caused by the breach itself.

(33) Other objections do not seem well founded either. For example, there is the objection that the moment when the breach of an international obligation is completed and when, as a result, international responsibility is established necessarily coincides with the moment when the dispute between the States involved originates. Whatever concept of "international dispute" one may adopt, international practice clearly shows that legal disputes may well arise before the perpetration of an internationally wrongful act, and even without any such act occurring. To link the question of the genesis of the dispute with that of the existence of international responsibility already fully established, and then to draw from the fact that disputes arise before the exhaustion of local remedies the conclusion that such exhaustion has nothing to do with the generation of responsibility is an extremely hazardous procedure. Again, we cannot agree that the theory that the exhaustion of local remedies is a substantive condition for the generation of international responsibility is invalidated by the fact that international tribunals normally deal with that point when considering preliminary objections. That questions of substance can be raised as preliminary objections is not at issue, especially as that now appears to be the prevailing opinion in the International Court of Justice itself. However, even for those who take a different view, the conclusion must be that the parties cannot invoke, and the Court cannot consider, failure to exhaust local remedies as a preliminary objection, and that such failure must be examined as a question of substance and nothing else.

(34) Finally, the objection that a purely "declaratory" judgment might be pronounced even before local remedies have been exhausted<sup>175</sup> would seem to be based on a theoretical rather than a practical possibility, since it has never actually occurred. Moreover, while it is quite possible to imagine a purely declaratory judgment that seeks to establish, before any

<sup>175</sup> Writers are divided in their views as to the possibility of a declaratory judgment being given before the exhaustion of local remedies. At the Institute of International Law, in 1956, P. Guggenheim and J. H. W. Verzijl spoke in favour of that possibility; E. Giraud and Ch. de Visscher against it. The majority of members shared the view defended in the text. Others in favour were J. E. S. Fawcett, and, against, C. H. P. Law and, with reservations, C. F. Amerasinghe. All these writers, however, whether for or against, based their views on the desirability or otherwise of the consequences of such a judgment, rather than on international practice.

consideration of a breach and the resulting responsibility, the existence of an international obligation incumbent on a State and the content and scope of that obligation, it is also possible to imagine a judgment of that kind being pronounced for the purpose of establishing that an initial course of conduct adopted by a State towards a private person conflicts with the result required by the obligation incumbent upon it.

(35) Thus an examination of the assertions made concerning an alleged incompatibility between the—likewise alleged—conclusions some would draw from certain premises and the conclusions which follow from the inherent logic of the principles and from an analysis of the positions taken by Governments and international judges in no way warrants any change in the conclusions reached.

(c) *Sphere of application of the principle*

(36) As we saw above,<sup>176</sup> the principle of the exhaustion of local remedies is a principle of general international law which has been affirmed in the law of nations concurrently with the development in that law of *rules concerning the status of aliens*. The question now arises whether general international law itself does not, today at any rate, make exceptions to the applicability of this principle to determination of the question whether international obligations concerning the treatment of foreign natural or juridical persons have been fulfilled or breached. Again, it may be asked whether the requirement of exhaustion of local remedies by the individuals concerned should not apply also to determination of the fulfilment or breach of international obligations concerning persons other than those for whom the principle has traditionally been affirmed, in particular, national natural or juridical persons. These questions are, of course, worth asking only in regard to general international law, for States can always avail themselves of the possibility of restricting or extending the scope of the principle by means of bilateral or even multilateral treaties.

(37) With regard to the first point, two different cases regularly raise the question whether the exhaustion of local remedies by the individuals concerned does or does not constitute a prior condition for a State to find that there has been a complete breach by another State of an international obligation concerning the treatment to be accorded to its nationals, and hence to be able to assert the international responsibility incurred by the other State. The first case is that in which an initial course of conduct by organs of the State *has created a situation held to be incompatible with the result required by an international obligation* and injurious to certain persons as *nationals of a particular foreign country*. It is a fact that, in a situation brought about by the conduct of a State organ which injures a person through his having the nationality of a State which is the object

<sup>176</sup> See para. 7.

of a *particular discriminatory intention*, the State of which that person is a national sometimes reacts by affirming the responsibility of the State in whose territory the act occurred, without waiting for the victim to apply to the local courts.<sup>177</sup> Also pertinent to this subject is a sentence from Denmark's reply to the request for information made by the Preparatory Committee for the 1930 Codification Conference. In accepting the proposition that the right to invoke State responsibility under international law should be subject to the exhaustion by those concerned of the remedies available to them under the internal law of the State whose responsibility is alleged, the Danish Government adds: "It is understood, however, that the national authorities must not allow the matter to drag on unconscionably and there must be no obvious neglect of the foreigner's right because he is a foreigner or a national of some foreign State."<sup>178</sup> However, it would be reading too much into this remark to ascribe to it an intention clearly to affirm the existence in general international law of an "exception" to the general condition of the exhaustion of local remedies. Like the attitude of some States in certain cases, it applies to a normal and reasonable application of the principle. In other words, it may be that, in certain specific cases where the injury due to the action or omission of a State organ occurred in a general atmosphere of hostility towards the nationals of some foreign country, the State of which the injured persons were nationals did not wait, before intervening, until those persons had had recourse to the local remedies. The reason for that, however, is that, in the specific cases in question, the State of nationality of the injured persons realized that the situation in which its nationals were placed was beyond remedy at the level of internal law. It was convinced that it was *impossible* in the circumstances to secure redress by effective local remedies of a situation created by the initial attitude of the other State.<sup>179</sup> It would thus appear that there is no reason to make an exception to the normal application of the principle of the exhaustion of local remedies in this case, since this principle applies only, as we shall

<sup>177</sup> Gaja (*op. cit.*, p. 79) cites, as recent examples, the communiqué of 31 July 1964 issued by the French Ministry of Foreign Affairs, regarding the demonstrations at Saigon against private French nationals (see text in Ch. Rousseau, "Chronique des faits internationaux," *Revue générale de droit international public* (Paris), 3rd series, vol. XXXV, No. 4 (Oct.-Dec. 1964), p. 943), and the note by the Netherlands Government of 18 December 1959, concerning discriminatory nationalization measures adopted by Indonesia (*American Journal of International Law* (Washington, D.C.), vol. 54, No. 2 (April 1960), pp. 487 *et seq.*).

<sup>178</sup> League of Nations, *Bases for Discussion ...* (*op. cit.*), p. 136. Ch. de Visscher, the Rapporteur of the Sub-Committee, pointed out that affirmation of the principle did not prevent the State from claiming, before the local remedies were exhausted, reparation for prejudice suffered by the State, which was distinct from, but consequential upon, the damage caused to persons because they were of a particular nationality.

<sup>179</sup> It was difficult in these cases for the respondent State itself seriously to challenge the ineffectiveness of the available remedies. See Gaja, *op. cit.*, p. 79, on the possibility of explaining the few cases that have occurred in practice otherwise than by recognizing the alleged exception.

have occasion to show once more, to remedies which are "effective" and really available.

(38) The second of the two cases mentioned in the previous paragraph is that in which the injury to the rights of foreign individuals has been inflicted outside the territory of the State or to the detriment of persons either not resident in the State or not having any voluntary link with that State. The principle of the exhaustion of local remedies is, indeed, most often defined with reference to a situation injurious to foreigners which has arisen *in the State's territory*. Such situations are certainly the most common, and this explains the formulation of the definitions. It is open to question, however, whether this would warrant an immediate inference that the principle of the exhaustion of local remedies would not apply in the case of injury caused by a State to foreign individuals outside its territory. Neither State practice nor international judicial decisions provide any explicit statements of position concerning the applicability or non-applicability of the condition of the exhaustion of local remedies to cases in which injury to foreign individuals or to their property has been caused *outside the territory of the State*, for example, on the high seas.<sup>180</sup> In the legal literature, some writers have rejected the view that the principle of the exhaustion of local remedies is applicable in cases of injury caused by State organs to aliens or their property outside the territory of that State.<sup>181</sup> The codification drafts whose scope was not limited in advance to international responsibility for injury caused by the State in its own territory to foreign individuals or

<sup>180</sup> In cases of the seizure of ships, especially private fishing vessels, on the high seas, the flag State has sometimes demanded immediate release of the vessel or compensation. That is what happened in the *l'm Alone* case between Canada and the United States, tried by a court of arbitration in 1933 (United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1609 *et seq.*). In other cases, however, the flag State has refrained from intervening immediately (see the cases cited by Law, *op. cit.*, pp. 103 *et seq.*, and by Gaja, *op. cit.*, pp. 90 *et seq.*). Practice in regard to fishing catches seems to support the idea of the applicability of the principle of the exhaustion of local remedies (see Reuter, *op. cit.*, pp. 161 *et seq.*, and Gaja, *op. cit.*, p. 91, note 17). In cases of aircraft shot down over the high seas, compensation has often been claimed and obtained without prior exhaustion of local remedies but by amicable settlement. Moreover, the private character of the aircraft shot down was often open to question. Instances of injury to aliens in the territory of another State are sometimes illustrated by reference to the case of the Consolidated Mining and Smelting Company at Trail, British Columbia ("Trail Smelter case") (United States v. Canada; for the arbitration court's award, see United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1907 *et seq.*), in which the fumes from a foundry situated in Canada had caused damage in United States territory. However, the international obligation claimed to be breached was that of respect for the territory of another State rather than that of the treatment of individual aliens. Lastly, it should be remembered that, in many cases, non-application of the principle of the exhaustion of local remedies was due only to the absence of remedies really available to those concerned.

<sup>181</sup> See for example C. Parry, "Some considerations upon the protection of individuals in international law", *Recueil des Cours ... 1956-II* (Leyde, Sijthoff, 1957), vol. 90, p. 688; T. Meron, "The incidence of the rule of exhaustion of local remedies", *British Year Book of International Law, 1959* (London), vol. 35, p. 98; Law, *op. cit.*, p. 104; and C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), pp. 185 *et seq.*

their property do not contain clauses excluding the application of the principle where the injury caused to such individuals was inflicted outside the territory of the State responsible for the offence.

(39) One criterion for determining whether the principle of the exhaustion of local remedies should or should not apply in cases of injury caused by a State to the person or property of foreign individuals outside its territory might be the availability or non-availability of effective remedies to the individuals concerned. It is, indeed, sometimes difficult for an injured alien to avail himself of such remedies when the damage to his property was inflicted outside the territory of the State which committed the injurious acts. In some of the decisions in specific cases, apparently based on the notion of non-applicability of the principle of the exhaustion of local remedies to cases of injury caused outside the territory of the State, the decisive factor seems really to have been the degree of effectiveness of the local remedies in the case in point and, in particular, the "availability" or otherwise of those remedies to the persons concerned. However, the question takes on a different aspect where local remedies exist and are genuinely available to those concerned. In such a situation, there seems in principle to be no reason why the State should be prevented from discharging its obligation by taking, upon the application by those concerned, the necessary steps to rectify the situation created by the initial conduct of its organs, solely on the ground that that initial conduct was adopted outside its frontiers. Even if the principle of the exhaustion of local remedies is regarded only as a purely "technical" rule, it is certainly open to question whether the location of the individual's property at the time when the damage was sustained should be decisive in determining whether or not his home State must wait until he has exhausted local remedies before being able to intervene with diplomatic protection.

(40) The Commission considered this question at length, and some members proposed that the words "within its jurisdiction" should be inserted in the text of article 22, after the words "an international obligation concerning the treatment to be accorded". Without imposing too rigid a limitation, the insertion of those words might have the effect of avoiding the application of the principle in cases where the State commits an act going beyond the limits of its territorial or other competence. Other members of the Commission, however, maintained that the adoption of the word "jurisdiction" might raise very difficult problems of interpretation. In the circumstances, the Commission preferred not to make the proposed insertion, at least for the time being, and to leave the problem of the applicability of the principle of the exhaustion of local remedies to cases of injury caused by a State to aliens outside its territory, and to similar cases, to be solved by State practice according to the best criteria available.

(41) Among such similar cases, specific mention should be made of that of injury caused to aliens not resident in the territory of the State causing the in-

jury. Here, again, the applicability of the principle of the exhaustion of local remedies is linked to a territorial element which really has no direct connexion with the *ratio* of the principle. The view that the principle in question is not applicable to cases of injury caused to non-resident aliens was upheld in practice by the French Government in the case of *Certain Norwegian Loans*, in order to release French nationals who were holders of Norwegian bonds, but resident in France, from the obligation to resort to the remedies provided for by Norwegian law.<sup>182</sup> The Norwegian Government strongly contested that view and maintained that there was no precedent to be found in practice for the limitation attributed to the rule by the French Government.<sup>183</sup> The Court did not have occasion to give any ruling on this point.<sup>184</sup> In other well-known specific instances, the requirement of the exhaustion of local remedies has been applied to causes of injury caused to non-resident aliens. For example, in the *Finnish Vessels* case and the *Ambatielos Claim* case, the individuals injured were not resident in the territory of the State responsible for the alleged injury. Nevertheless, neither of the claimants—the Finnish Government in the first case and the Greek Government in the second—invoked that circumstance to establish non-applicability of the principle. Moreover, article 4 of the draft adopted on first reading by the Third Committee of the 1930 Hague Conference made no distinction between resident and non-resident aliens.<sup>185</sup> The same applies to all the other codification drafts adopted under the auspices of international organizations and drafts of private origin. Lastly, most writers reject the idea of a distinction on this basis.<sup>186</sup> It should be not-

<sup>182</sup> The French Government's reply of 20 February 1957 states that:

"Although the rule under consideration is sometimes formulated in terms of the 'prior exhaustion of domestic remedies', it also, and perhaps more often, appears with such terms as 'exhaustion of local remedies' and 'local redress', ... suggesting a nuance affecting the very substance of this rule and its justification.

"... the only explanation of this rule lies in the requirement that a foreigner in dispute with the State under whose sovereignty he has chosen to live may not have his case transferred to the international level without having first exhausted all local means of settlement." [Translation by the Secretariat.] (*I.C.J. Pleadings, Certain Norwegian Loans*, vol. 1, p. 408.)

<sup>183</sup> *Ibid.*, pp. 452 *et seq.*

<sup>184</sup> However, Judge Read in his dissenting opinion remarked that: "France has not been able to put forward any persuasive authority for accepting this limitation on the application of the rule and, indeed, the weight of authority is the other way." (*I.C.J. Reports 1957*, p. 97.)

<sup>185</sup> League of Nations, *Acts of the Conference ... (op. cit.)*, p. 236. Text reproduced in *Yearbook... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>186</sup> With the exception of D. R. Mummery, "The content of the duty to exhaust local judicial remedies", *American Journal of International Law* (Washington, D.C.), vol. 58, No. 2 (April 1964), pp. 390 *et seq.*, who considers the principle to be applicable in the case of resident aliens and in that of non-resident aliens whose property is in the territory of the accused State. According to D. P. O'Connell (*International Law*, 2nd ed. (London, Stevens, 1970), vol. II, pp. 950 *et seq.*), the principle would not apply if the foreigner was outside the jurisdiction of the State. Definitely against any limitation of this kind are A. D. McNair (*International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 219) and Gaja (*op. cit.*, pp. 87 *et seq.*).

ed that generalized non-applicability of the principle to non-resident aliens would exclude from its field of application many cases of nationalization of aliens' property or prejudice to their investments, on the sole ground that the aliens concerned were not resident in the country.

(42) The idea of an exception would exempt from the requirement of the exhaustion of local remedies only aliens not connected by any voluntary link with the State whose remedies should be used is very close in spirit to the idea of an exception for non-resident aliens, but is more restricted in scope and therefore seems less likely to have harmful consequences. This idea was developed before the International Court of Justice by the Government of Israel, in connexion with damage caused to Israeli nationals by the Bulgarian anti-aircraft defence, which had shot down an Israeli civil aircraft that had entered Bulgarian air space by mistake.<sup>187</sup> The Bulgarian Government disputed the existence of the limitation.<sup>188</sup> The United States, some of whose nationals had also been injured by the action of the Bulgarian authorities, claimed that the principle was not applicable in that case, but did not invoke the exception put forward by the Government of Israel.<sup>189</sup> The Court did not have occasion to rule on this question, but the idea of introducing this exception subsequently found a few supporters among writers.<sup>190</sup> It was also specific cases of injury to aliens simply in transit, over land or by air, through the territory of a State, or brought into that territory against their will, that some members of the Commission had in mind when they proposed, as reported above,<sup>191</sup> that the limitation expressed by the words "within its jurisdiction" should be inserted in the text of article 22. For the reasons already stated, however, the Commission ultimately preferred not to insert those words and to leave it to practice to settle cases such as those discussed in this paragraph.

<sup>187</sup> In his oral argument, the agent of the Government of Israel said:

"There are a number of important limitations to the application in practice of this rule. In my submission ... it is essential, before the rule can be applied, that a link should exist between the injured individual and the State whose actions are impugned. I submit that all the precedents show that the rule is only applied when the alien ... has created ... a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there ... or by virtue of his having made contract with the government of that State, such as the cases involving foreign bondholders; and there may be other instances." (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 531-532.)

<sup>188</sup> *Ibid.*, p. 565.

<sup>189</sup> *Ibid.*, pp. 301, 326 *et seq.*

<sup>190</sup> Meron (*loc. cit.*, pp. 94 *et seq.*), Jiménez de Aréchaga (*loc. cit.*, p. 583), and Chappetz (*op. cit.*, pp. 48 *et seq.*) have expressed themselves in this sense. Law (*cp. cit.*, p. 104) links the exception advocated to the case of absence of voluntary submission by the alien to local law and jurisdiction. *Contra*, Gaja, *op. cit.*, p. 89.

<sup>191</sup> See para. 40.

(43) As pointed out above,<sup>192</sup> it is also necessary to consider whether the traditional area in which the principle of the exhaustion of local remedies was formed has not been widened in contemporary international law. The question is, in fact, whether one should not nowadays apply to other sectors of international obligations as well the requirement that persons interested in the fulfilment by the State of international obligations concerning them must use and exhaust the available local remedies before the State can be accused of having breached one of those obligations and before it can thus be claimed that that State has an international responsibility and may be called upon to discharge it. There can of course be no question of extending the applicability of the principle to cases of injury suffered by *persons acting in the country as organs of the State to which they belong*. This needs to be said, however, because it has sometimes been claimed that the requirement of exhaustion of local remedies is not applicable to aliens enjoying "special international protection" in the country. The 1956 resolution of the Institute of International Law, for example, provides that the rule of the exhaustion of local remedies does not apply "if the injurious act affected a person enjoying special international protection".<sup>193</sup> Such formulations could be misleading, and be thought to imply some sort of exception to an otherwise normal application of the principle, owing to the fact that certain foreigners—including diplomatic agents, consular agents and Heads of State—enjoy greater protection in the territory of the country than foreigners in general. In reality, however, the principle known as "the exhaustion of local remedies" has become established in general international law concurrently with the formation of international obligations laying down the treatment to be accorded by the State to foreign natural or juridical persons. Having regard to the specific object of these obligations and to the fact that private individuals are the beneficiaries of their fulfilment, it seemed normal that these same individuals should have to set in motion the machinery that enables the State to rectify, if necessary, any adverse consequences of the initial conduct of its organs and thus still achieve the result which might have been jeopardized by that initial conduct.

(44) In other words, the requirement of the exhaustion of local remedies is meaningful only in relation to the performance or breach of obligations concerning the treatment to be accorded to "private individuals". Foreign Heads of State, diplomatic agents, consular agents, members of special missions of a foreign State and the like are not foreign "individuals"; they are State organs—they are the foreign State itself. Their case is therefore outside the scope of the possible application of the principle of the exhaustion of local remedies.<sup>194</sup> If they suffer injury

<sup>192</sup> See para. 36.

<sup>193</sup> *Annuaire de l'Institut de droit international*, 1956 (Basel), vol. 46, p. 364.

<sup>194</sup> The same applies to other organs of a State called upon to perform functions in the territory of another State, and to organs

(Continued on next page.)

which affects them in their official capacity, there is no question of requiring them to use local remedies. On the other hand, the use of such remedies is not excluded, at least under certain conditions, in a specific case in which the persons in question complain of State action contrary to an international obligation which has allegedly affected them in their private capacity as mere "private individuals".<sup>195</sup> On this particular point too, however, the Commission agreed not to include special provisions in the text of article 22, but to leave the appropriate solution to emerge more clearly of itself in the practice of international life.

(45) An extension of the traditional field of application of the principle of the exhaustion of local remedies may result automatically from the growing participation of public capital in private companies. It is useful to bear this development in mind when delimiting the concrete situations in which the use of local remedies must be taken into account. The fact that this requirement has been established in connexion with international obligations concerning the treatment to be accorded by the State to foreign individuals must not lead us, in this context, to assign the same meaning to the word "individual" today as it had a century ago. A foreign company financed partly or even mainly by public capital is required, in certain circumstances, to employ local remedies in just the same way as a purely private joint-stock company. Moreover, the participation of public capital has never been put forward as a ground for the non-applicability of the principle of the exhaustion of local remedies to any given juridical person. For example, the United Kingdom Government made no such claim in the *Anglo-Iranian Oil Company* case while, in the dispute concerning the *Aerial Incident of 27 July 1955*, counsel for the Bulgarian Government observed, in support of the applicability of the principle in the case in question, that:

(Foot-note 194 continued.)

of subjects of international law other than States, such as the Holy See or international organizations. On this point, it is interesting to note the individual opinion given by Judge Azevedo in connexion with the advisory opinion in the case of *Reparation for Injuries Suffered in the Service of the United Nations*:

"In the case of officials or experts appointed directly by the Organization ... the Organization ... may make a claim without having to put forward a denial of justice, or even to show that domestic remedies have been exhausted." (*I.C.J. Reports 1949*, p. 195.)

<sup>195</sup> Let us imagine that a foreign diplomat owns private property in the receiving country, for example a country house which he has bought with a view to eventual retirement or for private profit. And let us suppose that he is the victim of an act of confiscation committed by a local authority contrary to the provisions of a treaty requiring that the real property of nationals of his country should be respected. He will obviously have to use the local remedies before it can be concluded that the international responsibility of the receiving State is engaged and that action may be taken accordingly. In this case, the fact that the diplomatic agent enjoys complete exemption from local jurisdiction cannot be invoked. That exemption forbids a diplomat to appear before the courts as a defendant, but in no way prevents him from applying to them as a plaintiff.

... and even if it is proved that El Al is a company ... in which the State of Israel holds a vast majority of the shares, I would say that this changes nothing in the case.<sup>196</sup>

In the case of foreign juridical persons of a predominantly, if not exclusively, public character, it would seem that, in this context, the main consideration should be, not the more or less public character attributed to the juridical person in the legal order to which it belongs, but the fact that its activity in the territory of the foreign State is carried on in the same areas as the usual activities of private juridical persons.<sup>197</sup>

(46) There remains the question of possible extension of the application of the principle of the exhaustion of local remedies from the traditional sphere of the treatment to be accorded to foreign individuals to that of the treatment a State undertakes to accord to national individuals. The problem is relatively new because States have only recently recognized—and so far only to a limited degree—that international law lays duties upon them in this regard. The principal conventions relating to the protection of human rights always expressly impose the requirement of prior exhaustion of local remedies by the persons concerned.<sup>198</sup> This is understandable for States are already disinclined to allow frequent intervention by other States when the purpose is to protect nationals of those other States, and they will naturally be even more unwilling when the purpose of the intervention is to protect their own nationals. Without in any way disregarding the existence of a few customary international rules on the subject, and without ruling out the possibility—even the likelihood—that such rules will increase in number, we are bound to conclude that, today, the international obligations of the State in regard to the treatment of its own nationals are almost exclusively of a conventional nature and that, in the instruments imposing them, the requirement of the exhaustion of local remedies by the persons concerned is nearly always expressly stated. That having been said, and without in any way prejudging the possible future development of general international law, the Commission considered that it might be premature at the present stage to extend the requirement stated in article 22, as a general principle, to the determination of the breach of international obligations concerning the treatment to be accorded to nationals.

<sup>196</sup> *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 569 [translation by the Secretariat].

<sup>197</sup> Various writers incline—somewhat tentatively, it is true—to the view that the requirement of the exhaustion of local remedies will gradually be extended to cases of injury caused to foreign public entities—including States—provided that, in the cases in question, they have acted *jure negotii* or *jure gestionis*. For references, see Gaja, *op. cit.*, p. 83, note 6.

<sup>198</sup> This is true of the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 26) (for reference, see foot-note 24 above); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11, para. 3, and art. 14, para. 7(a)) (*idem*, foot-note 33); the International Covenant on Civil and Political Rights (art. 41, para. 1(c)) (General Assembly resolution 2200 A (XXI), annex), and the Optional Protocol thereto (art. 5, para. 2(b)) (*ibid.*).

(d) *Local remedies must be open to individuals and must be effective*

(47) Needless to say, the requirement of the exhaustion of local remedies by the individuals concerned presupposes that there are remedies open to those individuals under the internal legal system of the State in question.<sup>199</sup> If the measure initially taken by a State organ, whether it be a legislative, administrative, judicial or other measure, does not admit of any remedy, the possibility of using other means to redress the situation created by that measure is ruled out.<sup>200</sup> In such a case, the breach by the State of its international obligation is complete *ab initio* and nothing can delay the possibility of implementing the resultant international responsibility. The only reservation to be made relates to the case in which the absence of remedies open to the individual is due to his own negligence, for example, failure to lodge his appeal within the prescribed time-limit.<sup>201</sup> Even in such a case, however, it will be necessary to verify whether, for example, the time allowed for recourse to a remedy is not unduly short, particularly if the injured alien is not resident in the territory of the State and it is thus materially impossible for him to take action in time. Such situations can in practice be treated as cases in which there is really no remedy at all.

(48) It is generally recognized in principle that the mere existence of remedies does not automatically impose a mandatory requirement that the individuals concerned make use of them. However, there is less unanimity about the cases in which it is permissible not to meet that requirement. The remedies vary considerably in form from one legal system to another. All that international law can do, therefore, is to provide some guidance in principle, which must be adapted to each specific case. In any event, the real reason for the existence of the principle of the ex-

haustion of local remedies must always be kept in mind: it is *to enable the State to avoid the breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the result required by the obligation.* From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken relates to all avenues which offer a *real prospect* of still arriving at the result originally aimed at by the international obligation or, if that has really become impossible, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be explored. This idea is summed up in the general conclusion requiring (a) that the usable remedies must be *effective*, and (b) that they must be *genuinely available* in the case in point.<sup>202</sup>

(49) From the positive standpoint, this conclusion means: (a) that all available remedies capable of redressing the situation complained of must be used, whether they be judicial or administrative, ordinary or extraordinary, of the first, second or third degree; and (b) that, generally speaking, all legal grounds calculated to secure a favourable decision must be advanced. The same applies to procedural means and other formal remedies.<sup>203</sup> In a word, the claimant must show that he wants to win the case, not merely to lodge an appeal in order to meet the requirement of formal exhaustion of local remedies. He must prove his genuine intention to establish the prerequisites for action by the State at the international level. It should be emphasized that, if, in the internal proceedings, the individual deliberately omits to use an essential argument which might have won him the case, and that deliberate omission is later revealed by the use of that argument before an international court, the individual runs the risk that the court may find that the requirement of the exhaustion of local remedies has not been duly met.

<sup>199</sup> See paragraph (28) of the commentary to article 21 in regard to cases in which the State encounters, in its own system of internal law, an insurmountable obstacle to using the opportunity of still fulfilling its obligation by remedying *ex post facto*, by the adoption of different conduct, a situation created by its initial conduct which is incompatible with the internationally required result. The Commission particularly noted the following passage in the arbitral award in the *Ambatielos Claim* case: "The ineffectiveness of local remedies may result clearly from the municipal law itself. This is the case, for example, when a Court of Appeal is not competent to reconsider the judgment given by a Court of first instance on matters of fact, and when, failing such reconsideration, no redress can be obtained. In such a case there is no doubt that local remedies are ineffective." The Commission also mentioned the cases in which local remedies "would have proved to be obviously futile." (United Nations, *Reports of International Arbitral Awards*, vol. XII, p. 119.)

<sup>200</sup> See the observation made by the United States Secretary of State Fish on 29 May 1873 to the effect that: "... a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust" (J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, p. 677). For an analysis of State practice, international judicial decisions and the opinions of writers on this point, see Gaja, *op. cit.*, pp. 123 *et seq.*, note 29, and p. 85, note 9.

<sup>201</sup> This aspect of the matter was considered in detail in the *Finnish Vessels* case.

<sup>202</sup> Appeals to the highest judicial authority (court of cassation, supreme court) are of course included, along with such special remedies as application for review, appeal against the judges and appeal to the constitutional court where such a court exists and is accessible to individuals. One doubtful point remains: that of "petitions for redress" not based on a precise legal claim. These were mentioned in the *Phosphates in Morocco* case. The general requirement that the available remedies should be "effective" must obviously be accompanied by a requirement that those remedies should be genuinely available and usable. Inability to use local remedies may be due to an objective situation (such as the fact that the injured individual's residence is distant from the territory of the State or that he has no voluntary link with the State), which makes it impossible in practice for him to use those remedies, and not to an inherent defect of the existing system of remedies.

<sup>203</sup> The question of using all procedural means was discussed, in particular, in the *Ambatielos Claim* case (see United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), pp. 119-120). The Arbitral Commission followed the opinion of the United Kingdom Government, according to which the complainant should have availed himself of all such procedural facilities in the way of calling witnesses, procuring documentation, etc. as the local system provides. The Commission, however, stressed that this criterion should not be regarded as of absolute application.

(50) From the negative standpoint, the conclusion also means: (a) that a remedy should not be used unless it holds out real—even if uncertain—prospects of success. In other words, the individual concerned is under no obligation to waste his time attacking, before a domestic court, a State measure which is, in fact, final. He cannot be required to use a remedy which would be a mere formality, as, for example, where it is clear from the outset that the law which the court will have to apply can lead only to rejection of the appeal (case of appeal against a measure in conformity with a law which cannot be set aside; of a court bound by a previous judgment rejecting a similar appeal or by a well-established body of unfavourable precedent; of proven partiality of the court, etc.); (b) that a remedy should not be used unless the success it may bring is not a merely formal success, but can actually produce either the result originally required by the international obligation or, if that is no longer possible, an alternative result which is really equivalent.<sup>204</sup>

(51) The exhaustive use of available local remedies may prove fruitful where it is carried out, and thus lead to acceptance of the individual's claim. On the other hand, it may prove fruitless and lead to rejection of the claim. If the claim is accepted, the effect of such acceptance is the achievement of the result required by the international obligation or, if necessary, the achievement of another result equivalent to it, especially from the economic point of view. If the claim is rejected, the breach of the obligation begun by the State conduct against which the claim was made is consequently completed by the rejection, and international responsibility is generated for the State. A purely ostensible acceptance of the claim, which, for example, would not lead to the internationally required result in a case where that result was still attainable, or which would lead to an alternative result that was not equivalent, would obviously be tantamount to rejection.

#### (e) *Conclusions*

(52) In view of all the foregoing considerations, the Commission considers that the principle establishing the requirement of the exhaustion of local remedies is well founded in general international law and suitably placed in the chapter of the draft devoted to analysing the objective element of the internationally wrongful act, in other words, to settling the various

<sup>204</sup> If the result required by the international obligation is in fact still attainable, it would appear that the individuals concerned cannot be compelled to settle for an equivalent result—in other words, for reparation instead of restitution. This point was discussed in the *Phosphates in Morocco* case, although the Court was not called upon to rule on it. Where the internationally required result has become unattainable, in fact, it is clear that the individual concerned cannot be required to use a remedy unless it offers him prospects of adequate compensation at the very least. Among possible cases under this heading are those in which the course of justice is unduly slow or unduly expensive in relation to the prospective compensation. These aspects of the matter were dealt with in the *Finnish Vessels* case and the *Ambatielos Claim* case.

questions that relate to the determination of the breach of an international obligation. It would be wrong, of course, to deal in this context with certain technical and procedural aspects which the principle obviously presents as well, and even more so to deny, by the formulation of the substantive requirement which the principle represents first and foremost, the parallel effect of the principle itself on the diplomatic or international judicial procedures relating to the "implementation" (*mise en œuvre*) of international responsibility, which will be the subject of part 3 of the draft. Furthermore, consideration of the various aspects of the principle of the exhaustion of local remedies must not go beyond the actual purpose of the draft articles now in course of preparation, namely, the codification of the general rules governing the international responsibility of States for internationally wrongful acts. In other words, for the reasons repeatedly mentioned by the Commission, consideration in the draft of the principle of the exhaustion of local remedies and its various aspects must at all costs stop short of an examination of the content of "primary" rules of international law, such as those relating to the treatment of aliens, efforts to define which proved fatal to earlier attempts at codification of the topic of international responsibility.

(53) It is particularly necessary to consider here the principle of the exhaustion of local remedies because, in the broad context of international obligations which require the State, not to adopt a particular course of conduct (article 20), but to achieve a specified result (article 21), a special category of obligations has to be distinguished: those specifically intended to ensure that, within the internal order of the State, a given treatment is guaranteed to aliens, whether natural or juridical persons, and their property. The very fact of this characterization means that an additional condition must be added, as already noted, to the other conditions normally required for establishing the fulfilment or breach of an obligation "of result". The *raison d'être* of this additional condition is that the object and purpose of the international obligations falling within the special category mentioned are that the State shall ensure, at the internal level, a particular situation for private individuals, in other words, for subjects of internal law. It is these "private individuals" who are the beneficiaries of the international obligations, and the situation which affords them protection must obtain at the level of the internal law of the State in which they are active.

(54) The effect of these considerations as regards the fulfilment of international obligations in this special category, and consequently as regards any breach of them, is easy to understand. As has been said from the beginning of this commentary, the co-operation of the private individuals concerned is essential if they are to benefit from the treatment internationally prescribed for them: first, co-operation in seeking the application of such treatment to their specific case; second, co-operation in securing that this treatment is again accorded to them, by remedying, if

necessary, any adverse effects of the initial conduct of the State. The purpose of the principle establishing the requirement of the exhaustion of local remedies is to enunciate what is of primary importance, namely, that there can be no breach, or at least no definitive breach, of an international obligation in the category here considered unless the individuals who complain of having been placed in a situation incompatible with the result required by the international obligation have tried to obtain redress by any means available under the internal law of the State bound by the obligation which can still achieve the result internationally required of it. In short, it is in the light of the principle of the exhaustion of local remedies that, in the cases here considered, it will be possible to determine whether the State has fulfilled its obligation or, on the contrary, has breached it by failing definitively to achieve the result internationally required by the obligation.<sup>205</sup> It is self-evident that this conclusion is only an application to the international obligations here considered of the fundamental principle for the determination of the breach of obligations "of result", which is expressed in draft article 21, paragraph 2.

(55) Admittedly, and the Commission is the first to acknowledge this, there are not exclusively advantages in the fact that general international law requires private individuals injured by an action or omission of a State organ to seek redress of the situation injurious to them by applying to the domestic courts to obtain a new course of State conduct that corrects the initial conduct. There are not exclusively advantages in the fact that a very large proportion of international obligations concerning the treatment to be accorded to private individuals ultimately allow the State to achieve the result required of it by stages. Nor are there exclusively advantages in the fact that such obligations allow conduct contrary to the internationally required result to be disregarded for the purposes of establishing international responsibility, provided that the result in question is eventually secured by subsequent conduct. It is precisely because of all the practical disadvantages inevitably attendant on these facts that various conventions expressly preclude the application of the principle of the exhaustion of local remedies to certain matters. And it is also in order to avoid the postponements and delays to which the principle may give rise, both in correcting situations incompatible with the result aimed

at by an international obligation and in establishing that the obligation has been definitively breached, that *alternative systems* have been considered and put into effect. Examples of such systems are the over-all compensation agreements concerning disputes relating to the nationalization of foreign property and the inclusion in contracts between States and foreign private companies of arbitration clauses to replace recourse to domestic courts. However, this, in the opinion of the Commission, affords no proof that States would be willing today, having regard to the progressive development of international law, to abandon the principle of the exhaustion of local remedies or greatly to reduce its scope.

(56) It is true that investing countries are showing a growing awareness of how injury to the interests of their nationals working on foreign soil can affect the interests of the national community as a whole. They would therefore like to be free to bring international claims as they see fit, regardless of whether the private individuals directly injured have exhausted the available local remedies or shown negligence in that respect. The advocates of more direct, quicker and more effective protection of human rights see the principle of the exhaustion of local remedies as an obstacle to the progress they desire. At the same time, the requirement that private individuals directly affected by measures taken by an organ of the State in which they reside and carry on their activity should exhaust the local remedies has always been a safeguard which the countries invested in have applied against a tendency unduly to extend obligations concerning the treatment of foreign natural and juridical persons. These countries regard this requirement as a protection against the undue facility with which it has traditionally been attempted to raise to the level of international relations disputes which often should have been kept on the internal level. The inclination of the developing countries would thus be to strengthen the principle of the exhaustion of local remedies within the framework of general international law rather than to weaken it. It may be added that those most attuned to present-day problems and the difficulties of solving them realize that compliance with this essential requirement may well be the best guarantee of further substantial progress in the acceptance of new obligations concerning human rights. In these circumstances, the Commission as a whole—notwithstanding the reservations of some of its members concerning particular aspects of the manner in which the principle is applied or of its scope or effects—therefore believes that it would be injudicious to tamper with the present general scope of the principle for the sake of a progressive development of international law which others might regard as detracting from guarantees of the sovereign equality of all States.

(57) That being said, it should be recalled that, as pointed out in the commentary to article 21, cases nevertheless exist in which an international obligation concerning the treatment to be accorded to foreign individuals is breached "immediately" as it

<sup>205</sup> For example, if a private individual who, in the first place, complained only that an internal law had been infringed in regard to him brings an action in a court of first instance which is dismissed in a manner contrary to the requirements of international law concerning the administration of justice in respect of aliens, that act does not yet generate international responsibility; the internationally wrongful act covered by the term "denial of justice" is not considered as completed until the higher judicial authorities have ruled in succession and confirmed the conduct of the court of first instance. This means that, in the case in question, even after the adoption of a course of conduct conflicting with what was required by an international obligation, a completed breach of that obligation does not occur until the person concerned has had recourse to and exhausted the local remedies available against that conduct.

were, and in which there can be no question of the exhaustion of local remedies by the individuals concerned before the breach can be established. These are mainly cases in which the international obligation concerning the treatment to be accorded to aliens is an obligation "of conduct", not "of result". For example, if the international obligation specifically requires the State to enact a law on a matter affecting the status of certain aliens in its territory, the mere failure to enact that law is in itself a breach of the obligation. Likewise, if the obligation imposed on a State by a treaty is that the frontier police should take action in favour of a national of another contracting State, the mere failure to take such action constitutes a definitive breach of the obligation. The article is therefore worded so as to make it clear that the requirement of the exhaustion of local remedies applies only to obligations "of result".

(58) The breach may also be of an "immediate" nature, in the case of an obligation which only requires the State to produce a result, if the initial conduct adopted by an organ of the State is such that the treatment which the obligation requires the State to accord to the individual concerned can no longer be accorded, and the circumstances also preclude an equivalent treatment. In a situation of this kind, and in other similar situations, the exhaustion of local remedies becomes manifestly pointless and cannot be required. The wording of the article therefore emphasizes that the result which the obligation requires, or an equivalent result which it permits, must still be possible after the conduct of the State has created a situation not in conformity with the result required.

(59) It must also be pointed out that the requirement that the individual considering himself injured must exhaust local remedies in no way implies that the State of which he is a national may not make diplomatic representations to the State alleged to have committed the wrongful act until he has exhausted the local remedies available in the latter State. Diplomatic action can be taken—albeit as an exceptional step—even before the local remedies have been exhausted by the individuals concerned, for example, in order to bring the matter to the attention of the State or simply to prevent the occurrence of an internationally wrongful act. What is not permissible, on the other hand, is that the State of which the individual concerned is a national should "take over" the wrong done him before he has had recourse to the domestic courts open to him, and on that basis make an international claim, as though a wrongful act infringing its own international subjective right had already taken place prior to the exhaustion of local remedies. What has just been said about diplomatic action probably also applies, in the absence of anything to the contrary in the applicable conventions,

to an application seeking only a purely declaratory judgment.

(60) As regards the formulation of the principle in the present draft article, the Commission took the view that the text adopted should be confined to a general statement on the exhaustion of local remedies as provided for by general international law, which should be flexible enough to be able to be adapted to the various situations that arise in practice. At the same time, the Commission decided that everything essential to the general statement of the principle should appear in the text of the article itself, including the proviso expressed by the criteria of "effectiveness" and genuine "availability" of the remedies open to private individuals.

(61) Having thought it advisable that the text of article 22 should not provide for any restrictions or exceptions relating to more or less special or marginal cases, in order to avoid weakening the principle and providing a pretext for possible attempts to evade the fulfilment of an international obligation, the Commission nevertheless feels bound to point out that the principle it has defined must be interpreted in the light of the general criterion of "good faith". It also wishes to indicate that it would welcome the views of Governments on its decision not to limit the scope of the principle explicitly to cases concerning conduct adopted by the State "within its jurisdiction", so that it may be in possession of the necessary information to take a final position on this question.

(62) As regards the question, raised during the discussion of the report, of the possible application of the principle of the exhaustion of local remedies to the special cases in which "foreign individuals" are injured at the same time and by the same conduct as the State of which they are nationals, the Commission finds that in such cases the agreements or decisions concerning indemnification of the injured State by the offending State normally also cover the question of the indemnification of private individuals. Where this is so, the exhaustion of local remedies by individuals is obviously not required. At all events, the matter seems to be one that should be regulated by private arrangements rather than by a special provision to be included in an article of general scope.

(63) Having adopted the text of article 22 which appears at the beginning of this commentary, the Commission considered it useful to provide, for the purposes of the commentary, the following definition of the term "local remedies":

"local remedies" means the remedies which are open to natural or juridical persons under the internal law of a State.

This definition will be kept in mind with a view to its possible insertion in an initial article of the present draft containing definitions.

## Chapter III

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

## A. Introduction

## 1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

32. The Commission, at its nineteenth session, in 1967, made new arrangements for dealing with the topic "Succession of States and Governments",<sup>206</sup> which was among the topics it had selected for codification in 1949.<sup>207</sup> It decided to divide the topic among more than one special rapporteur, the basis for the division being the three main "headings" of the broad outline of the subject laid down in the report submitted in 1963 by its Sub-Committee on Succession of States and Governments.<sup>208</sup> Those three headings were as follows:

- (a) Succession in respect of treaties;
- (b) Succession in respect of rights and duties resulting from sources other than treaties; and
- (c) Succession in respect of membership of international organizations.

33. In 1967, the Commission also appointed Sir Humphrey Waldock to be Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui to be Special Rapporteur for succession in respect of rights and duties resulting from sources other than treaties. It decided to leave aside for the time being the third heading, namely, succession in respect of membership of international organizations.<sup>209</sup>

34. Between 1968 and 1972, Sir Humphrey Waldock submitted to the Commission five reports on succession of States in respect of treaties.<sup>210</sup> In 1972, at its twenty-fourth session, the Commission adopted, in the light of those reports, a set of 31 provisional draft articles on the topic,<sup>211</sup> which were transmitted the same year to Governments of Member States for

their observations, in accordance with articles 16 and 21 of the Commission's Statute.<sup>212</sup> In 1974, in the light of the observations received in the meantime from Governments of Member States, the Commission adopted a final set of 39 draft articles "on succession of States in respect of treaties".<sup>213</sup> The General Assembly, in paragraph 3 of resolution 3496 (XXX) of 15 December 1975, decided to convene a conference of plenipotentiaries in 1977 to consider those draft articles and "to embody the results of its work in an international convention and such other instruments as it may deem appropriate". Pursuant to General Assembly resolution 31/18 of 24 November 1976, the United Nations Conference on Succession of States in respect of Treaties met at Vienna from 4 April to 6 May 1977. The Conference approved a report recommending that the General Assembly decide to reconvene the Conference in the first half of 1978, preferably in April at Vienna, for a final session of four weeks.<sup>214</sup>

35. Following his appointment as Special Rapporteur, Mr. M. Bedjaoui submitted to the Commission, at its twentieth session in 1968, a first report on succession of States in respect of rights and duties resulting from sources other than treaties.<sup>215</sup> In it, he considered *inter alia* the scope of the subject which had been entrusted to him and, accordingly, the appropriate title for the subject, as well as the various aspects into which it could be divided. Following the discussion of that report, the Commission, in the same year, took several decisions, one of which concerned the scope and title of the topic and another the priority to be given to one particular aspect of succession of States.

36. Endorsing the recommendations contained in the first report by the Special Rapporteur, the Commission considered that the criterion for delimitation of the topic entrusted to him and the topic of succession in respect of treaties should be "the subject-matter of succession". It decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to sources in order to avoid any ambiguity regarding its delimitation.

<sup>206</sup> For a detailed account of the historical background of the topic as a whole, see *Yearbook... 1968*, vol. II, pp. 213 *et seq.*, document A/7209/Rev.1, paras. 29-42, and *Yearbook... 1969*, vol. II, pp. 222 *et seq.*, document A/7610/Rev.1, paras. 20-34.

<sup>207</sup> *Yearbook... 1949*, p. 281, document A/925, para. 16.

<sup>208</sup> *Yearbook... 1963*, vol. II, p. 260, document A/5509, annex II.

<sup>209</sup> *Yearbook... 1967*, vol. II, p. 368, document A/6709/Rev.1, paras. 38-41.

<sup>210</sup> See *Yearbook... 1972*, vol. II, p. 224, document A/8710/Rev.1, paras. 17-21.

<sup>211</sup> *Ibid.*, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, section C.

<sup>212</sup> *Ibid.*, p. 225, document A/8710/Rev.1, para. 23.

<sup>213</sup> See *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

<sup>214</sup> A/CONF.80/15. See also *Official Records of the General Assembly, Thirty-second Session, Supplement No. 32 (A/32/32)*, p. 57.

<sup>215</sup> *Yearbook... 1968*, vol. II, p. 94, document A/CN.4/204.

The Commission accordingly changed the title of the topic and replaced the original title "Succession in respect of rights and duties resulting from sources other than treaties" by the title "Succession in respect of matters other than treaties".<sup>216</sup>

37. This decision was confirmed by the General Assembly in paragraph 4(b) of its resolution 2634 (XXV) of 12 November 1970, which recommended that the Commission should continue its work with a view to making "progress in the consideration of succession of States in respect of matters other than treaties". The absence of any reference to "succession of Governments" in that recommendation by the General Assembly reflects the decision taken by the Commission at its twentieth session to give priority to State succession and to consider succession of Governments for the time being "only to the extent necessary to supplement the study on State succession".<sup>217</sup>

38. As mentioned above,<sup>218</sup> the first report by the Special Rapporteur reviewed the various particular aspects of the topic of succession of States in respect of matters other than treaties. The report of the Commission on the work of its twentieth session notes in this connexion that, during the debate,

some members of the Commission referred to certain particular aspects of the topic (public property; public debts; legal régime of the predecessor State; territorial problems; status of the inhabitants; acquired rights) and made a few preliminary comments on them.

It adds that, in view of the breadth and complexity of the topic,

the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later.<sup>219</sup>

The report also notes that the predominant view of members of the Commission was that the economic aspects of succession should be considered first. It states:

At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources so as to cover problems of succession in respect of the different economic resources (interests and rights) including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next [twenty-first] session.<sup>220</sup>

<sup>216</sup> *Ibid.*, p. 216, document A/7209/Rev.1, para. 46. See also paras. 52-53 below.

<sup>217</sup> *Yearbook...* 1963, vol. II, p. 224, document A/5509, para. 57.

<sup>218</sup> Para. 35.

<sup>219</sup> *Yearbook...* 1968, vol. II, pp. 220 and 221, document A/7209/Rev.1, paras. 73 and 78.

<sup>220</sup> *Ibid.*, p. 221, para. 79.

39. The second report by the Special Rapporteur,<sup>221</sup> submitted at the twenty-first session of the Commission in 1969, was entitled "Economic and financial acquired rights and State succession". The report of the Commission on the work of that session notes that, during the discussion on the subject, most of the members were of the opinion that the topic of acquired rights was extremely controversial and that its study, at a premature stage, could only delay the Commission's work on the topic as a whole. They considered that "an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts".<sup>222</sup> The report notes that the Commission "requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters". It further records that "the Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts".<sup>223</sup>

40. Between 1970 and 1972, at the Commission's twenty-second to twenty-fourth sessions, the Special Rapporteur submitted three reports to the Commission—his third report<sup>224</sup> in 1970, his fourth<sup>225</sup> in 1971 and fifth<sup>226</sup> in 1972. Each of these reports dealt with succession of States to public property and contained draft articles on the subject. Being occupied with other tasks, the Commission was unable to consider any of these reports during its twenty-second (1970), twenty-third (1971) or twenty-fourth (1972) sessions. It did, however, include a summary of the third and fourth reports in its report on the work of its twenty-third session<sup>227</sup> and an outline of the fifth report in its report on the work of its twenty-fourth session.<sup>228</sup>

41. At the twenty-fifth (1970), twenty-sixth (1971) and twenty-seventh (1972) sessions of the General Assembly, during the Sixth Committee's consideration of the report of the International Law Commission, several representatives expressed the wish that progress should be made in the study on succession of States in respect of matters other than treaties.<sup>229</sup> On 12 November 1970, the General Assembly adopted resolution 2634 (XXV), in paragraph 4(b) of which

<sup>221</sup> *Yearbook...* 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

<sup>222</sup> *Ibid.*, p. 228, document A/7610/Rev.1, para. 61.

<sup>223</sup> *Ibid.*, pp. 228-229, para. 62.

<sup>224</sup> *Yearbook...* 1970, vol. II, p. 131, document A/CN.4/226.

<sup>225</sup> *Yearbook...* 1971, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

<sup>226</sup> *Yearbook...* 1972, vol. II, p. 61, document A/CN.4/259.

<sup>227</sup> *Yearbook...* 1971, vol. II (Part One), pp. 341 *et seq.*, document A/8410/Rev.1, paras. 77-98.

<sup>228</sup> *Yearbook...* 1972, vol. II, p. 323, document A/8710/Rev.1, para. 71.

<sup>229</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 72; *ibid.*, *Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 135; *ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 194.

it recommended that the Commission should continue

its work on succession of States, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963, with a view to ... making progress in the consideration of succession of States in respect of matters other than treaties.

On 3 December 1971, in paragraph 4(a) of part I of its resolution 2780 (XXVI), the General Assembly again recommended that the Commission should make "progress in the consideration of succession of States in respect of matters other than treaties". Lastly, on 28 November 1972, in paragraph 3(c) of part I of its resolution 2926 (XXVII), the General Assembly recommended that the Commission should "continue its work on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

42. In 1973, at the twenty-fifth session of the Commission, the Special Rapporteur submitted a sixth report<sup>230</sup> dealing, like his three previous reports, with succession of States to public property. The sixth report revised and supplemented the draft articles submitted earlier in the light, *inter alia*, of the provisional draft on succession of States in respect of treaties adopted by the Commission in 1972.<sup>231</sup> It contained a series of draft articles relating to public property in general. These articles divided public property into the following three categories: property of the State; property of territorial authorities other than States or of public enterprises or public bodies; and property of the territory affected by the State succession.

43. The Special Rapporteur's sixth report was considered by the Commission at its twenty-fifth session in 1973. In view of the complexity of the subject, the Commission decided, after full discussion and on the proposal of the Special Rapporteur, to limit its study for the time being to just one of the three categories of public property dealt with by the Special Rapporteur, namely, property of the State.<sup>232</sup> In the same year, it adopted on first reading eight draft articles, the text of which is reproduced below.<sup>233</sup> Articles 1 to 3 constitute the introduction to the draft, relating to the question as a whole of succession of States in respect of matters other than treaties. Articles 4 to 8 belong to part I of the draft, entitled "Succession to State property". They form the initial provisions of section I of that part, entitled "General provisions".

<sup>230</sup> *Yearbook... 1973*, vol. II, pp. 3 *et seq.*, document A/CN.4/267.

<sup>231</sup> *Yearbook... 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, sect. C.

<sup>232</sup> *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 87.

<sup>233</sup> For the text of articles 1 to 8 and the commentaries thereto adopted by the Commission at its twenty-fifth session, see *Yearbook... 1973*, vol. II, pp. 202 *et seq.*, document A/9010/Rev.1, chap. III, sect. B. For the text of all articles adopted so far by the Commission, see sect. B.1 below.

44. The General Assembly, in paragraph 3(d) of its resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission should "proceed with the preparation of draft articles on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

45. In 1974, at the twenty-sixth session of the Commission, the Special Rapporteur submitted a seventh report, dealing exclusively with succession to State property.<sup>234</sup> The report contained 22 draft articles together with commentaries, forming a sequel to the eight draft articles adopted in 1973. The Commission was unable to consider this report at its twenty-sixth session since, pursuant to paragraph 3(a) and (b) of General Assembly resolution 3071 (XXVIII), it had to devote most of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.<sup>235</sup>

46. By resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should "proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties" (section I, paragraph 4(b), of the resolution). Subsequently, the General Assembly made the same recommendation in paragraphs 4(c) of resolution 3495 (XXX) of 15 December 1975 and 4(c)(i) of resolution 31/97 of 15 December 1976.

47. At its twenty-seventh session, in 1975, the Commission considered draft articles 9 to 15 and X, Y and Z, contained in the Special Rapporteur's seventh report, and referred them to the Drafting Committee with the exception of article 10, relating to rights in respect of the authority to grant concessions,<sup>236</sup> on which it reserved its position. Having examined the provisions referred to it (with the exception, for lack of time, of articles 12 to 15), the Committee submitted texts to the Commission for articles 9 and 11 and, on the basis of articles X, Y and

<sup>234</sup> *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

<sup>235</sup> *Ibid.*, p. 304, document A/9610/Rev.1, para. 160.

<sup>236</sup> Draft article 10 reads as follows:

*"Article 10. Rights in respect of the authority to grant concessions"*

"1. For the purpose of the present article, the term 'concession' means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

"2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

"3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory."

Z, texts for article X and for subparagraph (e) of article 3. The Commission adopted on first reading all the texts submitted by the Committee, subject to a few amendments. These texts are reproduced below in the form agreed by the Commission.<sup>237</sup> One of them, subparagraph (e) of article 3, forms part of the Introduction to the draft. The others, namely, articles 9, 11 and X, complete section 1 (General provisions) of part I (Succession to State property).

48. At the twenty-eighth session of the Commission, in 1976, the Special Rapporteur submitted an eighth report,<sup>238</sup> dealing with succession of States in respect of State property and containing six additional articles (articles 12 to 17) with commentaries. The Commission, at that session, considered the eighth report and adopted on first reading the texts for subparagraph (f) of article 3 and articles 12 to 16. Subparagraph (f) of article 3 (Use of terms) forms part of the Introduction to the draft and articles 12 to 16 form section 2 (Provisions relating to each type of succession of States) of part I (Succession to State property) of the draft. The text of these articles is reproduced below.<sup>239</sup>

49. At the present session, the Special Rapporteur submitted a ninth report (A/CN.4/301 and Add.1),<sup>240</sup> dealing with succession of States to State debts and containing 20 draft articles with commentaries, presented as follows. Section 1 (General Provisions) comprised articles O (Definition of State debt) [A/CN.4/301 and Add.1, para. 63], R (Obligations of the successor State in respect of State debts passing to it) [*ibid.*, para. 102], S (Effects of the transfer of debts with regard to a creditor third State) [*ibid.*, para. 108], T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) [*ibid.*, para. 112], U (Expression and effects of the consent of the creditor third State) [*ibid.*, para. 114], C (Definition of odious debts) [*ibid.*, para. 140], and D [Non-transferability of odious debts) [*ibid.*, para. 173]. Section 2 (Provisions relating to each type of succession of States) was divided into three subsections, entitled respectively "Transfer of part of the territory of a State" (subsection 1), "Newly independent States" (subsection 2) and "Uniting of States" (subsection 3). Subsection 1 comprised articles X (Definition of general State debt) [*ibid.*,

para. 215], Y (Exoneration of the successor State from any participation in the general debt of the predecessor State) [*ibid.*, para. 214], Z (Contribution of the successor State to part of the general debt of the predecessor State) [*ibid.*], and YZ (Conditions for contribution of the successor State to a portion of the general debt of the predecessor State) [*ibid.*, para. 219], grouped under the heading "1. General debt of the predecessor State"; articles A (Definition of a special State debt [or localized State debt]) [*ibid.*, para. 238], and B (Assumption of special State debts by the successor State) [*ibid.*], grouped under the heading "2. Special debts of the predecessor State"; and articles L (Definition of a local debt) [*ibid.*, para. 242], L' (a variant of article L, entitled "Definition of a local debt guaranteed by the State") [*ibid.*] and M (Transfer to the successor State of the obligation arising from the guarantee provided by the predecessor State for a local debt relating to the transferred territory) [*ibid.*], grouped under the heading "3. Local debts guaranteed by the predecessor State". Subsection 2 (Newly independent States) comprised articles F (Non-transferability of debts contracted by the administering Power on behalf and for the account of the dependent territory) [*ibid.*, para. 364], G (Maintenance of the guarantee given by the predecessor State to cover loans contracted by the dependent territory) [*ibid.*, para. 374] and H (Consideration of the self-determination and financial capacity of the newly independent State in connexion with the succession to State debts) [*ibid.*, para. 388]. Finally, subsection 3 (Uniting of States) included article W (Treatment of State debts in cases of uniting of States) [*ibid.*, para. 456].

50. At its 1416th to 1418th, 1420th to 1428th and 1443rd to 1445th meetings, the Commission considered, with the exception of article W, the draft articles contained in the Special Rapporteur's ninth report as well as a draft article Z/B (Transfer of part of the territory of a State) and a new draft article on newly independent States, submitted by the Special Rapporteur at the 1427th and 1443rd meetings respectively, and referred to the Drafting Committee these last two draft articles, as well as draft articles O, R, S, T, U, C, D, F, G and H.

51. The Drafting Committee, having examined the provisions referred to it, submitted to the Commission texts for a new article 17, and for articles 18 (on the basis of article O), 19 (on the basis of article R), 20 (on the basis of articles S, T and U), 21 (on the basis of article Z/B) and 22 (on the basis of articles F, G and H and that submitted by the Special Rapporteur at the 1443rd meeting). At its 1447th meeting, the Commission adopted on first reading the texts submitted by the Drafting Committee for articles 17 to 19 and referred back to that Committee article 20 for further consideration. At its 1449th and 1450th meetings, the Commission adopted on first reading the texts of articles 21 and 22 and a revised text of article 20 submitted by the Drafting Committee. Articles 17 to 20 constitute section 1 (General provi-

<sup>237</sup> For the texts of subparagraph (e) of article 3 and of articles 9, 11 and X and the commentaries thereto adopted by the Commission at its twenty-seventh session, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.2. For the text of all the articles adopted so far by the Commission, see sect. B.1 below.

<sup>238</sup> *Yearbook... 1976*, vol. II (Part One), p. 55, document A/CN.4/292.

<sup>239</sup> For the texts of subparagraph (f) of article 3 and of articles 12, 16 and the commentaries thereto adopted by the Commission at its twenty-eighth session, see *Yearbook... 1976*, vol. II (Part Two), pp. 128 *et seq.*, document A/31/10, chap. IV, sect. B.2. For the text of all articles adopted so far by the Commission, see sect. B.1 below.

<sup>240</sup> Reproduced in *Yearbook... 1977*, vol. II (Part One).

sions) of part II and articles 21 and 22 form the initial provisions of section 2. (Provisions relating to each type of succession of States.)

## 2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

### (a) *Form of the draft*

52. As in the case of the codification of other topics by the Commission, the form to be given to the codification of succession of States in respect of matters other than treaties cannot be determined until the study of the subject has been completed. The Commission, in accordance with its Statute, will then formulate the recommendations it considers appropriate. Without prejudging those recommendations, it has already decided to set out its study in the form of *draft articles*, since it believes that this is the best method of discerning or developing the rules of international law in the matter. The draft is being prepared in a form which would permit its use as a basis for a convention if it were decided that a convention should be concluded.

### (b) *Scope of the draft*

53. As noted above,<sup>241</sup> the expression "matters other than treaties" did not appear in the titles of the three topics into which the question of succession of States and Governments was divided in 1967, namely, (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than treaties; and (c) succession in respect of membership of international organizations. In 1968, in a report submitted at the twentieth session of the Commission, Mr. Bedjaoui, the Special Rapporteur for the second topic, pointed out that, if the title of that topic (succession in respect of rights and duties resulting from sources other than treaties) was compared with the title of the first topic (succession in respect of treaties), it would be found that the word "treaty" was considered in the two titles from two different points of view. In the first case, the treaty was regarded as a subject-matter of the law of succession and in the second as a source of succession. The Special Rapporteur pointed out that, apart from the lack of homogeneity, this division of the question had the drawback of excluding from the second topic all matters which were the subject of treaty provisions. He noted that, in many cases, State succession was accompanied by the conclusion of a treaty regulating *inter alia* certain aspects of the succession, which were thereby excluded from the second topic as entitled in 1967. Since these aspects did not come under the first topic either, the Commission would have been obliged, if this title had been retained, to leave a substantial part of the subject-matter aside in its study on State succession.<sup>242</sup>

<sup>241</sup> See paras. 32 and 36 above.

<sup>242</sup> *Yearbook... 1968*, vol. II, pp. 96-97, document A/CN.4/204, paras. 18-21.

54. Consequently, the Special Rapporteur proposed taking the *subject-matter of succession* as the criterion for the second topic and entitling it: "Succession in respect of matters other than treaties".<sup>243</sup> This proposal was adopted by the Commission, which stated in its report on the work of the twentieth session that

All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was "the subject-matter of succession", i.e. the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to "sources", since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession.<sup>244</sup>

55. At its twentieth session in 1968, the Commission considered that, in view of the magnitude and complexity of the topic, it would do well to begin by studying one or two particular aspects, and it gave priority to economic and financial matters. At the same time, it specified that "this did not in any way imply that all the other questions coming under the same heading would not be considered later".<sup>245</sup> Accordingly, at its twenty-fifth session, in 1973, the Commission expressed the intention, subject to any later decision, to include in the draft articles as many "matters other than treaties" as possible.<sup>246</sup>

### (c) *Structure of the draft*

56. At the present stage of its work, the Commission has divided the draft into an introduction and a number of parts. The introduction will contain those provisions which apply to the draft as a whole, while each part will contain those which apply exclusively to one category of specific matters. The Commission moreover decided, in the circumstances outlined above,<sup>247</sup> to devote part I of the draft to succession to State property. Part II is devoted to succession to State debts.

57. As can be seen from paragraphs 43, 47, 48 and 51 above, the Commission has so far, in the course of four sessions, adopted 22 draft articles, three of which belong to the Introduction, 13 to part I and six to part II of the draft articles. Parts I and II are each divided into two sections entitled respectively "General provisions" (section 1) and "Provisions relating to each type of succession of States" (section 2). In part I, section 1 is formed of eight articles (articles 4, 5, 6, 7, 8, 9, [11] and X) and section 2 of five articles (articles 12 to 16). In part II, four articles (articles 17

<sup>243</sup> For reference to the General Assembly's insertion of the words "of States" after the word "Succession" in the title of the topic, see para. 37 above.

<sup>244</sup> *Yearbook... 1968*, vol. II, pp. 216-217, document A/7209/Rev.1, para. 46.

<sup>245</sup> See para. 38 above.

<sup>246</sup> *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 85.

<sup>247</sup> Paras. 42-43.

to 20) comprise section 1, while articles 21 and 22 fall within section 2. To the extent possible, having regard to the characteristics proper to each category of specific matters dealt with in each part, the articles forming sections 1 and 2 of part II parallel those included in the corresponding sections of part I. For example, in section 1 of both parts, there is an article determining the "Scope of the articles in the present Part" (articles 4 and 17); articles 5 and 18 define respectively the terms "State property" and "State debt"; and article 6 (Rights of the successor State to State property passing to it) parallels article 19 (Obligations of the successor State in respect of State debts passing to it). Likewise, in section 2 of each part, there is an article relating to the "Transfer of part of the territory of a State" (articles 12 and 21) as well as another concerning "Newly independent States" (articles 13 and 22). In each set of two parallel articles, the text has been drafted in such a manner as to maintain as close a correspondence between the language of the two provisions as the subject-matter of each would allow.

58. With the adoption, at its twenty-eighth session, of articles 12 to 16 and subject to the eventual adoption, at a future session, of provisions specifically concerning archives,<sup>248</sup> the Commission completed its study of succession to State property, forming part I. In the normal course of events, after ending that study, the Commission might have considered succession to the other categories of public property.<sup>249</sup> However, in view of the instructions laid down by the General Assembly in resolution 3315 (XXIX),<sup>250</sup> the Special Rapporteur proceeded directly, in his ninth report, to a study of succession to public debts, confining this to succession to State debts. Upon completion of its study of succession to State debts in part II, the Commission may decide whether or not, and in what order, the other questions concerning public property and debts, and the other matters included in the topic, in particular the question of the procedure for the peaceful settlement of disputes arising out of the application or interpretation of the draft articles, are to be considered.

(d) *Provisional character of the provisions adopted at the twenty-fifth and twenty-seventh to twenty-ninth sessions*

59. In its report on the work of its twenty-fifth session, the Commission stated that it deemed it necessary, for the information of the General Assembly, to place at the beginning of its draft articles a series of general provisions defining in particular the meaning of the expressions "succession of States" and "State property". It observed that the final content of provisions of that nature would depend to a considerable

extent on the results reached by the Commission in its further work. It therefore decided that, during the first reading of the draft, it would reconsider the text of the articles adopted at the twenty-fifth session with a view to making any amendments which might be found necessary.<sup>251</sup> At its twenty-seventh and twenty-eighth sessions, and again at the present session, the Commission extended that decision to the articles adopted during those three sessions.

**B. Draft articles on succession of States in respect of matters other than treaties**

60. The text of articles 1 to 9, 11, X and 12 to 22, adopted by the Commission at its twenty-fifth and twenty-seventh to twenty-ninth sessions, together with the text of articles 17 to 22 as well as the commentaries thereto, adopted by the Commission at its twenty-ninth session, are reproduced below for the information of the General Assembly.

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

INTRODUCTION

*Article 1. Scope of the present articles*

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

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

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

*Article 3. Use of terms*

For the purposes of the present articles:

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

<sup>248</sup> Yearbook... 1976, vol. II (Part Two), p. 130, document A/31/10, chap. IV, sect. B.2, introductory commentary to section 2 of part I of the draft, para. 7.

<sup>249</sup> See paras. 42-43 above.

<sup>250</sup> See para. 46 above.

<sup>251</sup> Yearbook... 1973, vol. II, p. 202, document A/9010/Rev.1, para. 91.

## PART I

## SUCCESSION TO STATE PROPERTY

## SECTION 1. GENERAL PROVISIONS

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

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

*Article 5. State property*

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

*Article 6. Rights of the successor State to State property passing to it*

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

*Article 7. Date of the passing of State property*

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

*Article 8. Passing of State property without compensation*

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

*Article 9. General principle of the passing of State property*

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

*Article 11. Passing of debts owed to the State*

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

*Article X.\* Absence of effect of a succession of States on third State property*

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

\* Provisional designation.

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

*Article 12. Transfer of part of the territory of a State*

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

2. In the absence of an agreement:

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

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

*Article 13. Newly independent States*

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became dependent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

2. Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

3. (a) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(b) Movable State property of the predecessor State other than the property mentioned in subparagraph (a), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

5. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the foregoing paragraphs shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

*Article 14. Uniting of States*

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

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

*Article 15. Separation of part or parts of the territory of a State*

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

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

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

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

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

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

*Article 16. Dissolution of a State*

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

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

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

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

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

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

PART II

SUCCESSION TO STATE DEBTS

SECTION 1. GENERAL PROVISIONS

*Article 17. Scope of the articles in the present Part*

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

*Article 18. State debt*

For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

*Article 19. Obligations of the successor State in respect of State debts passing to it*

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

*Article 20. Effects of the passing of State debts with regard to creditors*

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a third State or international organization which is a creditor [or against a third State which represents a creditor] unless:

(a) the agreement has been accepted by that third State or international organization; or

(b) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.

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

*Article 21. Transfer of part of the territory of a State*

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

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

*Article 22. Newly independent States*

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The provisions of the agreement referred to in the preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibria of the newly independent State.

2. TEXT OF ARTICLES 17 TO 22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION

## PART II

### SUCCESSION TO STATE DEBTS

#### SECTION I. GENERAL PROVISIONS

#### *Article 17. Scope of the articles in the present Part*

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

#### *Article 18. State debt*

For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

#### *Commentary*

(1) As already noted,<sup>252</sup> the Commission, with a view to maintaining as close a parallelism as possible between the provisions concerning succession to State debts in the present part and those relating to succession to State property in part I, decided to include at the beginning of part II a provision on the scope of the articles contained in this part. Article 17, therefore, provides that the articles in part II apply to the effects of succession of States in respect of State debts. It corresponds to article 4<sup>253</sup> of the draft and reproduces its wording, with the required substitution of the word "property" by the word "debts". The article is intended to make it clear that part II of the draft deals with only one category of public debts, namely, State debts, as defined in the following article and as explained in the subsequent paragraphs of this commentary.

(2) Article 18, which corresponds to article 5, contains a definition of the term "State debt" for the purposes of the articles in part II of the draft. In order to determine the precise limits of this definition, it is necessary, at the outset, to ascertain what a "debt" is, what legal relationships it creates, between what subjects it creates such relationships, and in what circumstances such relationships may be susceptible to novation through the intervention of another subject. Also, it is necessary to specify which "State" is meant.

- (a) *The concept of debt and the relationships which it establishes*

(3) The concept of "debt" is one which writers do not usually define because they consider the definition self-evident. Another reason is probably that the concept of "debt" involves a two-way or two-sided problem, which can be viewed from the standpoint either of the party benefiting from the obligation (in which case there is a "debt-claim") or of the party performing the obligation (in which case there is a "debt"). This latter point suggests one element of a definition, in that a debt may be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something, to effect a certain performance, for the benefit of a certain party, called the creditor. Thus, the relationship created by such an obligation involves three elements: the party against whom the right lies (the debtor), the party to whom the right belongs (the creditor), and the subject-matter of the right (the performance to be effected).

(4) It should further be noted that the concept of debt falls within the category of personal obligations. The scope of the obligation is restricted entirely to the relationship between the debtor and the creditor. It is thus a "relative" obligation in that the beneficiary (the creditor) cannot assert his right in the matter *erga omnes*, as it were. In private law, only the estate of the debtor, as composed at the time when the creditor initiates action to obtain performance of the obligation due to him, is liable for the debt.

(5) In short, the relationship between debtor and creditor is personal, at least in private law. Creditor-debtor relationships unquestionably involve personal considerations which play an essential role, both in the formation of the contractual link and in the performance of the obligation. There is a "personal equation" between the debtor and the creditor. "Consideration of the person of the debtor", says one writer, "is essential, not only in viewing the obligation as a legal bond, but also in viewing it as an asset; the debt-claim is worth what the debtor is worth".<sup>254</sup> Discharge of the debt depends not only on the solvency of the debtor but also on various considerations connected with his good faith. It is therefore understandable that the creditor will be averse to any change in the person of his debtor. National laws do not normally allow the transfer of a debt without the consent of the creditor.

(6) For the purposes of the present part, the question arises whether the foregoing also applies in international law. Especially where succession of States is concerned, the main question is whether and in what circumstances a triangular relationship is created and dissolved between a third State as creditor,<sup>255</sup>

<sup>254</sup> H., L. and J. Mazeaud, *Leçons de droit civil*, 4th ed. (Paris, Montchrestien, 1969), vol. II, p. 1093.

<sup>255</sup> Although in the following paragraphs of the commentary to the present articles, reference will be made, for purposes of con-

(Continued on next page.)

<sup>252</sup> See para. 57 above.

<sup>253</sup> See section B.1 above.

a predecessor State a first debtor and a successor State which agrees to assume the debt.

(b) *Exclusion of debts of a State other than the predecessor State*

(7) When reference is made to State debts, it is necessary to specify which State is meant. Only three States could possibly be concerned: a third State, the successor State and the predecessor State but, in fact, only the debts of one of them are legally "involved" as a result of the phenomenon of State succession: those of the predecessor State.

(i) *Exclusion of debts of a third State*

(8) A third State might assume financial obligations towards another third State, towards the successor State or towards the predecessor State. In the first case, the financial relationship—like any other relationship of whatever kind between two States, both of which are third parties as regards the State succession—obviously cannot be affected in any way by the phenomenon of territorial change that has occurred or by its consequences with respect to State succession. The same can be said of any financial relationship which may exist between a third State and the successor State. There is no reason why, and no way in which, debts owed by the third State to the successor State (or to a potential successor State) should come to be treated differently simply because of the succession of States. This succession does not alter the international personality of the successor State in cases where it existed as a State before the occurrence of the succession. The fact that the succession may have the effect of modifying, by enlargement, the territorial composition of the successor State does not affect, and should not in future affect, debts owed to it by a third State. If the successor State had no international personality as a State at the time the debt of the third State arose (e.g. in the case of a commercial debt between a third State and a territory having the potential to become independent or to detach itself from the territory of a State in order to form another State), it is perfectly clear that the acquisition of statehood would not cause the successor State to forfeit its rights vis-à-vis the third State.

(9) As to debts owed by a third State to the predecessor State, they are *debt-claims* of the predecessor State against the third State. Such debt-claims are State property and are considered in the context of succession of States in respect of State property. They are, therefore, not covered in the present part.

(ii) *Exclusion of debts of the successor State*

(10) The successor State might assume financial obligations to either a third State or the predecessor

State. In the case of a debt to a third State, no difficulty arises. In this instance, the debt came into existence at the time when the succession of States occurred—in other words, precisely when the successor State acquired the status of successor. To speak of a debt of the successor State to a third State, that debt must have been assumed by the successor State on its own account, and in this case it is clearly unconnected with the succession of States which has occurred. The category of debt by the successor State to a third State which must be excluded from this part is precisely that kind of debt which, in the strict legal sense, is a debt of the successor State, actually assumed by that State with respect to the third State and coming into existence in a context completely unconnected with the succession of States. In cases where this kind of debt was incurred after the succession of States, it is *a fortiori* excluded from the present part. On the other hand, any debt for which the successor State could be held liable vis-à-vis a third State because of the very fact of the succession of States would, strictly speaking, be not a debt assumed directly by the former with respect to the latter but rather a debt transmitted indirectly to the successor State as a result of the succession of States.

(11) The debt of the successor State to the predecessor State can have three possible origins. First, it may be completely unconnected with the relationship between the predecessor State and the successor State created and governed by the succession of States, in which case it should clearly remain outside the area of concern of the draft. Second, it can have its origin in the phenomenon of State succession, which may make the successor State responsible for a debt of the predecessor State. Legally speaking, however, this is not a debt of the successor State, but a debt of the predecessor State transmitted to the successor State as a result of the succession of States. This case will be discussed in connexion with the debt of the predecessor State.<sup>256</sup> It concerns a debt which came into existence as part of the liabilities of the predecessor State prior to the succession of States, and the subject-matter of State succession is, precisely, to determine what happens to such debt. Strictly speaking, however, this case is no longer one of a debt assumed previously by the successor State vis-à-vis the predecessor State.

(12) Lastly, the debt may be owed by the successor State to the predecessor State as a result of the succession of States. In other words, these may be liabilities which would have to be assumed by the successor State during, and as a result of, the process of State succession. For example, the successor State might be required to pay certain sums in compensation to the predecessor State as a financial settlement between the two States. This no longer involves debts which originated previously, and the subject-matter of State succession is what ultimately happens to the latter type of debt. Here, the problem has already been solved by the succession of States. This

(Foot-note 255 continued.)

venience only, to a third State as creditor, it should be understood that the relevant considerations are applicable also to international organizations or other subjects of international law as creditors.

<sup>256</sup> See para. (13) below.

is not to say that such debts do not relate to State succession, but simply that they no longer relate to it.

(iii) *Debts of the predecessor State, the only subject-matter of the present part*

(13) The predecessor State may have assumed debts with respect to either the potential successor State or a third State. In both cases, these are debts directly related to the succession of States, the difference being that, in the case of a debt of the predecessor State to the successor State, the only possibility to be envisaged is non-transmission of the debt, since deciding to transmit it to the successor State, which is the creditor, would mean cancellation or extinction of the debt. In other words, in this case, transmitting the debt would in fact mean not transmitting it, or extinguishing it. In any event, the basic subject-matter of State succession to debts is what becomes of debts assumed by the predecessor State, and by it alone; for it is the territorial change affecting the predecessor State, and it alone, that triggers the phenomenon of State succession. The change which has occurred in the extent of the territorial jurisdiction of the predecessor State raises the problem of the identity, continuity, diminution or disappearance of the predecessor State and thus causes a change in the territorial jurisdiction of the debtor State. The whole problem of succession of States in respect of debts is whether this change has any effects, and if so what effects, on debts contracted by the State in question.

(c) *Exclusion of debts of a non-State organ*

(14) Debts occur in a variety of forms, the exact features of which should be ascertained in the interests of a sounder approach to the concept of State debt. The following brief review of different categories of debts may help to clarify that concept.

In State practice, in judicial decisions and in the legal literature, a distinction is made in general between:

- (a) State debts and debts of local authorities;
- (b) General debts and special or localized debts;
- (c) State debts and debts of public establishments, public enterprises and other quasi-State bodies;
- (d) Public debts and private debts;
- (e) Financial debts and administrative debts;
- (f) Political debts and commercial debts;
- (g) External debt and internal debt;
- (h) Contractual debts and delictual or quasi-delictual debts;
- (i) Secured debts and unsecured debts;
- (j) Guaranteed debts and non-guaranteed debts;
- (k) State debts and other State debts termed "odious" debts, war debts or subjugation debts and, by extension, régime debts.

(i) *State debts and debts of local authorities*

(15) A distinction should first of all be made between State debts and debts of local authorities. The latter are contracted not by an authority or department responsible to the central Government but by a public body which usually is not of the same political nature as the State and which is in any event inferior to the State. Such a local authority has a territorial jurisdiction which is limited and is in any case less extensive than that of the State. It may be a federal unit, a province, a *Land*, a *département*, a region, a country, a district, an *arrondissement*, a *cer-cle*, a canton, a city or municipality, and so on. The local authority may also have a degree of financial autonomy in order to be able to borrow in its own name. It nevertheless remains subordinate to the State, not being a part of the sovereign structure which is recognized as a subject of public international law. That is why the defining of "local authority" is normally a matter of internal public law, and no definition of it exists in international law.

(16) Despite this, authors on international law have at times concerned themselves with the question of defining an authority such as "the commune". The occasion for this arose in particular when article 56 of the Regulations annexed to the Convention respecting the laws and customs of war on land, signed at The Hague on 18 October 1907<sup>257</sup> and following the example of the 1899 Hague Convention, attempted to make provision for a system to protect public property, including property owned by municipalities (*communes*), in case of war. The term "commune" then attracted the attention of authors.<sup>258</sup> In any event, a local authority is a public-law territorial body other than the State. Whatever debts it may contract by virtue of its financial autonomy are not legally debts of the State and do not bind the latter, precisely because of that financial autonomy.

(17) Strictly speaking, State succession should not be concerned with what happens to "local" debts because, prior to succession, such debts were, and after succession will be, the responsibility of the detached territory. Having never been assumed by the predecessor State, they cannot be assumed by the successor State. The territorially diminished State cannot transfer to the enlarged State a burden which it did not itself bear and had never borne. In this case, there is no subject-matter of State succession, which consists in the substitution of one State for another. Unfortunately, legal theory is not as clear on this point as would be desirable. There is in the legal literature almost unanimous agreement on the rule that "local" debts should pass to the successor State. This may not be incorrect in substance, but at least

<sup>257</sup> J. B. Scott, *The Proceedings of the Hague Peace Conferences* (New York, Oxford University Press, 1920), vol. 1, p. 623.

<sup>258</sup> O. Debbasch, *L'occupation militaire — Pouvoirs reconnus aux forces armées hors de leur territoire national* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 29-30 and footnotes 34 and 35.

it is badly expressed. If it is established absolutely that the debts in question are local debts, duly distinguished from other debts, then they will be debts proper to the detached territory. They will not of course be the responsibility of the diminished predecessor State, and from that standpoint the writers concerned are justified in their view. But it does not follow that they will become the responsibility of the successor State, as these writers claim. They were, and will continue to be, debts to be borne solely by the territory now detached. However, in the case of one type of State succession, namely, that of newly independent States, debts proper to the territory, which are called "local" (in relation to the metropolitan territory of the colonial Power), would be assumed by the successor State, since in this case the detached territory and the successor State are one and the same.

(18) However, a careful distinction must be drawn between *local debts*, meaning those contracted by a territorial authority inferior to the State, for which the detached territory was responsible before the succession of States and for which it alone will be responsible afterwards, and debts which may be the responsibility of the State itself and for which the State is liable, incurred either for the general good of the national community or solely for the benefit of the territory now detached. Here, there is subject-matter for the theory of State succession, the question being what happens to these two categories of debt on the occurrence of a succession of States. The comparison of general debts and special or "localized" debts which follows is intended to make the distinction clear.

(ii) *General debts and special or localized debts*

(19) In the past, a distinction was made between "general debt", which is regarded as State debt, and regional or local debts contracted, as was noted above, by an inferior territorial authority, which is solely responsible for this category of debts. It is possible nowadays to envisage a further category, comprising what are called "special" or "relative" debts incurred by the predecessor State solely to serve the needs of the territory concerned. A clear distinction should therefore be drawn between a local debt (which is not a State debt) and a localized debt (which may be a State debt). The criterion for making this distinction is whether or not the State itself contracted the loan earmarked for local use. It has been accepted to some extent in international practice that local debts remain entirely the responsibility of the part of territory which is detached, without the predecessor State's having to bear any portion of them. This is simply an application of the adage *res transit cum suo onere*.

(20) Writers differentiate several categories of "local" debts but do not always draw a clear dividing-line between those debts and "localized" debts. This should be gone into with more precision. "Local" debt is a concept that may sometimes appear to be

relative. Before a part of a State's territory detaches itself, debts are considered local because they have various links to that part of territory. At the same time, however, there may also be an obvious linkage to the territorially diminished State. The question is whether the local character of the debt outweighs its linkage to the predecessor State. It is mainly a problem of determination of degree.

(21) The following criteria may be tentatively suggested for distinguishing between localized State debt and local debt:

(a) Who the debtor is: a local authority or a colony or, for and on behalf of either of those, a central Government;

(b) Whether the part of territory which is detached has financial autonomy, and to what degree;

(c) To what purpose the debt is to be put: for use in the part of territory which is detached;

(d) Whether there is a particular security situated in that part of territory.

Although these criteria are not absolutely sure guides, each of them can provide part of the answer to whether the debt should be considered more a local debt or more a localized State debt. The criteria show why legal theory on the question fluctuates. It is not always easy to ascertain whether a territorial authority other than the State really has financial autonomy and what is the extent of its autonomy in relation to the State. Moreover, even when the State's liability (in other words, the fact that the debt assumed is a State debt) is clear, it is not always possible to establish with certainty what is the intended purpose of each individual loan at the time when it is assumed, where the corresponding expenditure is to be effected, and whether the expenditure actually serves the interests of the detached territory.

(22) The personality of the debtor is still the least uncertain of the criteria. If a local territorial authority has itself assumed a debt, there exists a strong presumption that it is a local debt. The State is not involved, nor will it be any more involved simply because it becomes a predecessor State. Hence, the successor State will also not be involved. There will be no subject-matter for State succession here. If the debt is assumed by a central Government, but expressly on behalf of the detached local authority, it is legally a State debt. It could be called a *localized State debt* because the State intends the funds borrowed to be used for a specific part of the territory. If the debt was contracted by a central Government on behalf of a colony, the same situation should in theory prevail.

(23) The financial autonomy of the detached part of territory is another useful criterion, although in practice it may prove difficult to draw absolutely certain conclusions from it. A debt cannot be considered local unless the part of territory to which it relates has a "degree" of financial autonomy. But does this mean that the province or colony must be financially

independent? Or is it sufficient that its budget is separate from the general budget of the predecessor State? Again, is it sufficient that the debt is distinguishable or, in other words, identifiable by the fact that it is included in the detached territory's own budget? What, for example, of certain "sovereignty expenditures" covered by a loan, which a central Government requires to be included in the budget of a colony and the purpose of which is to install settlers from the metropolitan country or to suppress an independence movement?<sup>259</sup> Inclusion of the loan in the local budget of the territory because of its financial autonomy does not suffice to conceal the fact that debts assumed for the purpose of making such expenditure are State debts.

(24) The third criterion, namely, the intended purpose and actual use of the debt contracted, in and of itself cannot provide the key for distinguishing between local (non-State) debts and localized (State) debts. A central Government, acting in its own name, may decide, just as a province would always do, to devote the loan which it has assumed to a local use. It is a State debt earmarked for territorial use. The criterion of intended purpose must be combined with the others in determining whether the debt is or is not a State debt. In other words, implicit in both the concept of local debt and that of localized debt is a presumption that the loan will actually be used in the territory concerned. This may or may not be a strong presumption. It is therefore necessary to determine the degree of linkage needed to justify a presumption that the loan will be used in the territory concerned. In the case of local debts, contracted by an inferior territorial authority, the presumption is naturally very strong: a *commune* or city generally borrows for itself and not in order to allocate the proceeds of its loan to another city. In the case of localized debts, contracted by the central Government with the intention of using them specifically for a part of territory, the presumption is obviously less strong.

(25) To refine the argument still further, it may be considered that, from this third point of view, there are three successive stages in the case of a localized State debt. First, the State must have intended the corresponding expenditures to be effected for the territory concerned (the principle of earmarking or intended use). Second, the State must actually have used the proceeds of the loan in the territory concerned (the criterion of actual use). Third, the expenditure must have been effected for the benefit and in the actual interest of the territory in question (the criterion of the interest or benefit of the territory). On these terms, abuses by a central Government could be avoided and problems such as those of régime debts or subjugation debts could be solved in a just and satisfactory manner.

(26) An additional item of evidence is the possible existence of securities or pledges for the debt. This is

the last criterion. A debt may be secured, for instance, by real property or fiscal resources, and the property may be situated or the taxes levied either throughout the territory of the predecessor State or only in the part of territory detached from that State. This may provide additional indications as to whether the debt is or is not a State debt. But the criterion should be cautiously applied for this purpose, since both the central Government and the province may offer securities of this nature for their respective debts.

(27) When it has been ascertained with sufficient certainty that the debt is a State debt, it remains to be determined—and this is the subject-matter of State succession to debts—what finally happens to the debt. The successor State is not necessarily liable for it. For example, in the case of a State debt secured by property belonging to the detached territory, it is by no means certain that the loan was contracted for the benefit of the territory in question. Perhaps the predecessor State had no other property which could be used as security. It would therefore be unfair to place the burden of such a debt on the successor State, simply because the territory which has become joined to it had the misfortune to be the only part capable of providing the security. In any case, such a debt is a State debt (not a local debt) for which the predecessor State was liable. In the case of debts secured by local fiscal resources, the presumption is stronger. As this form of security is possible in any part of the territory of the predecessor State (unless special revenue is involved), the linkage with the part of the territory which has been detached is specific in this case. However, as in the case of debts secured by real property, the debt may be either a State debt or a local debt since the State and the province can both secure their respective debts with local fiscal resources.

(28) The International Law Association, for its part, subdivides public debts into three categories:<sup>260</sup>

(a) *National debt*: "The national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any particular assets";

(b) *Local debt*: "Local debts, that is, debts either raised by the central government for the purposes of expenditure in particular territories, or raised by the particular territories themselves";

(c) *Localized debt*: "Localized debts, that is, debts raised by a central government or by particular territorial governments with respect to expenditure on particular projects in particular territories".

(29) In conclusion, a *local debt* can be said to be a debt: (a) which is contracted by a territorial authority inferior to the State; (b) to be used by that authority in its own territory; (c) which territory has a degree

<sup>259</sup> There is here the problem of "odious" debts, régime debts, war debts or subjugation debts; see paras. (42) *et seq.* below.

<sup>260</sup> International Law Association, *Report of the Fifty-fourth Conference, held at The Hague, 23rd–29th August 1970* (London, 1971, p. 108.

of financial autonomy; (d) with the result that the debt is identifiable. In addition, a "localized debt" is a State debt which is used specifically by the State in a clearly defined portion of territory. Because State debts are not generally "localized", it is felt that they should be described as such if that is in fact what they are. This is superfluous in the case of local debts, all of which are "localized", in that they are situated and used in the territory. The reason to specify that a debt is "localized" is that it is a State debt which happens to be, by way of exception, geographically "situated". In short, while all local debts are by definition "localized", State debts are usually not; when they are, this must be expressly indicated so that it will be known that such is the case.

### (iii) State debts and debts of public enterprises

(30) The present part is limited to State debts, excluding from this term any debts which might be contracted by public enterprises or public establishments. It is sometimes difficult, under the domestic law of certain countries, to distinguish the State from its public enterprises. And when it does prove possible to do so, it is even more difficult not to consider debts contracted by a public establishment in which the State itself has a financial participation to be State debts. There arises, first of all, a problem in defining a public establishment or public enterprise.<sup>261</sup> These are entities distinct from the State

<sup>261</sup> These two terms will be used interchangeably, even though the legal régime for the bodies in question may be different under the domestic law of certain countries. In French and German administrative law, the "établissement public" or "öffentliche Anstalt" are distinguished from the "entreprise publique" or "öffentliche Unternehmung". English law and related systems hardly seem to make any distinction between a "public corporation", an "enterprise", an "undertaking" and a "public undertaking" or "public utility undertaking". Spain has "institutos públicos", Latin America has "autarquias", Portugal has "estabelecimentos públicos" or "fiscalias" and Italy has "enti pubblici", "imprese pubbliche", "aziende autonome", and so on. See W. Friedmann, *The Public Corporation: A Comparative Symposium*, University of Toronto School of Law, *Comparative Law Series*, vol. 1 (London, Stevens, 1954).

See also *Yearbook... 1973*, vol. II, pp. 59-61 and 63, document A/CN.4/267, part four, articles 32-34.

International judicial bodies had to consider the definition of public establishments, in particular:

(a) In an arbitral award by Beichmann (Case of German reparations: *Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles* (arbitrator F. V. N. Beichmann), publication of the Reparation Commission, annex 2145a, Paris, 1924, and United Nations, *Reports of Arbitral Awards*, vol. 1 (United Nations publication, Sales No. 1948.V.2), pp. 453 *et seq.*);

(b) In a decision of the United Nations Tribunal in Libya (Case of the institutions, companies and associations mentioned in article 5 of the agreement concluded on 28 June 1951 between the United Kingdom and Italian Governments concerning the disposal of certain Italian property in Libya: decision of 27 June 1955, (United Nations, *Reports of Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 390 *et seq.*); and

(c) In a decision of the Permanent Court of International Justice in a case relating to a Hungarian public university establishment (Judgment of 15 December 1933, appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (*The Peter Pázmány University v. the State of Czechoslovakia*), P.C.I.J., Series A/B, No. 61, pp. 236 *et seq.*).

which have their own personality and usually a degree of financial autonomy, are subject to a *sui generis* juridical régime under public law, engage in an economic activity or provide a public service and have a public or public-utility character. The Special Rapporteur on State responsibility described them as "public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions".<sup>262</sup> In the *Certain Norwegian Loans* case considered by the International Court of Justice, the agent of the French Government stated:

... in domestic law ... a public establishment is brought into existence in response to a need for decentralization; it may be necessary to allow a degree of independence to certain establishments or bodies, either for budgetary reasons or because of the purpose they serve—for example, on an assistance function or a cultural purpose. This independence is achieved through the granting of moral personality under domestic law.<sup>263</sup>

(31) The International Law Commission has, in its draft on State responsibility, settled the question whether, in respect of international responsibility of the State, the debt of a public establishment can be considered a State debt. In respect of State succession, however, the answer to the question whether the debt of such a body is a State debt can obviously only be in the negative. The category of debts of public establishments will therefore be excluded from the scope of the present part in the same way as that of debts of inferior territorial authorities, despite the fact that both are of a public character. This public character does not suffice to make the debt a State debt, as will be seen below in the case of another category of debts.

### (iv) Public debts and private debts

(32) The preceding paragraphs show that the public character of a debt is absolutely necessary, but by no means sufficient, to identify it as a State debt.

A "public debt" is an obligation binding on a public authority, as opposed to a private body or an individual. But the fact that a debt is called "public" does not make it possible to identify more completely the public authority which contracted it, so that it may be the State, a territorial authority inferior to it, or a public institution or establishment distinct from the State. The term "public debt" (as opposed to private debt) is therefore not very helpful in identifying a State debt. This term is too broad and covers not only State debts, which are the subject of the present part, but also the debt of other public entities, whether or not of a territorial character.

<sup>262</sup> *Yearbook... 1971*, vol. II (Part One), p. 254, document A/CN.4/246 and Add.1-3, para. 163.

<sup>263</sup> *I.C.J. Pleadings, Case of Certain Norwegian Loans* (France v. Norway), vol. II, p. 72 [translation from French].

(v) *Financial debts and administrative debts*

(33) Financial debts are associated with the concept of credit. Administrative debts, on the other hand, result automatically from the activities of the public services, without involving any financing or investment. The International Law Association<sup>264</sup> cites several examples: certain expenses of former State services; debt-claims resulting from decisions of public authorities; debt-claims against public establishments of the State or companies belonging to the State; building subsidies payable by the State; salaries and remuneration of civil servants.<sup>265</sup> While financial debts may be either public or private, administrative debts can only be public. However, the fact that the former may, and the latter must, be of a public character does not suffice to make them State debts. The present part is concerned only with State debts, whether financial or administrative.

(vi) *Political debts and commercial debts*

(34) While commercial debts may be State debts, debts of local authorities or public establishments or private debts, political debts are always State debts. The term "political debts", as described by an author, should be taken to refer to

those debts for which a State has been declared liable or has acknowledged its liability to another State as a result of *political events*. The most frequent case is that of a debt imposed on a defeated State by a peace treaty (war reparations, etc.). Similarly, a war loan made by one State to another State gives rise to a political debt.<sup>266</sup>

The same author adds that "a *political debt* is one which exists only between Governments, between one State and another. The creditor is a State, and the debtor is a State. It is of little consequence whether the debt arises from a loan or from the imposition of war reparations."<sup>267</sup> He contrasts political debts, which establish between the creditor and the debtor a relationship between States, with commercial debts, which "are those arising from a loan contracted by a State with *private parties*, whether bankers or individuals".<sup>268</sup>

(35) The International Law Association makes distinctions between debts according to their form, their purpose and the status of the creditors:

The loans may be made by:

(a) Private individual lenders by means of individual contracts with the government:

(b) Private investors who purchase "domestic" bonds, that is bonds which are not initially intended for purchase by foreign investors ...;

(c) Private investors who purchase "international" bonds, that is bonds issued in respect of loans floated on the international loan market and intended to attract funds from foreign countries;

(d) Foreign governments for general purposes and taking the form of a specific contract of credit;

(e) Foreign governments for fixed purposes and taking the form of a specific contract of loan;

(f) Loans made by international organizations.<sup>269</sup>

(vii) *External debt and internal debt*

(36) The distinction between external debt and internal debt is normally applied only to *State debts*, although it could conceivably be applied to other public debts or even to private debts. Where this distinction is made in the commentaries to the articles in the present part, it will of course refer exclusively to State debts. An internal debt is one where the creditors are nationals of the debtor State,<sup>270</sup> while external debt includes all debts contracted by the State with other States or with foreign bodies corporate or individuals.

(viii) *Delictual or quasi-delictual debts*

(37) Delictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession of States, the solution of which is governed primarily by the principles relating to international responsibility of States.<sup>271</sup>

(ix) *Secured debts and unsecured debts*

(38) Although all debts, whether they are private, public or State debts, may or may not be secured in some manner, this part deals exclusively with State debts. In that connexion, the notion of secured debt is an extremely important one. A distinction must be made between two categories of debt. First, there are State debts which are specially secured by certain tax funds, it having been decided or agreed that the revenue from certain taxes would be used to secure the servicing of the State debt. Second, there may be cases in which State debts are specially secured by

<sup>269</sup> International Law Association, *op. cit.*, p. 106.

<sup>270</sup> See D. Bardonnnet, *La succession d'Etats à Madagascar — Succession au droit conventionnel et aux droits patrimoniaux* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 271 and 276.

<sup>271</sup> See Bardonnnet, *op. cit.*, p. 305. He refers (p. 270) to A. B. Keith, *The Theory of State Succession—with Special Reference to English and Colonial Law* (London, Waterlow and Sons, 1907), pp. 58 *et seq.*, with regard to succession of States in respect of delictual or quasi-delictual debts. See also International Law Association, *op. cit.*, p. 122 (appendix C, "Debts of the Belgian Congo", Brussels Court of Appeal, Bougnet et Hock v. Belgium, judgment of 4 December 1963).

<sup>264</sup> International Law Association, *op. cit.*, pp. 118–121.

<sup>265</sup> See *Materials on succession of States* (United Nations publication, Sales No. E.68.V.5), pp. 114–115 (Poldermans v. State of the Netherlands: judgment of 8 December 1955).

<sup>266</sup> G. Jèze, "Les défaillances d'Etat", *Recueil des cours de l'Académie de droit international de la Haye, 1935-III* (Paris, Sirey, 1936), vol. 53, p. 383. [Translation from French.]

<sup>267</sup> *Ibid.*, pp. 383–384. [Translation from French.]

<sup>268</sup> *Ibid.*, p. 383. [Translation from French.]

specific property, the borrowing State having in a sense mortgaged certain national assets.

(x) *Guaranteed debts and non-guaranteed debts*

(39) A State's liability can arise not only from a loan contracted by that State itself but also from a guarantee which it gives in respect of the debt of another party, which may be a State, an inferior territorial authority, a public establishment or an individual. The World Bank, when granting a loan to a dependent territory, often requires a guarantee from the administering Power. Thus, when the territory in question attains independence, two States are legally liable for payment of the debt.<sup>272</sup> However, a study of the actual record of loans contracted with IBRD shows that the succession of States does not alter the previously existing situation. The dependent territory which attains independence remains the principal debtor, and the former administering Power remains the guarantor. The only difference, which has no real effect on what happens to the debt, is that the dependent territory has changed its legal status and become an independent State.

(xi) *State debts and régime debts*

(40) The distinction to be made here serves not only to separate two complementary concepts but also to distinguish among a whole set of terms which are used at various levels. For the sake of strict accuracy, a contrast might be attempted between State debts and *régime debts* since the latter, as the term indicates, are debts contracted by a political régime or a Government having a particular political form. However, the question here is not whether the Government concerned has been replaced in the same territory by another Government with a different political orientation, since that would involve a mere succession of Governments in which régime debts may be repudiated. On the contrary, what is here involved is a succession of States or, in other words, the question whether the régime debts of a predecessor State pass to the successor State. For the purposes of this part, régime debts must be regarded as State debts. The law of State succession does not concern itself with Governments or any other organs of the State, but with the State itself. Just as internationally wrongful acts committed by a Government give rise to State responsibility, so also régime debts, i.e. debts contracted by a Government, are State debts.

(41) In the opinion of one writer, what is meant by régime debts is

<sup>272</sup> G. R. Delaume, *Legal Aspects of International Lending and Economic Development Financing* (New York, Oceana, 1967), p. 321; K. Zemanek, "State succession after decolonization", *Revue des cours ... 1965-III* (Leyden, Sijthoff, 1965), vol. 116, pp. 259-260.

debts contracted by the dismembered State in the temporary interest of a particular political form, and the term can include, in peacetime, *subjugation debts* specifically contracted for the purpose of colonizing or absorbing a particular territory and, in wartime, *war debts*.<sup>273</sup>

This is one application of the broader theory of "odious" debts, to which reference will be made in the ensuing paragraphs.

(d) *The question of "odious debts"*

(42) In his ninth report (A/CN.4/301 and Add.1), the Special Rapporteur included a chapter entitled "Non-transferability of 'odious' debts". That chapter dealt, first, with the matter of definition of "odious debts". The Special Rapporteur recalled, *inter alia*, the writings of jurists who referred to "war debts" or "subjugation debts",<sup>274</sup> as well as those who referred to "régime debts".<sup>275</sup> For the definition of "odious debts", he proposed an article C, which read as follows:

*Article C. Definition of odious debts*

For the purposes of the present articles, "odious debts" means:

(a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory:

(b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

(43) Second, the chapter dealt with the determination of the fate of odious debts. The Special Rapporteur reviewed State practice concerning "war debts", including a number of cases of the non-passing of such debts to a successor State,<sup>276</sup> as well as cases of

<sup>273</sup> C. Rousseau, *Droit international public* (Paris, Sirey, 1977), vol. III, p. 458 [translation by the Secretariat].

<sup>274</sup> For example, A. Sánchez de Bustamante y Sirvén, *Droit international public*, P. Goulé, transl. (Paris, Sirey, 1936), vol. III, pp. 293-294 and P. Fauchille, *Traité de droit international public, 8th edition of Manuel de droit international public by H. Bonfils* (Paris, Rousseau, 1922), vol. I (part one), p. 352.

<sup>275</sup> For example, G. Jèze, *Cours de science des finances et de législation financière française*, 6th ed. (Paris, Giard, 1922), vol. I (part one), pp. 302-305, 327.

<sup>276</sup> The report mentions, *inter alia*, the following examples: article 24 of the Treaty of Tilsit between France and Prussia (see E. H. Feilchenfeld, *Public Debts and State Succession* (New York, Macmillan, 1931), p. 91); the annexation of the Transvaal ("South African Republic") by the United Kingdom (*ibid.*, pp. 380-396, cf. J. de Louter, *Le droit international public positif* (Oxford, University Press, 1920), vol. I, p. 229); peace treaties following the end of the First and Second World Wars, in particular article 254 of the Treaty of Versailles (*British and Foreign State Papers, 1919*, vol. CXII (London, H. M. Stationery Office, 1922), pp. 124-125), article 203 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 405-407), article 141 of the Treaty of Neuilly-sur-Seine (*ibid.*, p. 821), article 186 of the Treaty of Trianon (*ibid.*, vol. CXIII, pp. 556-568), article 50 of the Treaty of Lausanne (League of Nations, *Treaty Series*, vol. XXVIII, pp. 41 and 43), and annexes X and XIV of the Treaty of Peace with Italy (United Nations, *Treaty Series*, vol. 49, pp. 209, 225).

the passing of such debts.<sup>277</sup> He further cited cases of State practice concerning the passing or non-passing to a successor State of "subjugation debts".<sup>278</sup> He proposed the following article D, concerning the non-transferability of odious debts:

*Article D. Non-transferability of odious debts*

[Except in the case of the uniting of States,] odious debts contracted by the predecessor State are not transferable to the successor State.

(44) As indicated already,<sup>279</sup> the Commission, having discussed articles C and D, referred those two articles to the Drafting Committee for its consideration in the light of the discussion. The Commission, following the recommendation of the Drafting Committee, recognized the importance of the issues raised in connexion with the question of "odious debts" but was of the opinion that it was best first to examine each particular type of succession of States, because the rules to be formulated for each type might well settle the issues raised by the question and might dispose of the need to draft general provisions on the matter. It was generally agreed that it would not be useful or timely to draft at this stage, for inclusion in the section on general provisions, articles relating to "odious debts". Later, once the draft articles of this part on each type of succession have been formulated, the Commission may revert to this question.

(e) *Definition of State debt*

(45) Having in mind the foregoing considerations, the Commission adopted the text of article 18, which contains the definition of State debt for the purposes of the articles in part II of the draft. The reference in the text of the article to the "articles in the present Part" conforms to usage throughout the draft and in particular to the language of the corresponding provision in part I, namely, article 5. Likewise, spec-

<sup>277</sup> For example, the 1720 treaty between Sweden and Prussia (see E. Feilchenfeld, *op. cit.*, p. 75, foot-note 6); the unification of Italy (*ibid.*, p. 269); and the assumption by Czechoslovakia, for a short period of time, of certain debts of Austria-Hungary (see D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. 1, pp. 420-421).

<sup>278</sup> The Special Rapporteur made reference to the 1847 treaty between Spain and Bolivia (see below, para. (11) of the commentary to article 22); the question of Spanish debts with regard to Cuba in the context of the 1898 Treaty of Paris between Spain and the United States (see Feilchenfeld, *op. cit.*, pp. 337-342, cf. C. Rousseau, *op. cit.*, p. 459); article 255 of the Treaty of Versailles (for reference, see foot-note 276 above) and the "Reply of the Allied and Associated Powers" concerning the German colonization of Poland (*British and Foreign, State Papers, 1919*, vol. CXII (London, H. M. Stationery Office, 1922), p. 290); the question of Netherlands debts with regard to Indonesia in the context of the 1949 Round Table Conference and of the subsequent 1956 denunciation by Indonesia (see below, paras. (16) to (19) of the commentary to article 22); and the question of French debts in Algeria (see below, para. (36) of the commentary to article 22).

<sup>279</sup> See para. 50 above.

ific mention is made of the "date of the succession of States", a term defined in article 3 (Use of terms), which constitutes the indispensable point of reference for the purposes of determining the time factor involved in the passing of a State debt. The text of article 18 refers to a "financial obligation ... chargeable to the State" in order to make it clear that the debt in question involves a monetary aspect and is an obligation that can be legally attributed to the predecessor State. The Commission included the word "international" in brackets to draw the attention of Governments to the difference of opinion among its members regarding the scope to be given to the provision in so far as creditors are concerned. Members agreed that the definition covers financial obligations chargeable to the State vis-à-vis another State, an international organization or another subject of international law, but does not extend to such obligations when the creditor is an individual who is a national of the debtor predecessor State, be it a juridical or natural person.

(46) In this connexion, the opinion was expressed that, if the word "international" were to be omitted from the text, the expression "financial obligation" could be interpreted to cover any such obligation assumed with respect to juridical or natural persons, including in particular those of the nationality of the predecessor State. If the draft articles were to extend to such category of obligations, they would constitute a flagrant interference in the internal affairs of States. International law was concerned with international relations only and, consequently, the word "international" should be retained in the text. The bracketed word "international" was intended to convey the idea that the financial obligation must arise at the international level. The position of foreign private creditors was, in this view, adequately safeguarded by the provisions of article 20, paragraph 1.

(47) On the other hand, many members of the Commission did not favour the inclusion of the term "international" since, in their view, international law, including that of State succession, has been and quite rightly remains concerned with the interests of aliens as well as of States. No question of interference in a State's internal affairs arose. It was pointed out that the use of the word "international" in the text would be contrary to the practice of States, which contained thousands of cases of succession of States to debts which were not debts on an inter-State or international plane but were State debts whose creditors were alien individuals or corporations. An important part of the credit currently extended to States derives from foreign private sources. Besides, the inclusion of such a word would lead to a limitation of the sources of credit available to States and international organizations, which would be detrimental to the interests of the international community as a whole and, in particular, to those of the developing countries, which were in dire need of external financing for their development programmes and whose easier access to private capital markets

was one of the objectives sought in the "North-South dialogue" on economic matters.<sup>280</sup>

**Article 19. Obligations of the successor State in respect of State debts passing to it**

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

*Commentary*

(1) Article 6 (Rights of the successor State to State property passing to it)<sup>281</sup> lays down a rule confirming the dual juridical effect of a succession of States upon the respective rights of the predecessor State and the successor State as regards State property passing from the former to the latter, consisting in the extinction of the rights of the predecessor State to the property in question and the simultaneous arising of the rights of the successor State to that property. Article 19 embodies a parallel rule regarding the obligations of the predecessor and successor States in respect of State debts which pass to the successor State in accordance with the provisions of the articles in part II.

(2) It should be stressed that this rule applies only to the State debts which actually pass to the successor State "in accordance with the provisions of the articles in the present Part". Particularly important among such provisions is article 20, which, as a complement to article 19, guarantees the rights of creditors.

**Article 20. Effects of the passing of State debts with regard to creditors**

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a third State or international organization which is a creditor [or against a third State which represents a creditor] unless:

(a) the agreement has been accepted by that third State or international organization; or

(b) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.

*Commentary*

(1) In part I (Succession to State property) of the present draft articles, the Commission has adopted a rule, i.e. article X,<sup>282</sup> for the protection of the property of a third State from any "disturbance" as a result of territorial change through a succession of States. If article X were to be given a narrow interpretation, it could be said to relate only to tangible property, such as lands, buildings, consulates and possibly bank deposits (which are referred to in the commentary to article X),<sup>283</sup> whose location in the territory of the successor State (or of the predecessor State) in accordance with article X could, by their nature, be determined. However, no restriction was placed on the expression "property, rights and interests" of the third State that would enable third State debt-claims, which constitute intangible property whose location it might prove difficult to determine, to be excluded from it. If, therefore, article X is taken to refer also to third State debt-claims, this would mean that the debts of the predecessor State corresponding to those debt-claims of the third State should in no way be affected by the succession of States. In other words, it would be pointless to study the general problem of succession of States in respect of debts, since the debts of the predecessor State (which are nothing more than the debt-claims of the third State) must remain in a strict *status quo*, which cannot be changed by the succession of States.

(2) What article X really means is that the debt-claims of the third State must not cease to exist or suffer as a result of the territorial change. Prior to the succession of States, the debtor State and the creditor State were linked by a specific, legal debtor-creditor relationship. The problem which then presents itself is whether the succession of States is, in this case, intended not only to create and establish a legal relationship between the debtor predecessor State and the successor State, enabling the former to shift on to the latter all or part of its obligation to the creditor third State, but also to create and establish a new "successor State-third State" legal relationship to replace the "predecessor State-third State" relationship in the proportion indicated by the "predecessor State-successor State" relationship with respect to assumption of the obligation. The answer must be that succession of States in respect of State debts can create a relationship between the predecessor State and the successor State with regard to debts which linked the former to a third State, but that it cannot, in itself, establish any direct legal relationship between the creditor third State and the successor State, should

<sup>280</sup> Conference on International Economic Co-operation, which opened in Paris in December 1975.

<sup>281</sup> See section B.1 above.

<sup>282</sup> Provisional designation. See section B.1 above.

<sup>283</sup> *Yearbook... 1975*, vol. II, p. 114, document A/10010/Rev.1, chap. III, sect. B.2, article X, para. 3 of the commentary.

the latter "assume" the debt of its predecessor. From this point of view, the problem of succession of States in respect of debts is much more akin to that of succession of States in respect of treaties than to that of succession in respect of property.

(3) Considering here only the question of the transfer of obligations and not that of the transfer of rights, there are certainly grounds for stating that a "succession of States", in the strict sense, takes place only when, by reason of a territorial change, certain international obligations of the predecessor State to third parties pass to the successor State solely by virtue of a norm of international law providing for such passing, independently of any manifestation of will on the part of the predecessor State or the successor State. But the effect, in itself, of the succession of States should stop there. A new legal relationship is established between the predecessor State and the successor State with regard to the obligation in question. However, the existence of this relationship does not have the effect either of automatically extinguishing the former "predecessor State-third State" relationship (except where the predecessor State entirely ceases to exist) or of replacing it with a new "successor State-third State" relationship in respect of the obligation in question.

(4) If, then, it is concluded that there is a passing of the debt to the successor State (in a manner which it is precisely the main purpose of the succession of States to determine), it cannot be argued that it must automatically have effects in relation to the creditor third State in addition to the normal effects it will have vis-à-vis the predecessor State. As in the case of succession of States in respect of treaties, there is a personal equation involved in the matter of succession to State debts. The legal relationship which existed between the creditor third State and the predecessor State cannot undergo a twofold novation, in a triangular relationship, which would have the effect of establishing a direct relationship between the successor State and the third State.

(5) The problem is not a theoretical one, and its implications are important. In the first place, if the successor State is to assume part of the debts of the predecessor State, in practice this often means that it will pay its share to the predecessor State, which will be responsible for discharging the debt to the creditor third State. The predecessor State thus retains its debtor status and full responsibility for the old debt. This has frequently occurred, if only for practical reasons, the debt of the predecessor State having led to the issue of bonds signed by that State. For the successor State to be able to honour those bonds directly, it would have to guarantee them; until that operation, which constitutes the novation in legal relations, has taken place, the predecessor State remains liable to the creditors for the whole of its debts. Nor is this true only in cases where the territorial loss is minimal and where the predecessor State is bound to continue servicing the whole of the old debt. Moreover, if the successor State defaults, the predecessor State remains responsible to the creditor third State

for the entire debt until an express novation has taken place to link the successor State specifically and directly to the third State.

(6) The above position has been supported by an author, who wrote:

If the annexation is *not total*, if there is *partial* dismemberment, there can be no doubt on the question: after the annexation, as before it, the bondholders have only one *creditor*, namely the State which floated the loan... Apportionment of the debt between the successor State and the dismembered State does not have the immediate effect of automatically making the successor State the *direct* debtor vis-à-vis the holders of bonds issued by the dismembered State. To use legal terms, the *right* of the creditors to *institute proceedings* remains as it was before the dismemberment; only the contribution of the successor State and of the dismembered State is affected; it is a legal relationship *between States*.

...

Annexation or dismemberment does not *automatically* result in *novation through a change of debtor*.

In practice, it is desirable, *for the sake of all the interests involved*, that the creditors should have as the *direct* debtor the *real and principal* debtor. Treaties concerning cession, annexation or dismemberment should therefore settle this question. In fact, that is what usually occurs.

...

In case of *partial* dismemberment, and when the portion of the debt assumed by the annexing State is small, the *principal and real* debtor is the dismembered State. It is therefore preferable not to alter the debt but to leave the dismembered State as the *sole debtor* to the holders of the bonds representing the debt. The annexing State will pay its contribution to the dismembered State and the latter *alone* will be responsible for servicing the debt (interest and amortization), *just as before the dismemberment*.

The contribution of the annexing State will be paid by the latter in the form either of a *periodic payment* ... or of a *one-time capital payment*.<sup>284, 285</sup>

<sup>284</sup> G. Jèze, "L'emprunt dans les rapports internationaux — La répartition des dettes publiques entre États au cas de démembrement du territoire", *Revue de science et de législation financières* (Paris), vol. XIX, No. 1 (Jan.-March 1921), pp. 67-69. Jèze also quotes A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1905), vol. I, p. 287.

<sup>285</sup> A contrary position was taken, however, by Alexandre N. Sack, who formulated such rules as the following:

"No part of an indebted territory is bound to assume or pay a larger share than that for which it is responsible. If the Government of one of the territories refuses to assume, or does not actually pay, the part of the old debt for which it is responsible, there is no obligation on the other cessionary and successor States or on the diminished former State to pay the share for which that territory is responsible.

"This rule leaves no doubt concerning cessionaries and successors which are sovereign and independent States; they cannot be required to guarantee jointly the payments for which each of them and the diminished former State (if it exists) are responsible, or to assume any part of the debt which one of them refuses to assume.

"However, the following question then arises: is the former State, if it still exists and if only part of its territory has been detached, also released from such an obligation?"

...

"The argument that the diminished 'former' State remains the principal debtor vis-à-vis the creditors and, as such, has a right of recourse against the cessionary and successor States is based

(Continued on next page.)

(7) For the sake of the argument, reference may be made to the case of a State debt which has come into existence as a result of an agreement between two States. In this case, the creditor third State and the debtor predecessor State may set out their relationship in a treaty. The fate of that treaty, and thus of the debt to which it gave rise, may have been decided in a "devolution agreement" concluded between the predecessor State and the successor State. But the creditor third State may prefer to remain linked to the predecessor State, even though it is diminished, if it considers it more solvent than the successor State. In consequence of its debt-claim, the third State possessed a right which the predecessor State and the successor State cannot dispose of at their discretion in their agreement. The general rules of international law concerning treaties and third States (in other words, articles 34 to 36 of the Vienna Convention on the Law of Treaties)<sup>286</sup> quite naturally apply in this case. It must, of course, be recognized that the agreement between the predecessor State and the successor State concerning the passing of a State debt from one to the other is not in principle designed to be detrimental to the creditor third State, but rather to ensure the continuance of the debt incurred to that State.

(8) However, as the Commission observed with respect to devolution agreements, in the case of succession of States in respect of treaties,

the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.<sup>287</sup>

And the Commission further stated:

(Foot-note 285 continued.)

on [an erroneous] conception [according to which] the principle of succession to debts is based on the relations of States among themselves...

"... Thus, in principle, the diminished former State has the right to consider itself responsible only for that part of the old debt for which it is responsible in proportion to its contributive capacity.

"... The creditors have no right of recourse (or right to take legal action) either against the diminished former State as regards those parts of the old debt for which the ... successors are responsible or against one of the ... successors as regards those parts of the old debt for which another ... successor or the diminished former State is responsible.

"... The debtor States have the right to apportion among all the indebted territories what was formerly their common debt. This right belongs to them independently of the consent of the creditors. They are therefore bound to pay to the creditors only that part of the old debt for which each of them is responsible." (A. N. Sack, "La succession aux dettes publiques d'Etat", *Recueil des cours ... 1928-III* (Paris, Hachette 1929) vol. 23, pp. 303-304, 306 and 320).

<sup>286</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

<sup>287</sup> *Yearbook... 1974*, vol. II (Part One), p. 183, document A/9610/Rev.1, chap. II, sect. D, art. 8, para. (5) of the commentary.

A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported *assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory*.<sup>\*</sup> It is, however, extremely doubtful whether such a purported assignment *by itself* changes the legal position of any of the interested States. The Vienna Convention contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, *as a treaty*, can be binding only as between the predecessor and the successor States and the direct legal effects of which are necessarily confined to them.

... That devolution agreements, if valid, do constitute at any rate a general expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question is whether a devolution agreement constitutes something more, namely an *offer* to continue the predecessor State's treaties which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties.<sup>288</sup>

(9) A similar situation exists as to the effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes the debts of the predecessor State, however consented to by the latter. Does a unilateral declaration by the successor State that it assumes all or part of the debts of the predecessor State following a territorial change mean, *ipso facto*, a novation in the legal relationship previously established by treaty between the creditor third State and the debtor predecessor State? Such a declaration is unquestionably to the advantage of the predecessor State, and it would be surprising and unexpected if that State were to find some objection to it since it has the practical effect of easing its debt burden. It is, at least in principle, also to the advantage of the creditor third State, which might have feared that all or part of its debt-claim would be jeopardized by the territorial change. However, the creditor third State might have a political or material interest in refusing to agree to substitution of the debtor or to assignment of the debt. Moreover, under most national systems of law, the assignment of debts is, of course, generally impossible. The creditor State has a subjective right, which involves a large measure of *intuitus personae*. It may, in addition, have a major reason for refusing to agree to assignment of the debts—for example, if it considers that the successor State, by its unilateral declaration, has taken over too large (or too small) a share of the debts of the predecessor State, with the result that the declaration may jeopardize its interests in view of either the degree of solvency of one of the two States (the predecessor or the successor) or the

<sup>288</sup> *Ibid.*, paras. (6) and (11) of the commentary.

nature of the relations which the third State has with each of them, or for any other reason. More simply still, the third State cannot feel itself automatically bound by the unilateral declaration of the successor State, since that declaration might be challenged by the predecessor State with regard to the amount of the debts which the successor State has unilaterally decided to assume.

(10) Having in mind the foregoing considerations relating to creditor third States, which are equally valid in cases where the creditors are not States, the Commission has adopted the present article on the effects of the passing of State debts with regard to creditors. *Paragraph 1* of article 20 enunciates the basic principle that the succession of States does not, by that phenomenon alone, affect the rights and obligations of creditors. Under this paragraph, while a succession of States may have the effect of permitting the debt of the predecessor State to be apportioned between that State and the successor State, or to be assumed in its entirety by either of them, it does not, of itself, have the effect of binding the creditor. Furthermore, a succession of States does not, of and by itself, have the effect of giving the creditor an established claim equal to the amount of the State debt which may pass to the successor State; in other words, the creditor does not, in consequence only of the succession of States, have a right of recourse or a right to take legal action against the State which succeeds to the debt. The word "creditors" covers such owners of debt-claims as fall under the scope of the articles in part II and should be interpreted to mean *third creditors*, thus excluding successor States or, when appropriate, natural or juridical persons under the jurisdiction of the predecessor or successor States. Although this paragraph will in practice apply mostly to the "rights" of creditors, it refers as well to "obligations" in order not to leave a possible lacuna in the rule and allow it to be interpreted as meaning that a succession as such could affect that aspect of the debt relationship involving the creditor's obligations arising out of the State debt.

(11) *Paragraph 2* envisages the situation where the predecessor and the successor States or, as the case may be, the successor States themselves, conclude an agreement specifically for the passing of State debts. It is evident that such an agreement has by itself no effect on the rights of creditors. To have such an effect, the creditor must in some way express its consent to the agreement on the passing of debts from the predecessor to the successor State. In other words, succession of States does not, *of itself*, have the effect of automatically releasing the predecessor State from the State debt (or a fraction of it) assumed by the successor State or States unless the consent, express or tacit, of the creditor has been given. This is provided for in *subparagraph (a)*. There may be cases where the creditors feel more secured by an agreement between a predecessor State and a successor State or between successor States concerning the passing of State debts because, for example, of the greater solvency of the successor State or States than

the predecessor State. It would, therefore, be for their benefit that creditors are given the possibility, provided for in *subparagraph (a)*, of accepting such agreement. In addition, under *subparagraph (b)*, the legal effect of such an agreement could also be recognized if the consequences of the agreement are in accordance with the other applicable rules of part II, that is, with the applicable rules of the present part other than the rule that questions relating to succession should be settled by agreement between the predecessor and successor States. It should be stressed that *subparagraph (b)* deals only with the *consequences* of the agreement and not with the agreement itself, whose effect would be subject to the general rules of international law concerning treaties and third States, i.e. articles 34 and 36 of the Vienna Convention on the Law of Treaties.

(12) Since the rule embodied in article 20 concerns the effects of the passing of State debts with regard to creditors, paragraph 2 is drafted in such a way as to deny the opposability of the agreement in question to creditors unless one or another of the conditions spelled out in *subparagraphs (a)* and *(b)* is fulfilled. Although the introductory sentence of paragraph 2 refers to "a third State or international organization" without mentioning other subjects of international law, it is not the intention of the Commission to exclude the latter; the rule applies equally to such subjects, mention of which is being omitted simply in order not to make the text unduly heavy. The phrase inserted in square brackets has been retained to show the existence of a difference of opinion within the Commission on the scope of part II in so far as creditors are concerned, as explained in the commentary to articles 17 and 18.<sup>289</sup>

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

### *Commentary*

In part I (Succession to State property) of the present draft articles, the Commission decided to draft the provisions relating to each type of succession of States following the broad categories of succession which it had adopted for the draft articles on succession of States in respect of treaties, yet introducing certain modifications to those categories in order to accommodate the characteristics and requirements proper to the topic of succession of States in respect of matters other than treaties. The Commission, therefore, established a typology consisting of the following five types of succession: (a) transfer of part of the territory of a State; (b) newly independent States; (c) uniting of States; (d) separation of part or parts of the territory of a State; and (e) dissolution of a State.<sup>290</sup> In the present part also, the Commission has

<sup>289</sup> See paras. (46)-(47) of the commentary to articles 17 and 18.

<sup>290</sup> *Yearbook... 1976*, vol. II (Part Two), p. 129, document A/31/10, chap. IV, sect. B.2, paras. (2)-(5) of the introductory commentary to section 2 of part I of the draft.

attempted to follow, in so far as appropriate, the typology of succession of States adopted in part I. Thus the titles of section 2 and of the draft articles therein correspond to those of section 2 of part I and of the draft articles in that section.

**Article 21. Transfer of part of the territory of a State**

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

**2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.**

*Commentary*

(1) The type of succession of States which article 21 deals with corresponds to that covered by article 12. There is divergency in State practice and in the legal literature on the legal principle to be applied concerning the passing (or non-passing) of the State debt of the predecessor State to the successor State for the type of succession envisaged in article 21. In the following paragraphs, reference will be made to doctrinal views and to examples of State practice and judicial decisions concerning the fate of the general debt of a State as well as that of localized State debts.

(2) Commenting on the uncertainties of the doctrine regarding the general public debt contracted for the general needs of a dismembered State, an author summed up the situation as follows:

... What conclusion is to be drawn with regard to the *general public debt* of the dismembered State? Opinions on this differ widely. There are several schools of thought. According to the first, the cession by a State of a fraction of its territory should have no effect on its public debt; the debt remains wholly its responsibility, for the dismembered State continues to exist and retains its individuality; it must therefore continue to be held responsible vis-à-vis its creditors. Moreover, the annexing State, being only an assignee in its private capacity, should not be held responsible for personal obligations contracted by its principal. ... The second holds that the public debt of the dismembered State must be divided between that State and the territory which is annexed; the annexing State should not bear any portion of it. ... According to the third school of thought, the annexing State must take over part of the public debt of the dismembered State. There are two main grounds for this view, which is the most widely held. Firstly, since the public debt was contracted in the interest of the entire territory of the State, and the portion which is now detached benefited just as did the rest, it is only fair that it should continue to bear the burden to some extent. Secondly, since the annexing State receives the profits from the ceded part, it is only fair that it should bear its costs. The State, whose entire resources are assigned to payment of its debt, must be relieved of

a corresponding portion of that debt when it loses a portion of its territory and thus a part of its resources.<sup>291</sup>

(3) The arguments in favour of the passing of part of the general debt can be divided into four groups. The first is the theory of the patrimonial State and of the territory encumbered in its entirety with debts. One author, for example, advocating the passing of a part of the general debt of the predecessor State to the successor State in proportion to the contributing capacity of the transferred territory, argued as follows:

Whatever territorial changes a State may undergo, State debts continue to be guaranteed by the entire public patrimony of the territory encumbered with the debt.<sup>292</sup> The legal basis for public credit lies precisely in the fact that public debts encumber the territory of the debtor State. ...

Seen from that standpoint, the principle of *indivisibility*<sup>293</sup> proclaimed in the French constitutions of the great Revolution is very enlightening; it has also been proclaimed in a good number of other constitutions. ... Government actions and their consequences, as well as other events, may adversely affect the finances and the capacity to pay of the debtor State.

All these are risks which must be borne by creditors, who cannot and could not restrict the Government's ... right freely to dispose of [its] property and of the State's finances. ...

Nevertheless, creditors do have a legal guarantee in that their claims encumber the territory of the debtor State. ...

The debt which encumbers the territory of a State is binding on any Government, old or new, that has jurisdiction over that territory. In case of a territorial change in the State, the debt is binding on all Governments of all parts of that territory. ...

The justification for such a principle is self-evident. When taking possession of assets, one cannot repudiate liabilities: *ubi emolumentum, ibi onus esse debet, res transit cum suo onere*. ... Therefore, with regard to State debts, the *emolumentum* consists of the public patrimony within the limits of the encumbered territory.<sup>294</sup>

(4) In the foregoing passage, two arguments are intermingled. The first is debatable so far as the principle is concerned. Since all parts of the territory of the State "guarantee", as it were, the debt that is contracted, the part which is detached will continue to do so, even if it is placed under another sovereignty; as a result of this, the successor State is responsible for a corresponding part of the general debt of the predecessor State. Such an argument is as valid as the theories of the patrimonial State may be valid. In addition, another argument casts an awkward shadow over the first: it is the reference to the benefit which the transferred territory may have derived from the loan, or to the justification for taking over liabilities because of the acquisition of assets. This argument may fully apply in the case of "local" or "localized" debts, where it is necessary to take into consideration the benefit derived from these debts by

<sup>291</sup> Fauchille, *op. cit.*, p. 351.

<sup>292</sup> It is clear from the context that the author meant the entirety of the territory of the predecessor State prior to its amputation.

<sup>293</sup> The author is referring here to the indivisibility of the Republic and to its territory.

<sup>294</sup> Sack, *loc. cit.*, pp. 274-277.

the transferred territory or to compare the assets with the liabilities. It has no relevance when, as in the case in point, the question involves a general State debt contracted for a nation's general needs, since these needs may be such that the transferred territory will not benefit—or will not benefit as much as other territories—from that general debt.

(5) A second argument is the theory of the profit derived from the loan by the transferred territory. One author, for instance, wrote:

The State which profits from the annexation must be responsible for the contributory share of the annexed territory in the public debt of the ceding State. It is only fair that the cessionary State should share in the debts from which the territory it is acquiring profited in various ways, directly or indirectly.<sup>295</sup>

Another author, for his part, wrote that “the State which contracts a debt, either through a loan or in any other way, does so for the general good of the nation; all parts of the territory profit as a result.”<sup>296</sup> And he drew the same conclusion. Again, it has been said that “these debts were contracted in the general interest and were used to effect improvements from which the annexed areas benefited in the past and will perhaps benefit again in the future. ... It is therefore fair ... that the State should be reimbursed for the part of the debt relating to the transferred province.”<sup>297, 298</sup>

(6) In practice, this theory leads to an impasse; for in fact, since this is a general debt of the State contracted for the general needs of the entire territory, with no precise prior assignment to or location in any particular territory, the statement that such a loan profited a particular transferred territory leads to vagueness and uncertainty. It does not give an automatic and reliable criterion for the assumption by the successor State of a fair and easily calculated share of the general debt of the predecessor State. In actual fact, this theory is an extension of the principle of succession to local debts, which, not being State debts, are outside the scope of the present draft, and to localized State debts, which will be considered below.<sup>299</sup> In addition, it may prove unfair in certain cases of territorial transfer and this would destroy its own basis of equity and justice.

(7) A third argument purports to explain *why* part of the general debt is transferable, but in fact it explains only *how* this operation should be effected. For example, certain theories make the successor State responsible for part of the general debt of the predecessor State by referring flatly to the “contributory capacity” of the transferred territory. Such positions are diametrically opposed to the theory of benefit, so that

they and it cancel each other out. The “contributory strength” of a transferred territory, calculated for example by reference to the fiscal resources an economic potential which it previously provided for the predecessor State, is a criterion which is at variance with the theory of the profit derived from the loan by the transferred territory. A territory already richly endowed by nature, which was attached to another State, may not have profited much from the loan but may, on the other hand, have contributed greatly by its fiscal resources to the servicing of the general State debt, within the framework of the former national solidarity. If, when the territory becomes attached to another State, that successor State is asked to assume a share of the predecessor State's national public debt, computed according to the financial resources which the territory provided up to that time, such a request would not be justified by the theory of profit. The criterion of the territory's financial capacity takes no account of the extent to which that territory may have profited from the loan.

(8) A fourth argument is the one based on considerations of justice and equity towards the predecessor State and of security for creditors. It has been argued that the transfer of a territory, particularly of a rich territory, results in a loss of resources for the diminished State. The predecessor State—and indeed the creditors—relied on those resources. It is claimed that it is only fair and equitable, as a consequence, to make the successor State assume part of the general debt of the predecessor State. But the problem is how this share should be computed; some authors refer to “contributory capacity”, which is logical, given their premises (referring to the resources previously provided by the territory), while others consider the benefit which the territory has derived from the loan. Thus the same overlapping considerations, always entangled and interlocked, are found in the works of various authors. It is particularly surprising to find the argument of justice and equity in the works of authors of the nineteenth or early twentieth century, who were living at a time when provinces were annexed by conquest and by war. It is thus difficult to imagine how the annexing State (which did not shrink from the territorial amputation of its adversary or even the forced imposition on the adversary of reparations or a war tribute) could in any way be moved by considerations of justice and equity to assume part of the general debt of the State which it had geographically diminished. There is a certain lack of realism in this theoretical construction.

(9) The arguments which deny that there is any legal basis for the passing of the general State debt from the predecessor to the successor State in the case of transfer of part of the territory have been advanced on two different bases. The first is based on the sovereign nature of the State. The sovereignty which the successor State exercises over the detached territory is not a sovereignty transferred by the predecessor State; the successor State exercises its own sovereignty there. Where State succession is concerned, there is no transfer of sovereignty but a

<sup>295</sup> H. Bonfils, *Manuel de droit international public (droit des gens)*, 5th ed. (Paris, Rousseau, 1908), p. 117.

<sup>296</sup> N. Politis, *Les emprunts d'Etat en droit international public* (Paris, 1891) [thesis], p. 111.

<sup>297</sup> R. Sèlousse, *Traité de l'annexion au territoire français et de son démembrement* (Paris, Larose, 1880), p. 168.

<sup>298</sup> For all these and other authors, see the details given by Sack, *loc. cit.*, pp. 295 *et seq.*

<sup>299</sup> See paras. 22 *et seq.* below.

substitution of one sovereignty for another. In other words, the successor State which is enlarged by a portion of territory exercises its own sovereign rights there and does not come into possession of those of the predecessor State; it therefore does not assume the obligations or part of the debts of the predecessor State.

(10) The second argument is derived from the nature of the State debt. The authors who deny that a portion of the national public debt (i.e. of a general State debt) passes to the successor State consider that this is a personal debt of the State which contracted it. Thus, in their view, on the occasion of the territorial change, this personal debt remains the responsibility of the territorially diminished State, since that State retains its political personality despite the territorial loss suffered. For example, one author wrote:

... The dismembered or annexed State *personally* contracted the debt. (We are considering here only *national* debts, and not *local* debts ...). It gave a solemn undertaking to service the debt, *come what may*. It is true that it was counting on the tax revenue to be derived from the *whole* of the territory. In case of *partial* annexation, the dismemberment reduces the resources with which it is expected to be able to pay its debt. *Legally*, however, the obligation of the debtor State cannot be affected by variations in the size of its resources.<sup>300</sup>

And he added a foot-note stating:

*In the case of partial annexation*, most English and American authors consider this principle to be absolute, so that they even declare that the annexing State is not *legally* bound to assume *any* part of the debt of the dismembered State.<sup>301</sup>

<sup>300</sup> G. Jèze, "L'emprunt dans les rapports internationaux...", *loc. cit.*, p. 65. However, the same author writes in the same article:

"The annexing State did not *personally* contract the debt of the annexed or dismembered State. It is logical and equitable that, as a result of the annexation, it should *at most* be obligated only *propter rem*, because of the annexation ... What exactly is involved in the obligation *propter rem*? It is the burden corresponding to the contributory strength of the inhabitants of the annexed territory." (*ibid.*, p. 62).

G. Jèze thus favours in this passage a contribution by the successor State with regard to the general debt of the predecessor State. But see also *ibid.*, p. 70, where he states:

"*Present and future* taxpayers in each portion of the territory of the dismembered State must continue to bear the total burden of the debt *regardless of the political events which occur*, even if the annexing State does not agree to assume part of the debt. ... A change in the size of the territory cannot cause the disappearance of the legal obligation regularly contracted by the competent public authorities. The taxpayers of the dismembered State, despite the reduction in its territorial size and in resources, remain bound by the original obligation."

Jèze must ultimately be classified among the authors who favour *conditional* transferability of part of the national public debt of the predecessor State, for he concludes with the following words:

"To sum up, *in principle* (1) the annexing State must assume part of the debt of the annexed State; (2) this share must be calculated on the basis of the contributory strength of the annexed territory; (3) by way of exception, if it is demonstrated in a *certain and bona fide manner* that the annexed territory's resources for the present and for the near future are not sufficient to service the portion of the debt thus computed and chargeable to the annexing State, the latter State may suspend or reduce the debt to the extent strictly necessary to obtain the desirable financial stability" (*ibid.*, p. 72).

<sup>301</sup> *Ibid.*, p. 65, foot-note 2.

For example, one such author wrote:

The general debt of a State is a personal obligation. ... With the rights which have been contracted by the State as personal rights and obligations, the new State has nothing to do. The old State is not extinct.<sup>302</sup>

(11) The practice of States on the question of the passing of general State debts with a transfer of part of the territory of a predecessor State is equally divided. On the one hand, several cases can be cited where the successor State assumed such debts.

(12) Under article 1 of the Franco-Sardinian Convention of 23 August 1860, France, which had gained Nice and Savoy from the Kingdom of Sardinia, did assume responsibility for a small part of the Sardinian debt. In 1866, Italy accepted a part of the Pontifical debt proportionate to the population of the Papal States (Romagna, the Marches, Umbria and Benevento) which the Kingdom of Italy had annexed in 1860. In 1881, Greece, having incorporated in its territory Thessaly, which until then had belonged to Turkey, accepted a part of the Ottoman public debt corresponding to the contributory capacity of the population of the annexed province (article 10 of the Treaty of 24 May 1881).

(13) The many territorial upheavals in Europe following the First World War raised the problem of succession of States to public debts on a large scale, and attempts to settle it were made in the Treaties of Versailles, Saint-Germain-en-Laye and Trianon. In those treaties, writes one author, "political and economic considerations came ... into play". He writes further that:

The Allied Powers, who drafted the peace treaties practically on their own, had no intention of completely destroying the economic structure of the vanquished countries and reducing them to a state of complete insolvency. That explains why the vanquished States were not left to shoulder their debts alone, for they would have been incapable of discharging them without the help of the successor States. But other factors were also taken into consideration, including the need to ensure preferential treatment for the allied creditors and the difficulty of arranging regular debt-servicing owing to the heavy burden of reparations. ...

Finally, it should be pointed out that the traditional differences in legal theory as to whether or not the transfer of public debts was obligatory caused a cleavage between the States concerned, entailing a *radical contrast between the domestic judicial precedents of the dismembered States and those of the annexing States*.<sup>303</sup>

A general principle of succession to German public debts was consequently affirmed in article 254 of the Treaty of Versailles of 28 June 1919. According to this provision, the Powers to which German territory was ceded were to undertake to pay a portion—to be determined—of the debt of the German *Empire* (and of the debt of the German *State* to which the ceded territory belonged), as they had stood on 1 August 1914.<sup>304</sup> However, article 255 of the Treaty provided

<sup>302</sup> W. E. Hall, *A Treatise on International Law*, 7th ed. (Oxford, Clarendon Press, 1917), pp. 93 and 95.

<sup>303</sup> Rousseau, *op. cit.*, p. 442 [translation by the Secretariat].

<sup>304</sup> War debts were thus excluded. Article 254 of the Treaty of Versailles (for reference, see foot-note 276 above) read as follows:

a number of exceptions to this principle. For example, in view of Germany's earlier refusal to assume, in consideration of the annexation of Alsace-Lorraine in 1871, part of France's general public debt, the Allied Powers decided, as demanded by France, to exempt France in return from any participation in the German public debt for the retrocession of Alsace-Lorraine.

(14) One author cites a case of participation of the successor State in part of the general debt of its predecessor. But that case is not consistent with contemporary international law, since the transfer of part of the territory was effected by force. The Third Reich, in its agreement of 4 October 1941 with Czechoslovakia, did assume an obligation of 10 billion Czechoslovak korunas as a participation in that country's general debt (and also in the localized debt for the conquered *Länder* of Bohemia-Moravia and Silesia). Part of the 10 billion covered the consolidated internal debt of the State, the State's short-term debt, its floating debt and the debts of government funds, such as the central social security fund, the electricity, water and pension funds (and all the debts of the former Czechoslovak armed forces, as at 15 March 1939, which were State debts and which the said author incorrectly included among the debts of the territories conquered by the Reich).<sup>305</sup>

(15) On the other hand, there have often been cases where the successor State was exonerated from any portion of the general State debt of the predecessor State. Thus, in the "Peace Preliminaries between Austria, Prussia and Denmark," signed at Vienna on 1 August 1864, article 3 provided that:

Debts contracted specifically on behalf either of the Kingdom of Denmark or of one of the Duchies of Schleswig, Holstein and Lauenburg shall remain the responsibility of each of those countries.<sup>306</sup>

(16) At a time when annexation by conquest was the general practice, Russia rejected any succession to part of the Turkish public debt for territories it had conquered from the Ottoman Empire. Its plenipotentiaries drew a distinction between transfer of part of territory by agreement, donation or exchange (which could perhaps give rise to the assumption of part of the general debt) and territorial transfer effect-

ed by conquest—as was acceptable at the time—which in no way created any right to relief from the debt burden of the predecessor State. Thus, at the meeting of the Congress of Berlin on 10 July 1878, the Turkish plenipotentiary, Karatheodori Pasha, proposed the following resolution: "Russia shall assume the part of the Ottoman public debt pertaining to the territories annexed to Russian territory in Asia." It is said in the record of that meeting that:

Count Shuvalov replied that he believed he was justified in considering it generally recognized that, whereas debts in respect of territories that were detached by agreement, donation or exchange would be apportioned, that was not so in the case of conquest. Russia was the victor in Europe and in Asia. It did not have to pay anything for the territories and could in no way be held jointly responsible for the Turkish debt. Prince Gorchakov categorically rejected Karatheodori Pasha's request and said that, in fact, he was astonished by it.

The President said that, in view of the opposition of the Russian plenipotentiaries, he could see no possibility of acceding to the Ottoman proposal.<sup>307</sup>

(17) The Treaty of Frankfurt of 10 May 1871 between France and Prussia, whereby Alsace-Lorraine passed to Germany, was deliberately silent on the assumption by the successor State of part of the French general debt. Prince von Bismarck, who in addition had imposed on France, after its defeat at Sedan, the payment of war indemnities amounting to 5 billion francs, had categorically refused to assume a share of the French national public debt proportionate to the size of the territories detached from France.<sup>308</sup> The cession of Alsace-Lorraine to Germany in 1871, free and clear of any contributory share in France's public debt, had, as has been seen,<sup>309</sup> a mirror effect in the subsequent retrocession to France of the same provinces, also free and clear of all public debts, under articles 55 and 255 of the Treaty of Versailles.

(18) When, under the Treaty of Ancón of 20 October 1883, Chile annexed the province of Tarapacá from Peru, it refused to assume responsibility for any part whatever of Peru's national public debt. However, after disputes had arisen between the two countries concerning the implementation of the Treaty, another treaty, signed by them at Lima on 3 June 1929, confirmed Chile's exemption from any part of Peru's general debt.<sup>310</sup>

<sup>305</sup> The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay:

"A portion of the debt of the German Empire as it stood on August 1, 1914..."

"A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged..."

<sup>306</sup> I. Paenson, *Les conséquences financières de la succession des Etats* (Paris, Domat-Montchrestien, 1954), pp. 112-113.

The author refers to an irregular annexation and, moreover, considers the Czechoslovak case as falling within the category of "cession of part of territory"; in fact, the case was more complex, involving disintegration of the State, not only through the joining of territories to Hungary and to the Reich but also through the creation of States: the so-called "Protectorate of Bohemia-Moravia" and Slovakia.

<sup>307</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), vol. XVII, pp. 470 *et seq.* [Translation by the Secretariat.]

<sup>308</sup> Protocole n° 17 du Congrès de Berlin sur les affaires d'Orient, in *British and Foreign State Papers 1877-1878* (London, Ridgway, 1885), vol. LXIX, p. 862 and pp. 1052 *et seq.* [Translation by the Secretariat.] This was exactly the policy followed by the other European Powers in the case of conquest.

<sup>309</sup> One must not be led astray by the fact that Prince von Bismarck affected to reduce the cost of war indemnities by first fixing them at 6 billion francs, since it did not correspond to an assumption of part of the general debt of France. This apparent concession by Prince von Bismarck was later used by d'Arnim at the Brussels Conference, on 26 April 1871, as a pretext for ruling out any participation by Germany in France's general public debt.

<sup>310</sup> See para. (13) above.

<sup>311</sup> However, deposits of guano situated in the province transferred to Chile had apparently served to guarantee Peru's public debt to foreign States such as France, Italy, the United Kingdom or the United States. Claims having been lodged against the suc-

(Continued on next page.)

(19) In 1905, no part of Russia's public debt was transferred to Japan with the southern part of the island of Sakhalin.

(20) Following the Second World War, the trend of State practice broke with the solutions adopted at the end of the First World War. Unlike the treaties of 1919, those concluded after 1945 generally excluded the successor States from any responsibility for a portion of the national public debt of the predecessor State. Thus the Treaty of Peace with Italy of 10 February 1947 ruled out any succession to the debts of the predecessor State, for instance in the case of Trieste,<sup>311</sup> except in so far as the holders of bonds for those debts issued in the ceded territory were concerned.

(21) With regard to judicial precedent, the arbitral award most frequently cited is the one rendered by E. Borel on 18 April 1925 in the case of the *Ottoman Public Debt*. Even though this involved a type of succession of States other than the transfer of part of the territory of one State to another—since the case related to the apportionment of the Ottoman public debt among States and territories detached from the Ottoman Empire (separation of one or more parts of territory of a State with or without the constitution of new States)—it is relevant here because of the general nature of the terms advisedly used by the arbitrator from Geneva. He took the view that there was no legal obligation for the transfer of part of the general debt of the predecessor State unless a treaty provision existed to that effect. In his award, he said:

In the view of the arbitrator, despite the existing precedents, one cannot say that the Power to which a territory is ceded is automatically responsible for a corresponding part of the public debt of the State to which the territory formerly belonged.<sup>312</sup>

He went on to state even more clearly:

One cannot consider that the principle that a State acquiring part of the territory of another State must at the same time take responsibility for a corresponding portion of the latter's public debts is established in positive international law. Such an obligation can stem only from a treaty in which it is assumed by the State in question, and it exists only on the terms and to the extent stipulated therein.<sup>313</sup>

(22) Examination has so far been focused on the general State debts of the predecessor State. What then is the situation about localized State debts, i.e. State debts contracted by the central Government on

behalf of the entire State but intended particularly to meet the specific needs of a locality, so that the proceeds of the loan may have been used for a project in the transferred territory? At the outset, it should be pointed out that, though localized State debts are often separately dealt with from the general State debts, identifying such debts can prove to be difficult in practice. As it has been stated:

it is not always possible to establish precisely: (a) the intended purpose of each particular loan at the time when it is concluded; (b) how it is actually used; (c) the place to which the related expenditure should be attributed . . . ; (d) whether a particular expenditure did in fact benefit the territory in question.<sup>314</sup>

(23) Among the views of publicists, the most commonly—and perhaps most easily—accepted theory appears to be that a special State debt of benefit only to the ceded territory should be attributed to the transferred territory for whose benefit it was contracted. It would then pass with the transferred territory “by virtue of a kind of right of continuance (*droit de suite*)”.<sup>315</sup> However, a sufficiently clear distinction is not made between State debts contracted for the special benefit of a portion of territory and local debts proper, which are not contracted by the State. Yet the assertion that they follow the fate of the territory by virtue of a right of continuance, and that they remain charged to the transferred territory, implies that they were already charged to it before the territory was transferred, which is not the case for localized State debts, these being normally charged to the central State budget.

(24) Writers on the subject appear, generally speaking, to agree that the successor State should assume special debts of the predecessor State, as particularized and identified by some project carried out in the transferred territory. The debt will, of course, be attributable to the successor State and not to the transferred territory, which had never assumed it directly under the former legal order and to which there is no reason to attribute it under the new legal order. Moreover, it can be argued that, if the transferred territory was previously responsible for the debt, it could not be regarded with certainty as a State debt specially contracted by the central Government for the benefit or the needs of the territory concerned. Rather would it be a local debt contracted and assumed by the territorial district itself. That is a completely different case, which does not involve the question of a State debt and hence falls outside the scope of the present draft articles.

(25) The practice of States shows that, in general, the attribution of localized State debts to the successor State has nearly always been accepted. Thus, in 1735, Emperor Charles VI borrowed the sum of one million crowns from some London financiers and merchants, securing the loan with the revenue of the Duchy of Silesia. Upon his death in 1740, Frederick II of Prussia obtained the Duchy from Maria

(Foot-note 310 continued.)

cessor State for continuance of the security and assumption of part of the general debt of Peru secured by that resource of the transferred territory, a Franco-Chilean arbitral tribunal found that the creditor States had acquired no guarantee, security or mortgage, since their rights resulted from *private* contracts concluded between Peru and certain nationals of those creditor States (arbitral award of Rapperswil of 5 July 1901). See Feilchenfeld, *op. cit.*, pp. 321–329, and D. P. O'Connell, *The Law of State Succession* (Cambridge, University Press, 1956), pp. 167–170. In any event, the Treaty of Lima, referred to above, confirmed the exoneration of Chile as the successor State.

<sup>311</sup> For reference, see foot-note 276 above.

<sup>312</sup> United Nations, *Reports of International Arbitral Awards*, vol. I (*op. cit.*), p. 573. [Translation from French.]

<sup>313</sup> *Ibid.*, p. 571. [Translation from French.]

<sup>314</sup> Sack, *loc. cit.*, p. 292.

<sup>315</sup> F. Despagne, *Cours de droit international public*, 3rd ed. (Paris, Larose et Tenin, 1905), p. 109.

Theresa under the Treaties of Breslau and Berlin. Under the latter Treaty, signed on 28 July 1742, Frederick II undertook to assume the sovereign debt (or State debt, as it would be called today) with which the province was encumbered as a result of the security arrangement.

(26) Two articles of the Treaty of Peace between the Emperor of Austria and France, signed at Campo Formio on 17 October 1797, presumably settled the question of the State debts contracted in the interests of the Belgian provinces or secured on them at the time when Austria ceded those territories to France:

*Article IV.* All debts which were secured, prior to the war, on the territory of the countries specified in the preceding articles and which were contracted in accordance with the customary formalities shall be assumed by the French Republic.

*Article X.* Debts secured on the territory of countries ceded, acquired or exchanged under this Treaty shall pass to the parties into whose possession the said countries come.<sup>316</sup>

These two articles, like similar articles in other treaties, referred without further specification to "debts secured on the territory" of a province. This security arrangement may have been made either by the central authority in respect of State debts or by the provincial authority in respect of local debts. However, the context suggests that it was in fact a question of State debts, since the debts were challenged for the very reason that the provinces in question had not consented to them. France refused on that ground to assume the so-called "Austro-Belgian" State debt dating to the period of Austrian rule.<sup>317</sup>

(27) As a result of this, France, Germany and Austria included in the Treaty of Lunéville of 9 February 1801 an article VIII reading as follows:

As in articles IV and X of the Treaty of Campo Formio, it is agreed that, in all countries ceded, acquired or exchanged under this Treaty, those into whose possession they come shall assume debts secured on the territory of the said countries; in view, however, of the difficulties which have arisen in this connexion with regard to the interpretation of the said articles of the Treaty of Campo Formio, it is expressly agreed that the French Republic shall assume only debts resulting from loans formally authorized by the States of the ceded countries or from expenditure undertaken for the actual administration of the said countries.<sup>318</sup> [The word "States" here refers not to State entities but to provincial bodies.]

(28) The Treaty of Peace between France and Prussia, signed at Tilsit on 9 July 1807, made the successor State liable for debts contracted by the former sovereign for or in the ceded territories. Article 24 of the Treaty reads as follows:

<sup>316</sup> A. J. H. de Clercq, *Recueil des traités de la France* (Paris, Durand, 1880), vol. I (1713–1802), pp. 336–337; G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1829), vol. VI, pp. 422–423. [Translation from French.]

<sup>317</sup> Cf. Sack, *loc. cit.*, pp. 268–269.

<sup>318</sup> de Clercq, *Recueil des traités de la France*, vol. I (*op. cit.*), pp. 426–427; G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1831), vol. VII, p. 299; Baron Descamps and L. Renault, *Recueil international des traités du XIX<sup>e</sup> siècle* (Paris, Rousseau), vol. I (1801–1825), p. 3. [Translation from French.]

Such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Prussia may have entered into or contracted ... as owner of countries, territories, domains, property and revenue ceded or renounced by His Majesty under this Treaty shall be assumed by the new owners ...<sup>319</sup>

(29) Article 9 of the Treaty of 26 December 1805 between Austria and France provided that His Majesty the Emperor of Germany and Austria:

shall remain free of any obligation in relation to any debts whatsoever which the House of Austria has contracted by reason of possession, and has secured on the territory of the countries renounced by it under this Treaty.<sup>320</sup>

Similarly, article 8 of the Treaty of 11 November 1807 between France and Holland provided that

such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Holland may have entered into or contracted as owner of the ceded cities and territories shall be assumed by France ...<sup>321</sup>

Article XIV of the Treaty of 28 April 1811 between Westphalia and Prussia is identical with the article just cited.<sup>322</sup>

(30) Article VIII of the Treaty of Lunéville of 9 February 1801 served as a model for article 5 of the Treaty of Paris between France and Württemberg of 20 May 1807, which stated:

Article VIII of the Treaty of Lunéville concerning debts secured on the territory of the countries on the left bank of the Rhine shall serve as a basis and rule in respect of the debts with which the possessions and countries included in the cession under article II of the present Treaty are encumbered.<sup>323</sup>

The Treaty of 14 November 1802 between the Batavian Republic and Prussia contains a similarly worded article IV.<sup>324</sup> Again, article XI of the Treaty of 22 September 1815 between the King of Prussia and the Grand Duke of Saxe-Weimar-Eisenach provided that "His Royal Highness shall assume [any debts] ... specially secured on the ceded districts".<sup>325</sup>

(31) Article IV of the Treaty of 4 June 1815 between Denmark and Prussia provided as follows:

H.M. the King of Denmark undertakes to assume the obligations which H.M. the King of Prussia has contracted in respect of the Duchy of Lauenburg under articles IV, V and IX of the

<sup>319</sup> A. J. H. de Clercq, *Recueil des traités de la France* (Paris, Durand, 1880), vol. II, (1803–1815), p. 221; G. F. de Martens, ed., *Recueil...*, 1835, vol. VIII, p. 666; Descamps and Renault, *op. cit.*, p. 184. [Translation from French.]

<sup>320</sup> de Clercq, *Recueil des Traités de la France*, vol. II (*op. cit.*), pp. 147–148; de Martens, ed., *Recueil...*, vol. VIII (*op. cit.*), p. 391; Descamps and Renault, *op. cit.*, p. 153. [Translation from French.]

<sup>321</sup> de Clercq, *Recueil...*, vol. II (*op. cit.*), p. 241; de Martens, ed., *Recueil...*, vol. VIII (*op. cit.*), p. 720. [Translation from French.]

<sup>322</sup> de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1817), vol. I, p. 367.

<sup>323</sup> de Clercq, *Recueil...*, vol. I (*op. cit.*), vol. I, p. 582; de Martens, ed. *Recueil des principaux traités* (Göttingen, Dieterich, 1831), vol. VII, p. 430 [translation from French].

<sup>324</sup> de Martens, ed. *Recueil...*, vol. VII, (*op. cit.*), pp. 427–428.

<sup>325</sup> de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1831), vol. III, p. 330; Descamps and Renault, *op. cit.*, p. 513.

Treaty of 29 May 1815 between Prussia and His Britannic Majesty, King of Hanover...<sup>326</sup>

The Franco-Austrian agreement of 20 November 1815, whose 26 articles dealt exclusively with debt questions, required the successor State to assume debts which "formed part of the French public debt" (State debts) but "originated as debts specially secured on countries which have ceased to belong to France or were contracted for purposes of the internal administration of the said countries" (article VI).<sup>327</sup>

(32) Even though an irregular forced annexation of territory was involved, mention may be made of the assumption by the Third Reich, under the Agreement of 4 October 1941, of debts contracted by Czechoslovakia for the purchase of private railways in the *Länder* seized from it by the Reich.<sup>328</sup> Debts of this kind seem to be governmental in origin and local in purpose.

(33) After the Second World War, France, which had regained Tenda and Briga from Italy, agreed to assume part of the Italian debt only subject to the following four conditions: (a) that the debt was attributable to public works or civilian administrative services in the transferred territories; (b) that the debt was contracted before Italy's entry into the war and was not intended for military purposes; (c) that the transferred territories had benefited from the debt; and (d) that the creditors resided in the transferred territories.

(34) Succession to special State debts which were used to meet the needs of a particular territory is more likely if the debts in question are backed by a special security arrangement. The predecessor State may have secured its special debt on tax revenue derived from the territory which it is losing or on property situated in the territory in question, such as forests, mines or railways. In both cases, succession to such debts is usually accepted.

(35) On rare occasions, however, the passing of localized debts was refused. One such example is article 255 of the Treaty of Versailles, which provided a number of exceptions to the general principle, laid

down in article 254, for the succession to the public debts of the predecessor State.<sup>329</sup> Thus, in the case of all ceded territories other than Alsace-Lorraine, that portion of the debt of the German Empire or the German States which represented expenditure by them upon property and possessions belonging to them and situated in the ceded territories was not assumed by the successor States. Obviously, political considerations played a role in this particular case.

(36) From the foregoing observations, it may be concluded that, while there appears to exist a fairly well established practice requiring the successor State to assume a localized State debt, no such consensus can be found with regard to general State debts. Although the refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice, political consideration or considerations of expediency have admittedly played some part in such refusals. At the same time, those considerations appear to have been even more present in cases where the successor State ultimately assumed a portion of the general debt of the predecessor State, as occurred in the peace treaties ending the First World War. In any event, it must also be acknowledged that the bulk of the treaty precedents available is largely composed of treaties terminating a state of war; there is a strong presumption that that is not a context in which States express their free consent or are inclined to yield to the demands of justice, of equity or even of law, if it exists.

(37) Whatever the case, the refusal of the successor State to assume part of the national public debt of the predecessor State appears to have logic on its side, as one author remarks, although he agrees that this approach is "hard ... for the ceding State, which is deprived of part of its property without being relieved of its debt, whereas the cessionary State is enriched or enlarged without correspondingly increasing its debt burden."<sup>330</sup> It is useless, however, to seek for the existence of an incontestable rule of international law to avoid that situation. Under the circumstances, the Commission proposes, in the absence of an agreement between the parties concerned, the introduction of the concept of equity as the key to the solution of the questions relating to the passing of State debts. That concept has already been adopted by the Commission in part I of the draft and therefore does not require detailed commentary here.<sup>331</sup>

(38) The rules enunciated in article 21 keep certain parallelisms with those of article 12, relating to the passing of State property. *Paragraph 1* thus lays down, and thereby attempts to encourage, settlement by agreement between the predecessor and successor

<sup>326</sup> de Martens, ed., *Nouveau Recueil...*, 1887, vol. II, p. 350; Descamps and Renault, *op. cit.*, p. 426.

<sup>327</sup> de Martens, ed., *Nouveau Recueil...*, vol. II, *op. cit.*, p. 723; Descamps and Renault, *op. cit.*, p. 531; *British and Foreign State Papers, 1815-1816*, vol. III (London, Ridgway, 1838), pp. 326-327. See also article 5 of the Treaty of 14 October 1809 between France and Austria, concerning debts secured on the territories ceded to France by Austria (Upper Austria, Carniol, Carinthia, Istria) (de Clercq, *Recueil...*, vol. II (*op. cit.*), p. 295; de Martens, ed., *Nouveau Recueil...*, vol. I (*op. cit.*), p. 213); article VII of the Treaty of 3 June 1814 between Austria and Bavaria (de Martens, ed., *Nouveau Recueil...*, vol. II (*op. cit.*), p. 21); article IX of the Treaty of 18 May 1815 between Prussia and Saxony (de Clercq, *Recueil...*, vol. II (*op. cit.*), pp. 520-521; de Martens, ed., *Nouveau Recueil...*, vol. II (*op. cit.*), pp. 277-278); article XIX of the Treaty of Cession of 16 March 1816 under which the Kingdom of Sardinia ceded to Switzerland various territories in Savoy which were incorporated into the Canton of Geneva (de Martens, ed., *Nouveau Recueil...* (Göttingen, Dieterich, 1880), vol. IV, p. 223; Descamps and Renault, *op. cit.*, p. 555).

<sup>328</sup> I. Paenson, *op. cit.*, p. 113.

<sup>329</sup> See para. (13) above.

<sup>330</sup> L. Cavaré, *Le droit international public positif*, 3rd ed. (Paris, Pedone, 1967), vol. I, p. 380.

<sup>331</sup> *Yearbook...* 1976, vol. II (Part Two), pp. 132-133, document A/31/10, chap. IV, sect. B.2, paras. 16-24 of the introductory commentary to section 2 of part 1 of the draft.

States. Although it reads "the passing ... is to be settled ...", the paragraph should not be interpreted as presuming that there is always such a passing. *Paragraph 2* provides for the situation where no such agreement can be reached. It stipulates that "an equitable proportion" of the State debt of the predecessor State shall pass to the successor State. In order to determine what constitutes "an equitable proportion", all the relevant factors should be taken into account in each particular case. Such factors must include, among others, "the property, rights and interests" which pass to the successor State in relation to the State debt in question.

(39) Article 21 is drafted in such a manner as to cover all types of State debts, whether general or localized. It may readily be seen under *paragraph 2* that localized State debts would pass to the successor State since the "property, rights and interests" derived from the localized State debts pass by definition to the successor State.

### *Article 22. Newly independent States*

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The provisions of the agreement referred to in the preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibria of the newly independent State.

### *Commentary*

(1) Article 22 concerns the succession to State debts by a newly independent State. As has been noted,<sup>332</sup> at its twenty-eighth session, the Commission included in part I of the draft a parallel article relating to the succession to State property by a newly independent State, namely, article 13.<sup>333</sup>

(2) The Commission has on several occasions affirmed the necessity and utility of including "newly independent States" as a distinct type of succession of States. It did so in its draft articles on succession of States in respect of treaties<sup>334</sup> and again in the

present set of draft articles in connexion with succession to State property.<sup>335</sup> It might be argued by some that decolonization is a "closed book" belonging almost entirely to the history of international relations and that, consequently, there is no need to include "newly independent States" in a typology of succession of States. In fact, decolonization is not yet a thing of the past. Important parts of the world are still dependent, even though some cover only a small area. Decolonization is far from complete from yet another point of view. If decolonization is taken to mean the end of a relationship based on political domination, it has reached a very advanced stage. However, economic relations are vital, and are much less easily rid of the effects of colonization than political relations. Political independence may not be genuine independence and, in reality, the economy of newly independent States may long remain particularly dependent on the former metropolitan country and firmly bound to it, even taking account of the fact that the economies of nearly all countries are interdependent. The usefulness of the draft articles on succession to State debts cannot therefore be denied, not only with respect to territories which are still dependent but also with respect to countries which have recently attained political independence and even for countries which attained political independence much earlier. In fact, the debt problem, including the servicing of the debt, the progressive amortization of the principal and the payment of interest, all spread over several years, if not decades, is the most typical example of matters covered by succession which long survive political independence. Thus, the effects of problems connected with succession of States in respect of State debts continue to be felt for many decades, and would appear more lasting than in the case of succession in respect of treaties or State property, in each of which the Commission nevertheless devoted a chapter to decolonization. Learned jurists continue to be concerned with succession of States in the case of newly independent States. Recent studies, particularly those of the International Law Association,<sup>336</sup> show that there is still a need to devote particular attention to the problem of decolonization.

(3) Before reviewing State practice and the views of jurists on the fate of State debts in the process of decolonization, it may be of historical interest to note the extent to which colonial powers were willing, in cases of *colonization* which occurred during the last century and the early 1900s, to assume the debts of territories colonized. State practice seems contradictory in this respect. In the cases of the annexation of Tahiti in 1880 (by internal law), Hawaii in 1898 (by internal law), and Korea in 1910 (by treaty), the States which annexed those territories assumed wholly or in part the debts of the territory concerned.<sup>337</sup>

<sup>332</sup> See para. 57 above.

<sup>333</sup> See section B.1 above.

<sup>334</sup> *Yearbook... 1974*, vol. II (Part One), pp. 167-169, document A/9610/Rev.1, paras. 45, 57-60.

<sup>335</sup> *Yearbook... 1976*, vol. II (Part Two), pp. 140-141, document A/31/10, chap. IV, sect. B.2, para. (3) of the commentary to article 13.

<sup>336</sup> International Law Association, *op. cit.*, p. 102.

<sup>337</sup> Feilchenfeld, *op. cit.*, pp. 369, 377 and 378 respectively.

In an opinion relating to the Joint Resolution of the United States Congress providing for the annexation of Hawaii, the United States Attorney-General stated that

... the general doctrine of international law, founded upon obvious principles of justice, is that, in the case of annexation of a State or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed State or territory—it takes the burdens with the benefits.<sup>338</sup>

In the case of the annexation of the Fiji Islands in 1874, it appears that the United Kingdom, after annexation, agreed to voluntarily undertake payment of certain debts contracted by the territory before annexation, as an “act of grace”.<sup>339</sup> The metropolitan Power did not recognize a legal duty to discharge the debts concerned. A similar position appears to have been taken on the annexation of Burma by the United Kingdom in 1886.<sup>340</sup>

(4) In other cases, the colonial Powers refused to honour the debts of the territory concerned. In the 1895 treaty establishing the (second) French protectorate over Madagascar, article 6 stated that, *inter alia*,

The Government of the French Republic assumes no responsibility with respect to undertakings, debts or concessions contracted by the Government of Her Majesty the Queen of Madagascar before the signing of the present Treaty.<sup>341</sup>

Shortly after the signing of that treaty, the French Minister for Foreign Affairs declared in the Chamber of Deputies that, as regards the debts contracted abroad by the Madagascar Government,

the French Government shall, without having to guarantee them for our own account, follow strictly the rules of international law governing cases in which sovereignty over a territory is transferred as a result of military action.<sup>342</sup>

According to one writer, while that declaration recognized the existence of rules of international law governing the treatment of debts of States which had lost their sovereignty, it also made clear that, according to the opinion of the French Government, there was no rule of international law which compelled an annexing State to guarantee or assume the debts of annexed States.<sup>343</sup> The Annexation Act of 1896, by which Madagascar was declared a French colony, was silent on the issue of succession to Malagasy debts.

Colonial powers also refused to honour debts of colonized territories on the grounds that the previously independent State retained a measure of legal personality. Such appears to have been the case with the protectorates established at the end of the nineteenth century in Tunisia, Annam, Tonkin and Cambo-

dia.<sup>344</sup> A further example may be mentioned, that of the annexation of the Congo by Belgium.<sup>345</sup> In the 1907 treaty of cession, article 3 provided for the succession of Belgium in respect of all the liabilities and all the financial obligations of the “Congo Free State”, as set forth in annex C. However, in article 1 of the Colonial Charter of 1908, it is stated that the Belgian Congo was an entity distinct from the metropolitan country, having separate laws, assets and liabilities, and that, consequently, the servicing of the Congolese debt was to remain the exclusive responsibility of the colony, unless otherwise provided by law.

#### (a) *Early decolonization*

(5) In the case of the independence of 13 British colonies in North America, the successor State, the United States, did not succeed to any of the debts of the British Government. Neither the Treaty of Versailles of 1783, by which Great Britain recognized the independence of those colonies, nor the constituent instruments of the United States (the Articles of Confederation of 1776 and 1777 and the Constitution of 1787) mention any payment of debts owed by the former metropolitan Power.<sup>346</sup> This precedent was alluded to in the 1898 peace negotiations between Spain and the United States following the Spanish-American War. The Spanish delegation asserted that there were publicists who maintained that the 13 colonies which had become independent had paid 15 million pounds to Great Britain for the extinguishment of colonial debts. The American delegation, however, viewed the assertion as entirely erroneous, pointing out that the preliminary (1782) and definitive (1783) treaties of peace between the United States and Great Britain contained no stipulation of the kind referred to.<sup>347</sup>

(6) A similar resolution of the fate of the State debts of the predecessor State occurred in South America upon the independence of Brazil from Portugal in the 1820s. During the negotiations in London in 1822, the Portuguese Government claimed that part of its national debt should be assumed by the new State. In a dispatch of 2 August 1824, the Brazilian plenipotentiaries informed their Government of the way in which they had opposed that claim, which they deemed inconsistent with the examples furnished by diplomatic history. The dispatch states:

Neither Holland nor Portugal itself, when they separated from the Spanish Crown, paid anything to the Court of Madrid in exchange for the recognition of their independence; recently, the United States likewise paid no monetary compensation to Great Britain for similar recognition.<sup>348</sup>

<sup>338</sup> O'Connell, *State Succession ... (op. cit.)*, p. 377.

<sup>339</sup> Feilchenfeld, *op. cit.*, p. 292.

<sup>340</sup> *Ibid.*, p. 379. It appears that the British Government did not consider Upper Burma to be a “civilized country” and that therefore rules more favourable to the “succeeding Government” could be applied than in the case of the incorporation of a “civilized” State. O'Connell, *State Succession ... (op. cit.)*, vol. I, pp. 358–360.

<sup>341</sup> See Feilchenfeld, *op. cit.*, p. 372, foot-note 20.

<sup>342</sup> *Ibid.*, p. 373, foot-note 22.

<sup>343</sup> *Ibid.*, p. 373.

<sup>344</sup> *Ibid.*, pp. 369–371.

<sup>345</sup> *Ibid.*, pp. 375–376.

<sup>346</sup> *Ibid.*, pp. 53–54.

<sup>347</sup> *Ibid.*, p. 54, foot-note 95.

<sup>348</sup> Dispatch of 2 August 1824 in *Archivo diplomático de independencia*, vol. II, p. 95, cited by H. Accioly in *Traité de droit international public*, P. Goulé, transl. (Paris, Sirey, 1940), vol. I,

The Treaty between Brazil and Portugal of 29 August 1825, which resulted from the negotiations, in fact made no express reference to the transfer of part of the Portuguese State debt to Brazil. However, since there were reciprocal claims involving the two States, a separate instrument—an additional agreement of the same date—made Brazil responsible for the payment of 2 million pounds sterling as part of an arrangement designed to liquidate those reciprocal claims.

(7) With regard to the independence of the Spanish colonies in America,<sup>349</sup> article VII of the Treaty of Peace and Friendship, signed at Madrid on 28 December 1836 between Spain and newly independent Mexico, reads as follows:

Considering that the Mexican Republic, by a Law passed on the 28th of June, 1824, in its General Congress, has voluntarily and spontaneously recognized as its own and as national, all debt contracted upon its Treasury\* by the Spanish Government of the Mother Country and by its Authorities, during the time they ruled the now independent Mexican Nation\*, until, in 1821, they entirely ceased to govern it ... Her Catholic Majesty ... and the Mexican Republic, by common accord, desist from all claim or pretension which might arise upon these points, and declare that the 2 High Contracting Parties remain free and quit from henceforward for ever from all responsibility on this head.<sup>350</sup>

It thus seems clear that, in accordance with its unilateral statement, independent Mexico had taken over only those debts of the Spanish State which had been contracted for and on behalf of Mexico and had already been charged to the Mexican Treasury.

(8) Article V of the Treaty of Peace and Friendship and Recognition, signed at Madrid on 16 February 1840 between Spain and Ecuador, in turn provided that

The Republic of Ecuador ... recognizes voluntarily and spontaneously every debt contracted upon the credit of its Treasury, whether by direct orders of the Spanish Government or by its authorities established in the Territory\* of Ecuador, provided that such debts are always registered in the account books belonging to the treasuries of the ancient kingdom and presidency of Quito, or provided that it is shown through some other legal and equivalent means that they have been contracted within the said Territory by the said Spanish Government and its authorities while they administered the now independent Ecuadorian Republic, until they ceased governing it in the year 1822 ...<sup>351</sup>

(9) A provision more or less similar to the one in the treaties mentioned above may be found in article V of the Treaty of 30 March 1845 between Spain and Venezuela, in which Venezuela recognized

pp. 198-199. It would appear that the matter at issue was less a question of Brazil's taking over part of the Portuguese State public debt than of the payment of "compensation" in exchange for the "recognition of independence".

<sup>349</sup> See J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. I, pp. 342-343. See also Feilchenfeld, *op. cit.*, pp. 251-257, and Jèze, "L'emprunt dans les rapports internationaux...", *loc. cit.*, p. 76. The case of Cuba is dealt with in para. (12) below.

<sup>350</sup> *British and Foreign State Papers, 1835-1836*, vol. XXIV (London, Ridgway, 1853), pp. 868-869.

<sup>351</sup> Marqués de Olivart, *Colección de los Tratados, Convenios y Documentos Internacionales* (Madrid, El Progreso Editorial, 1890), vol. I, pp. 144-145. [Translation from Spanish.]

as a national debt ... the sum to which the debt owing by the treasury of the Spanish Government amounts and which will be found entered in the ledgers and account books of the former Captaincy-General of Venezuela, or which may arise from other fair and legitimate claims.<sup>352</sup>

Similar wording may be found in a number of treaties concluded between Spain and the former colonies.<sup>353</sup>

(10) The cases of decolonization of the former Spanish dependencies in America would seem to represent a departure from the earlier precedents set by the United States and Brazil. However, it may be noted that the departure was a limited one, not involving a succession to the national debt of the predecessor State but rather to two types of debts: those contracted by the predecessor State for and on behalf of the dependent territory and those contracted by an organ of the colony. As has been noted,<sup>354</sup> the latter category of debts, considered as proper to the territory itself, are in any event excluded from the subject-matter of the present draft articles as they do not properly fall within the scope and definition of State debts of the predecessor State. In spite of the fact that overseas possessions were considered under the colonial law of the time a territorial extension of the metropolitan country, with which they formed a single territory, it did not occur to writers that any part of the national public debt of the metropolitan country should be imposed on those possessions.<sup>355</sup> This was a natural solution, according to an author, because "the creditors [of the metropolitan country] could never reasonably assume that their debts would be paid out of the resources to be derived from such a financially autonomous territory".<sup>356</sup> What was involved was not a participation of the former Spanish-American colonies in the national debt of the metropolitan territory of Spain, but a take-over by those colonies of State debts, admittedly of Spain but contracted by the metropolitan country on behalf and for the benefit of its overseas possessions.<sup>357</sup> It

<sup>352</sup> *British and Foreign State Papers, 1846-1847*, vol. XXXV (London, Harrison, 1860), p. 302.

<sup>353</sup> For example, article IV of the Treaty between Spain and Argentina of 9 July 1859 (*ibid.*, 1859-1860, vol. L (London, Ridgway, 1867), p. 1161); article 11 of the Treaty between Spain and Uruguay of 9 October 1841 (*ibid.*, 1841-1842, vol. XXX, 1858, p. 1366); article V of the Treaty between Spain and Costa Rica of 10 May 1850 (*ibid.*, 1849-1850, vol. XXXIX (London, Harrison, 1863), p. 1331); article V of the Treaty between Spain and Nicaragua of 25 July 1850 (*ibid.*, p. 1340); article IV of the Treaty between Spain and Guatemala of 29 May 1863 (*ibid.*, 1868-1869, vol. LIX (London, Ridgway, 1854) p. 1201); article IV of the Treaty between Spain and El Salvador of 24 June 1865 (*ibid.*, 1867-1868, vol. LVIII (London, Ridgway, 1873) pp. 1251-1252.

<sup>354</sup> See paras. (15) *et seq.* of the commentary to articles 17 and 18 above.

<sup>355</sup> Cases of unlimited colonial exploitation, whereby a metropolitan Power, during the time of old colonial empires, was able to cover part of its national debt by appropriating all of the resources or raw materials of the colonies, have been disregarded as being archaic or rare. See foot-note 405 below.

<sup>356</sup> Jèze, "L'emprunt dans les rapports internationaux..." (*loc. cit.*), p. 74.

<sup>357</sup> It seems clear, however, that the South American republics which attained independence did not seek to determine whether

must also be pointed out that in the case of certain treaties there was a desire to achieve a "package deal" involving various reciprocal compensations rather than any real participation in the debts contracted by the predecessor State for and on behalf of the colony.

Finally, it may be noted that, in most of the cases involving Spain and her former colonies, the debts assumed by the successor States were assumed by means of internal legislation, even before the conclusion of treaties with Spain, which often merely took note of the provisions of those internal laws. None of the treaties, however, speak of rules or principles of international law governing succession to State debts. Indeed, many of the treaty provisions indicate that what was involved was a "voluntary and spontaneous" decision on the part of the newly independent State.

(11) Mention should, however, be made of one Latin American case which appears to be at variance with the general practice of decolonization in that region as outlined in the preceding paragraph. This relates to the independence of Bolivia. A Treaty of Recognition, Peace and Friendship, signed between Spain and Bolivia on 21 July 1847, provides in article 5 that

The Republic of Bolivia ... has already spontaneously recognized, by the law of 11 November 1844, *the debt contracted against its treasury, either by direct orders of the Spanish Government\*, or by orders emanating from the established authorities of that Government in the Territory of Upper Peru, now the Republic of Bolivia; and [recognizes] as consolidated debt of the Republic, in the same category as the most highly privileged debt, all the credits, of whatever description, for pensions, salaries, supplies, advances, freights, forced loans, deposits, contracts and every other debt, either arising from the war or prior thereto\**, which are a charge upon the aforesaid treasury, provided always that such credits proceed *from the direct orders of the Spanish Government\** or of their established authorities in the provinces which now form the Republic of Bolivia, ...<sup>358</sup>

(12) The Anglo-American precedent of 1783 and the Portuguese-Brazilian precedent of 1825 were followed by the Peace Treaty of Paris of 10 December 1898 concluded at the end of the war between the United States and Spain. The charging of Spanish State debts to the budget of Cuba by Spain was contested. The assumption that charging a debt to the accounts of the Cuban Treasury meant that it was a debt contracted on behalf and for the benefit of the island was successfully challenged by the United States plenipotentiaries. The Treaty of 10 December 1898 freed Spain only from liability for debts proper to Cuba, that is, debts contracted after 24 February 1895 and the mortgage debts of the municipality of Hava-

na. It did not allow succession to any portion of the Spanish State debt which Spain had charged to Cuba.<sup>359</sup>

(b) *Decolonization since the Second World War*

(13) An examination of cases of decolonization since the Second World War indicates little conformity in the practice of newly independent States. There are precedents in favour of succession to State debts and precedents against, as well as cases of repudiation of such debts after they had been accepted. It is not the intention of the Commission to overburden its report by including a complete catalogue of all cases of decolonization since the Second World War. The cases mentioned below are not intended to represent an exhaustive survey of practice in the field but are rather provided as illustrative examples.

(14) The independence of the Philippines was authorized by the Philippines Independence Act (otherwise known as the "Tydings-McDuffie Act") of the United States Congress, approved on 24 March 1934.<sup>360</sup> By that Act, a distinction was made between the bonds issued before 1934 by the Philippines with the authorization of the United States Congress and other public debts. Provision was made that the United States declined all responsibility for those post-1934 debts of the archipelago. The inference has thus been drawn that the United States intended to maintain pre-1934 congressionally authorized debts.<sup>361</sup> As regards these pre-1934 debts, by a law of 7 August 1939, the proceeds of Philippine export taxes were allocated to the United States Treasury for the establishment of a special fund for the amortization of the pre-1934 debts contracted by the Philippines with United States authorization. Under the 1934 and 1939 Acts, it was provided that the archipelago could not repudiate loans authorized by the predecessor State and that, if, on the date of independence, the special fund should be insufficient for service of that authorized debt, the Philippines would make a payment to balance the account. Under both its Constitution (article 17) and the Treaty of 4 July 1946 with the United States, the Philippines assumed all the debts and liabilities of the islands.

(15) The case of the independence of India and Pakistan is another example where the successor State accepted the debts of the predecessor State. It would be more correct to speak of successor *States*, and in fact this seems a two-stage succession as a result of partition, Pakistan succeeding to India, which succeeded to the United Kingdom. It has been explained that

(Foot-note 357 continued.)

the metropolitan country had been fully justified in including the debt among the liabilities of their respective treasuries. The inclusion of that debt in the accounts of the treasury of the colony by the metropolitan country was based on an assumption that the debt had been concluded on behalf and for the benefit of the colony. Such an assumption was vigorously challenged in later cases of succession. See para. (12) below.

<sup>358</sup> *British and Foreign State Papers, 1868-1869* (London, Ridgway, 1874) vol. LIX, p. 422.

<sup>359</sup> Feilchenfeld, *op. cit.*, pp. 329-343; Moore, *op. cit.*, pp. 351 *et seq.*; Jéze, "L'emprunt dans les rapports internationaux ..." (*loc. cit.*), p. 84.

<sup>360</sup> O'Connell, *State Succession... (op. cit.)*, p. 433; G. Fischer, *Un cas de décolonisation — Les Etats-Unis et les Philippines* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 264; and M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1963), vol. 2, pp. 211-213, 854.

<sup>361</sup> Fischer, *op. cit.*, p. 264.

There was no direct repartition of the debts between the two Dominions. All financial obligations, including loans and guarantees, of the central Government of British India remained the responsibility of India ... While India continued to be the sole debtor of the central debt, Pakistan's share of this debt, proportionate to the assets it received, became a debt to India.<sup>362</sup>

It does not seem that many distinctions were made regarding the different categories of debt. Only one appears to have been made by the Committee of Experts set up to recommend the apportionment of assets and liabilities. This was the public debt composed of permanent loans, Treasury bills and special loans, as against the unfunded debt, which comprised savings bank deposits and bank deposits. These various obligations were assigned to India, but it is not indicated whether they were debts proper to the dependent territory, which would have devolved upon it in any event, or debts of the predecessor State, which would thus have been transferred to the successor State. The problem to which the Committee of Experts devoted most attention appears to have been that of establishing the modalities for apportioning the debt between India and Pakistan. An agreement of 1 December 1947 between the two States was to embody the practical consequences of this and determine the respective contributions. That division, however, has not been implemented owing to differences between the two States as to the sums involved. (These problems relating to separation of States will be considered in greater detail in connexion with a more appropriate type of succession.)

(16) The problems arising from the succession of Indonesia to the Kingdom of the Netherlands were, as far as debts are concerned, reflected essentially in two instruments: the Round-Table Conference Agreement, signed at The Hague on 2 November 1949,<sup>363</sup> and the Indonesian Decree of 15 February 1956, which repudiated the debt, Indonesia having denounced the 1949 agreements on 13 February 1956.<sup>364</sup> The Financial and Economic Agreement (which is only one of the Conference agreements) specifies the debts which Indonesia agreed to assume.<sup>365</sup> Article 25 distinguishes four series of debts: (a) a series of six consolidated loans; (b) debts to third countries; (c) debts to the Kingdom of the Netherlands; (d) Indonesia's internal debts.

(17) The last two categories of debts need not be taken into consideration here. Indonesia's debts to the Kingdom of the Netherlands were in fact debt-claims of the predecessor State, and thus do not concern the present report. The internal debts of Indonesia at the date of transfer of sovereignty are also excluded by definition. However, it should be noted that this category was not precisely defined. The

predecessor State later interpreted that provision as including debts which the successor State considered as "war debts" or "odious debts". It would appear that this was a factor in the denunciation and repudiation of the debt in 1956.<sup>366</sup>

(18) The other two categories of debts to which the newly independent State succeeded involved: (a) consolidated debts of the Government of the Netherlands-Indies<sup>367</sup> and the portion attributed to it in the consolidated national debt of the Netherlands, consisting of a series of loans issued before the Second World War; (b) certain specific debts to third States.<sup>368</sup>

(19) During the Round-Table Conference, Indonesia brought up issues relating to the degree of autonomy which its organs had possessed by comparison with those of the metropolitan country at the time when the loans were contracted. The Indonesian plenipotentiaries also, and in particular, referred to the problem of their assignment, and the utilization of and benefit derived from those loans by the territory. As in the other cases, it appears that the results of the negotiations at The Hague should be viewed as a whole and in the context of an over-all arrangement. The negotiations had led to the creation of a "Netherlands-Indonesian Union", which was dissolved in 1954. Shortly afterwards, in 1956, Indonesia repudiated all its colonial debts.

(20) As far as the independence of Libya is concerned, the General Assembly of the United Nations resolved the problem of the succession of States, including the succession to debts, in resolution 388 (V) of 15 December 1950 entitled "Economic and financial provisions relating to Libya", article IV of which stated that "Libya shall be exempt from the payment of any portion of the Italian public debt".

(21) Guinea attained its independence in 1958, following its negative vote in the constitutional referendum of 28 September of the same year establishing the Fifth Republic and the French Community. One writer stated: "Rarely in the history of international relations has a succession of States begun so abruptly".<sup>369</sup> The implementation of a monetary reform in Guinea led to that country's leaving the franc area. To that was added the fact that diplomatic relations

<sup>366</sup> See *Libre Belgique* of 12 August 1956: "L'Indonésie répu-die sa dette envers les Pays-Bas", quoted in: France, Présidence du Conseil et Ministère des affaires étrangères, *La documentation française — Problèmes économiques* (Paris), 28 August 1956, No. 452, pp. 17-18.

<sup>367</sup> It has been maintained that these debts were contracted by the dependent territory on its own behalf and for its own account (Rousseau, *op. cit.*, p. 451; O'Connell, *State Succession... [op. cit.]*, p. 437). It appears however that the loans were contracted under Netherlands legislation; thus the argument could be made that the debts were contracted by the metropolitan Power for the account of the dependent territory.

<sup>368</sup> This involved debts contracted under the Marshall Plan and to the United States in 1947, to Canada in 1945 and to Australia in 1949.

<sup>369</sup> Gonidec, quoted by G. Tixier in "La succession à la régie des chemins de fer de l'A.O.F.", *Annuaire français de droit international*, 1965 (Paris), vol. XI, 1966, p. 921.

<sup>362</sup> O'Connell, *State Succession... [op. cit.]*, p. 404.

<sup>363</sup> United Nations, *Treaty Series*, vol. 69, p. 3. See also O'Connell, *State Succession... [op. cit.]*, pp. 437-438; and Paenson, *op. cit.*, pp. 77-78.

<sup>364</sup> Rousseau, *op. cit.*, pp. 451-452.

<sup>365</sup> United Nations, *Treaty Series*, vol. 69, pp. 252-258, draft Financial and Economic Agreement, articles 25-27.

between the former colonial Power and the newly independent State were severed for a long period. All these considerations were not conducive to the promotion of a swift solution of the problems of succession of States which arose some 20 years ago. However, it seems that a trend towards a settlement has emerged since the resumption of diplomatic relations between the two States in 1975. But apparently the problem of debts has not assumed a significant dimension in the relations between the two States. This problem seems to be reduced essentially to questions regarding civilian and military pensions.

(22) As regards other newly independent States which had formerly been French dependencies in Africa, the case of Madagascar<sup>370</sup> may be noted. Madagascar, like all former French overseas territories in general, had legal personality, implying a degree of financial autonomy. The island was thus able to subscribe loans and exercised that right on the occasion of five public loans in 1897, 1900, 1905, 1931 and 1942. The decision in principle to issue the loan was made in Madagascar by the Governor-General. He was given the views of various administrative organs and economic and financial delegations. If the process had stopped there and it had been possible for the public actually to subscribe to the loan, the debt would have been contracted within the simple framework of the financial autonomy of the dependent territory. The loan would then have to be termed a "debt proper to the territory" and could not be attributed to the predecessor State; consequently, it would not have been considered within the scope of the present report.<sup>371</sup> But it appears that a further decision had to be taken by the administering Power. The decision-making process, begun in Madagascar, was completed within the framework of the laws and regulations of the central Government of the administering Power. Approval could have been given either by a decree adopted in the Conseil d'Etat or by statute. In actual fact, all the Malagasy loans were the subject of legislative authorization by the metropolitan country.<sup>372</sup> This authorization might be said to have constituted a substantial condition of the loan, a *sine qua non*, without which the issue of the loan would have been impossible. The power to enter into a genuine commitment in this regard lay only, it would seem, with the administering Power and by so doing, it assumed an obligation which might be compared with the guarantees required by IBRD,

which confer on the predecessor State the status of "primary obligor" and not of "surety merely".<sup>373</sup>

(23) These debts were assumed by the Malagasy Republic, which, it appears, did not dispute them at the time. The negotiators of the Franco-Malagasy Agreement on co-operation in monetary, economic and financial matters of 27 June 1960 thus did not work out any special provisions for this succession. Later, following a change of régime, the Government of Madagascar denounced the 1960 Agreement on 25 January 1973.<sup>374</sup>

(24) The former Belgian Congo acceded to independence on 30 June 1960 in accordance with article 259 of the Belgian Act of 19 May 1960. Civil war erupted and diplomatic relations between the two States were severed from 1960 to 1962. The problems of succession of States were not solved until five years later, in two conventions dated 6 February 1965. The first relates to "the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony".<sup>375</sup> The second concerns the statutes of the "Belgo-Congolese Amortization and Administration Fund".<sup>376</sup>

(25) The classification of debts was made in article 2 of the Convention for the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony, which distinguished three categories of debts: (1) "Debts expressed in Congolese francs and the debt expressed in foreign currencies held by public agencies of the Congo as at 30 June 1960..."; (2) "Debt expressed in foreign currencies and guaranteed by Belgium..."; (3) "Debt expressed in foreign currencies and not guaranteed by Belgium (except the securities of such debt held by public agencies of the Congo)...". This classification thus led ultimately to a distinction between the internal debt and the external debt.

(26) The internal debt should not engage attention for long, not because it was "internal" but because it was held by public agencies of the Congo,<sup>377</sup> or, as one writer specifies, "three quarters" of it was.<sup>378</sup> It was thus intermingled with the debts of local public authorities and hence cannot be regarded as a State debt of the predecessor State.

(27) The external debt was subdivided into guaranteed external debt and non-guaranteed external debt. The external debt guaranteed or assigned by Belgium extended to two categories of debts, which are set forth in schedule 3 annexed to the above convention.<sup>379</sup> The first concerns the Congolese debt in respect of which Belgium intervened only as guaran-

<sup>370</sup> See Bardonnet, *op. cit.*

<sup>371</sup> For a different reason, the first Malagasy loan of 1897 must be disregarded. It was subscribed for a term of 60 years, and redemption was completed in 1957, prior to the date of independence. Whether it is defined as a debt exclusive to the territory or a debt of the metropolitan country, this loan clearly does not concern the succession of States. It remains an exclusively colonial affair. The other loans do concern the succession of States because their financial consequences continued to exert an effect in the context of decolonization.

<sup>372</sup> See Act of 5 April 1897; Act of 14 April 1900; Act of 19 March 1905; Act of 22 February 1931; Act of 16 April 1942. For further details, see the table of Malagasy public loans in Bardonnet, *op. cit.*, p. 650.

<sup>373</sup> See paras. (53) to (56) below.

<sup>374</sup> See Rousseau, *op. cit.*, p. 454.

<sup>375</sup> United Nations, *Treaty Series*, vol. 540, p. 227.

<sup>376</sup> *Ibid.*, p. 275.

<sup>377</sup> A list of these agencies and funds is annexed to the Convention: *ibid.*, p. 253.

<sup>378</sup> C. Lejeune, "Le contentieux financier belgo-congolais", *Revue belge de droit international* (Brussels), 1969-2, p. 546.

<sup>379</sup> United Nations, *Treaty Series*, vol. 540, p. 255.

tor. It was a debt denominated in foreign currencies (United States dollars, Swiss francs or other). In this category, mention may be made of the loan agreements concluded between the Belgian Congo and the World Bank, which are referred to in article 4 of the Belgo-Congolese Agreement. The guarantee and liability of Belgium could naturally not extend, with regard to the IBRD loans, beyond "the amounts withdrawn by the Belgian Congo ... before 30 June 1960", i.e. before independence. When it granted its guarantee, it seemed that Belgium intended to act "as primary obligor and not as surety merely". According to the actual provisions of the agreements with IBRD, this character of State debt of the predecessor State emerges even more clearly in the case of the second category of debts guaranteed by Belgium.

(28) The second type of external debt was called "assigned" debt; it relates to "loans subscribed by Belgium, the proceeds of which were assigned to the Belgian Congo".<sup>380</sup> This is a particularly striking illustration of a State debt of the predecessor State. Belgium was no longer a mere guarantor. The obligation fell directly on Belgium, and it was that country which was the debtor.

(29) The two types of debt, guaranteed and assigned, were to become the responsibility of Belgium. That is what is provided by article 4 of the Convention for the settlement of questions relating to the public debt, in the following terms:

1. Belgium shall assume sole liability in every respect for the part of the public debt listed in schedule 3, which is annexed to this Convention and which forms an integral part thereof.

[The preceding paragraphs describe the contents of schedule 3.]

...

2. With regard to the Loan Agreements concluded between the Belgian Congo and the International Bank for Reconstruction and Development, the part of the public debt referred to in paragraph 1 of this article shall comprise only the amounts withdrawn by the Belgian Congo, under those Agreements, before 30 June 1960.<sup>381</sup>

(30) The external debt not guaranteed by Belgium, which was expressed in foreign currency in the case of the "Dillon loan" issued in the United States and in Belgian currency in the case of other loans, was owed, as one writer says, to "people who have been referred to as 'the holders of colonial bonds'", 95 per cent of whom were Belgians.<sup>382</sup> What would seem to have been involved was a kind of "colonial debt", which would be outside the scope of consideration. However, it might be relevant, according to another author's view, "that the financial autonomy of the Belgian Congo was purely formal in nature and that the administration of the colony was completely in the hands of the Belgian authorities."<sup>383</sup> However, neither Belgium nor the Congo agreed to have that debt devolve upon it, and the two countries avoided the difficulty by setting up a special international

agency to handle the debt. That is the significance of articles 5 to 7 of the Convention for the settlement of questions relating to the public debt, which established a Fund.<sup>384</sup>

(31) The establishment of the Fund, an "autonomous international public agency", and the arrangement for joint contributions to it implied two things:

(a) Neither State in any sense accepted the status of debtor. That is made clear by article 14 of the Convention:

The settlement of the public debt of the Belgian Congo, which is the subject of the foregoing provisions, constitutes a solution in which each of the High Contracting Parties reserves its legal position with regard to recognition of the public debt of the Belgian Congo.

(b) The two States nevertheless regarded the matter as having been finally settled. That is stated in the first paragraph of article 18 of the Convention:

The foregoing provisions being intended to constitute a final settlement of the problems to which they relate, the High Contracting Parties undertake to refrain in the future from any discussion and from any action or recourse whatsoever in connexion either with the public debt or with the portfolio of the Belgian Congo. Each Party shall hold the other harmless, fully and irrevocably, for any administrative or other act performed by the latter Party in connexion with the public debt and portfolio of the Belgian Congo before the date of the entry into force of this Convention.

(32) In the case of the independence of Algeria, article 18 of the "Declaration of Principles concerning Economic and Financial Co-operation", contained in the Evian Agreements,<sup>385</sup> provided for the succession of the Algerian State to France's rights and obligations in Algeria. However, neither this declaration of principles nor the others contained in the Evian Agreements referred specifically to public debts, much less to the various categories of such debts, so that authors have taken the view that the Agreements were silent on the matter.<sup>386</sup>

(33) Negotiations on public debts were conducted by the two countries from 1963 until the end of 1966. They resulted in a number of agreements, the most important of which was the agreement of 23 December 1966, which settled the financial differences between the two countries through the payment by Algeria to France of a lump sum of 400 million francs (40 billion old francs). Algeria does not seem to have succeeded to the "State debts of the predecessor

<sup>384</sup> See article 5, para. 1, of the Convention:

Belgium and the Congo jointly establish, by this Convention, an autonomous international public agency to be known as "the Belgo-Congolese Amortization and Administration Fund", hereinafter referred to as "the Fund". The Statutes of the Fund shall be established by a separate Convention.

The Fund was to receive an annual contribution in Belgian francs from the two States, two fifths of which was to come from Belgium and three fifths from the Congo (article 11 of the Convention).

<sup>385</sup> Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement: United Nations, *Treaty Series*, vol. 507, p. 25.

<sup>386</sup> Rousseau, *op. cit.*, p. 454, and O'Connell, *State Succession ... (op. cit.)*, pp. 444-446.

<sup>380</sup> *Ibid.*, p. 257.

<sup>381</sup> *Ibid.*, p. 231.

<sup>382</sup> Lejeune, *loc. cit.*, p. 546.

<sup>383</sup> Rousseau, *op. cit.*, p. 453.

State” by making the payment since, if it had so succeeded, it would have paid the money not to the predecessor State (which would by definition have been the debtor), but to any third parties to which France owed money in connexion with its previous activities in Algeria. What was involved was, rather, debts which might be termed “miscellaneous” debts, resulting from the take-over of all public services by the newly independent State, assumed by it as compensation for that take-over or in respect of the repurchase of certain property. Also included were *ex post facto* debts covering what the successor State had to pay to the predecessor State as a final settlement of the succession of States. Algeria was not assuming France’s State debts (to third States) connected with its activities in Algeria.

(34) In the negotiations, Algeria argued that it had agreed to succeed to France’s “obligations” only in return for certain French commitments to independent Algeria. Under the aforementioned “Declaration of Principles”, a “French contribution to the economic and social development of Algeria” and “marketing facilities on French territory for Algerian surplus production” (wine)<sup>387</sup> were to be the *quid pro quo* for the obligations assumed by Algeria under article 18 of the Declaration. The Algerian negotiators maintained that that “contractual” undertaking between Algeria and France could only be regarded as valid if two conditions were met: (a) the respective obligations were properly balanced, and (b) the financial situation inherited by Algeria was a sound one.

(35) Algeria also refused to assume debts representing loans which France had contracted during the war of independence for the purpose of carrying out economic projects in Algeria. The Algerian delegation argued that the projects had been undertaken in a particular political and military context in order to advance the interests of the French settlers and of the French presence in general and that they fell within the over-all framework of France’s economic strategy, since nearly all of France’s investment in Algeria had been complementary in nature. The Algerians also argued that the departure of the French population during the months preceding independence had resulted in massive disinvestment and that Algeria could not pay for investments at a time when the necessary income had dried up and, in addition, a process of disinvestment had developed.

(36) The Algerian negotiators stated that a substantial part of the economic programme in Algeria had had the effect of incurring debts for that country while it still had dependent status. They argued that, during the seven-and-a-half years of war, the administering Power had for political reasons been overly generous in pledging Algeria’s backing for numerous loans, thus seriously compromising the Algerian treasury. Finally, the Algerian negotiators refused to assume certain debts they considered to be “odious debts” or “war debts” which France had charged to Algeria.

(37) This brief account, which shows the extent of the controversy surrounding even the question how to refer to the debts (French State debts or debts proper to the dependent territory), gives an indication of the complexity of the Algerian-French financial dispute, which the negotiators finally settled at the end of 1966.<sup>388</sup>

(38) As to the independence of British dependencies, it would appear that borrowings of British colonies were made by the colonial authorities and were charges on colonial revenues alone.<sup>389</sup> The general practice appears to be that, upon attaining independence, former British colonies succeeded to four categories of loans: loans under the colonial Stock Acts; loans from IBRD; colonial welfare and development loans; and other raisings in the London and local stock markets.<sup>390</sup> It would therefore seem that such debts were considered to be debts proper to the dependent territory and hence might be outside the scope of the draft articles, in view of the definition of State debts as those of the predecessor State.

#### (c) *Financial situation of newly independent States*

(39) International law cannot be codified or progressively developed in isolation from the political and economic context in which the world is living at present. The rules which the Commission is to propose to the international community must reflect that community’s concerns and needs. For that reason, it is impossible to evolve a set of rules concerning State debts for which newly independent States are liable without to some extent taking into account the situation in which a number of these States find themselves.

(40) Unfortunately, statistical data are not available to show exactly how much of the extensive debt problem of these countries is due to the fact of their having attained independence and assumed certain debts in connexion with the succession of States and how much to the loans which they have had to contract as sovereign States in an attempt to overcome their under-development.<sup>391</sup> Similarly, the relevant statistics covering all the developing countries cannot easily be broken down in order to individualize and illustrate the specific situation of the newly independent States since the Second World War. The figures given below relate to the external debt of the developing countries; they include the Latin Ameri-

<sup>388</sup> One writer has stated that the 1966 agreement constituted “a compromise” (Rousseau, *op. cit.*, p. 454).

<sup>389</sup> O’Connell, *State Succession...* (*op. cit.*), p. 423.

<sup>390</sup> *Ibid.*, p. 424.

<sup>391</sup> The statistics published or made available by international economic or financial organizations are not sufficiently detailed to enable a distinction to be drawn between debts which predate and debts which postdate independence. OECD has published various studies and numerous tables giving a break-down of debts by debtor country, type of creditor and type of debt, but with no indication of whether the debts are “colonial debts”. See OECD, *Total external liabilities of developing countries* (Paris, 1974).

<sup>387</sup> United Nations, *Treaty Series*, vol. 507, pp. 57 and 59.

can countries—in other words, countries decolonized long ago. Here the aim is not so much to calculate precisely the financial burden resulting from the assumption by the newly independent States of the debts of the predecessor States, but rather to highlight a dramatic and widespread debt problem affecting the majority of the developing countries. This context and this situation impart special and specific overtones to succession of States involving newly independent States which do not arise, normally, in connexion with other types of succession.

(41) The increasingly burdensome debt problem of these countries has become a structural phenomenon, whose profound effects were apparent long before the present international economic crisis. The Commission on International Development (the "Pearson Commission") estimated that by 1977 debt service alone (annual amortization and interest payments) would exceed the total amount of new loans by 20 per cent in Africa and by 30 per cent in Latin America. In 1960, the developing countries' external public debt already amounted to several billion dollars. During the 1960s, the total indebtedness of the 80 developing countries studied by UNCTAD increased at an annual rate of 14 per cent, so that at the end of 1969 the external public debt of these 80 countries amounted to \$59 billion.<sup>392</sup> It was estimated that, at the same date, the total sums disbursed by those countries simply for servicing of the public debt and repatriation of profits would be \$11 billion.<sup>393</sup> At that time already, the servicing of the public debt of certain developing countries alone consumed over 20 per cent of their total export earnings. As at 31 December 1973, the data collected by the World Bank for 86 developing countries showed a total outstanding external public debt of \$119 billion,<sup>394</sup> which is about double the amount calculated by UNCTAD in 1969 for 80 countries. Service payments on the public debt alone, excluding all other financial outflows, then amounted to \$11 billion.<sup>395</sup>

(42) This considerable increase in the external debt placed an unbearable burden on certain countries. For Zambia, for example, service payments on the external public debt represented 28 per cent of the value of exports in 1973 compared with 2.4 per cent in 1967; for Peru, the figure was 32.5 per cent compared with 3 per cent; for Uruguay, 30.1 per cent compared with 17 per cent; and for Egypt, 34.6 per cent compared with 19.5 per cent. Facing the same

difficulties, India renegotiated its debt in 1971, Chile and Pakistan did so in 1972, and India along with Pakistan did so again in 1973. But other developing countries were in an equally alarming situation:

During the past years, a growing number of developing countries have experienced debt crises which warranted debt relief operations. Multilateral debt renegotiations were undertaken, often repeatedly, for Argentina, Bangladesh, Brazil, Chile, Ghana, India, Indonesia, Pakistan, Peru and Turkey. In addition, around a dozen developing countries were the subject of bilateral debt renegotiations. Debt crises have disruptive effects on the economies of developing countries and a disturbing influence on creditor/debtor relationships. Resource providers and recipients should therefore ensure that the international resource transfer is effected in such a way that it avoids debt difficulties of developing countries.<sup>396</sup>

(43) The considerable increase in inflation in the industrialized economies, which began in 1973, was to have serious consequences for the developing countries, which depend heavily on those economies for their imports, and thus aggravated their external debt. Whereas the average annual rate of inflation had been 4 per cent from 1962 to 1972 in the industrialized economies, it rose sharply to 7.1 per cent in 1973, 11.9 per cent in 1974 and 10.5 per cent in 1975.<sup>397</sup> Certain countries, such as Japan and the United Kingdom, experienced inflation rates of 20.8 per cent in 1974 and 20 per cent in 1975 respectively. As a result of this situation, the prices of manufactures exported by the developed countries increased at an exceptionally high rate, which led to a further deterioration in terms of trade to the detriment of the developing countries.

(44) In fact, the current deficit of these non-oil-exporting countries increased from \$9.1 billion in 1973 to \$27.5 billion in 1974 and \$35 billion in 1976.<sup>398</sup> These deficits resulted in a huge increase in the outstanding external debt of the developing countries and in service payments on that debt in 1974 and 1975. The preliminary information available indicates that the outstanding external public debt of these countries increased by at least one third between 1973 and the end of 1975. If this information proves to be accurate, this would give for 31 December 1975 an outstanding debt of well over \$150 billion for the sample of 86 countries used by the World Bank, which includes oil-exporting countries with large deficits such as Algeria and Indonesia.

(45) This assumption appears to be confirmed by the results of a recent study by IMF, which reveals that the total outstanding guaranteed public debt increased from about \$62 billion in 1973 to an estimated \$95.6 billion in 1975—an increase of one third.<sup>399, 400</sup>

<sup>392</sup> UNCTAD, *Debt problems of developing countries: Report by the UNCTAD secretariat* (United Nations publication, Sales No. E.72.II.D.12), para. 12.

<sup>393</sup> See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. III, *Financing and invisibles* (United Nations publication, Sales No. E.73.II.D.6) p. 71, document TD/118/Supp.5, para. 4.

<sup>394</sup> IBRD, *Annual Report, 1975* (Washington D.C.), p. 81.

<sup>395</sup> *Ibid.*, p. 97, statistical annex, table 8. See also OECD, *Development Co-operation — 1976 Review* (report by M. J. Williams, Chairman of the Development Assistance Committee) (Paris, 1976), pp. 41 *et seq.* and 254 *et seq.*

<sup>396</sup> OECD, *Les problèmes d'endettement des pays en développement* (Paris, 1974), p. 2.

<sup>397</sup> IMF, "World economic outlook: General survey", December 1975, p. 3, table 1.

<sup>398</sup> IMF, "World economic outlook: Developments and prospects in the non-oil primary producing countries", p. 4, table 1.

<sup>399</sup> IMF, "World economic outlook: Developments and prospects in the non-oil primary producing countries", table 8.

<sup>400</sup> The figures differ from those of IBRD because of the difference in the countries chosen, in the elements studied and in the method of calculation used.

(46) In addition, while the developing countries' indebtedness was increasing, the relative value of official development assistance was declining: the volume of such transfers has declined from 0.33 per cent of GNP in 1970–1972 to 0.29 per cent, although the International Development Strategy called for a minimum transfer of 1 per cent.

(47) In addition to and simultaneously with this trend, there was a considerable increase in reverse transfers of resources in the form of repatriation of profits made by investors from developed countries in developing countries. According to data for the balance of payments of 73 developing countries, financial outflows of such profits increased from \$6 billion in 1970 to \$12 billion in 1973, so that the increase in the absolute value of resources transferred to the developing countries in fact conceals a worsening of the debt situation of those countries. It has been estimated that the total percentage of export earnings used for debt service will be 29 per cent in 1977 compared with 9 per cent in 1965.

(48) A concern about the debt problem has been reflected in the proceedings of many international meetings, of which those mentioned in this and the following two paragraphs may serve as illustrations. Solutions agreeable to both developing countries and industrialized creditor States to remedy this dramatic situation have not been easy to achieve. The debtor countries have indicated that, in their view, their indebtedness is such that, if it is not reconsidered, it may cancel out any development effort.<sup>401</sup>

(49) The issue of the cancellation of the debts of the former colonized countries has been raised by certain newly independent States.<sup>402</sup> The General Assembly,

<sup>401</sup> At the Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers in 1973, the problem was stated as follows:

"The adverse consequences for the current and future development of developing countries arising from the burden of external debt contracted on hard terms should be neutralized by appropriate international action..."

"Appropriate measures should be taken to alleviate the heavy burden of debt-servicing, including the method of rescheduling." (Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries. "Action programme for economic co-operation" (see A/9330 and Corr.1 section entitled "International monetary and financial systems", paras. 6–7).)

<sup>402</sup> Speaking at the sixth special session of the United Nations General Assembly, in his capacity as Chairman of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, the Head of State of Algeria declared:

"In this regard it would be highly desirable to examine the problem of the present indebtedness of the developing countries. In this examination, we should consider the cancellation of the debt in a great number of cases and, in other cases, re-financing on better terms as regards maturity dates, deferrals and rates of interest."

(Official Records of the General Assembly, Sixth Special Session, Plenary Meetings, 2208th meeting, para. 136.)

At the second session of the United Nations Conference on Trade and Development, held at New Delhi, Mr. L. Nègre, Minister of Finance of Mali, stated at the 58th plenary meeting:

"Many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign powers ... the developing countries asked their creditors to show a

by resolution 3202 (S-VI) of 1 May 1974, adopted the "Programme of Action on the Establishment of a New International Economic Order", which provided in section II.2 that all efforts should be made to take, *inter alia*, the following measures:

(f) Appropriate urgent measures, including international action, should be taken to mitigate adverse consequences for the current and future development of developing countries arising from the burden of external debt contracted on hard terms;

(g) Debt renegotiation on a case-by-case basis with a view to concluding agreements on debt cancellation, moratorium, rescheduling or interest subsidization.

(50) Resolution A/31/158, adopted by the General Assembly of the United Nations on 21 December 1976, concerning "debt problems of developing countries" states:

The General Assembly,

...

*Convinced* that the situation facing the developing countries can be mitigated by decisive and urgent relief measures in respect of ... their official ... debts ...,

*Acknowledging* that, in the present circumstances, there are sufficient common elements in the debt-servicing difficulties faced by various developing countries to warrant the adoption of general measures relating to their existing debt,

*Recognizing* the especially difficult circumstances and debt burden of the most seriously affected, least developed, land-locked and island developing countries,

1. *Considers* that it is integral to the establishment of the new international economic order to give a new orientation to procedures of reorganization of debt owed to developed countries away from the past experience of a primarily commercial framework towards a developmental approach;

2. *Affirms* the urgency of reaching a general and effective solution to the debt problems of developing countries;

3. *Agrees* that future debt negotiations should be considered within the context of internationally agreed development targets, national development objectives and international financial co-operation, and debt reorganization of interested developing countries carried out in accordance with the objectives, procedures and institutions evolved for that purpose;

4. *Stresses* that all these measures should be considered and implemented in a manner not prejudicial to the credit-worthiness of any developing country;

5. *Urges* the International Conference on Economic Co-operation to reach an early agreement on the question of immediate and generalized debt relief of the official debts of the developing countries, in particular of the most seriously affected, least developed, land-locked and island developing countries, and on the re-

greater spirit of equity and suggested that, during the present Conference, they might decree ... the cancellation of all debts contracted during the colonial period ... (Proceedings of the United Nations Conference on Trade and Development, second session, vol. I (and Corr.1, 3 and 4, and Add.2), Report and annexes (United Nations publication, Sales No. E.68.II.D.14), annex V, p. 140.)

During an official visit to French-speaking Africa, the President of the French Republic, Mr. G. Pompidou, decided to cancel a debt of about 1 billion francs owed by 14 African countries. That gesture, which was well received, does not fall within the scope of this draft, which is not concerned with the debt-claims of the predecessor State (constituting State property of that State). See France, *Journal officiel de la République française: Lois et décrets* (Paris), 20 July 1974, 106th year, No. 170, p. 7577.

organization of the entire system of debt renegotiations to give it a developmental rather than a commercial orientation.<sup>403</sup>

(d) *Rule reflected in article 22*

(51) It may, at this juncture, be helpful to recall the scope of part II of the draft articles and the provisions of article 18, defining "State debt". As has been noted,<sup>404</sup> debts proper to the territory to which a succession of States relates and contracted by one of its territorial authorities are excluded from the scope of "State debts" in this draft, as they may not properly be considered to be the debts of the predecessor State. In adopting such an approach in the context of decolonization, the Commission is aware that not all problems relating to succession in respect of debts are settled for newly independent States by article 22. In fact, the bulk of the liabilities involved in the succession may not, in the case of decolonization, consist of State debts of the predecessor State. They may be debts said to be "proper to the dependent territory", contracted under a very formal financial autonomy by the organs of colonization in the territory, which may constitute a considerable volume of liabilities. As has been seen, disputes have frequently arisen concerning the real nature of debts of this kind, which are at times considered by the newly independent State as "State debts" of the predecessor State, which must remain the responsibility of the latter. The category of debts directly covered by article 22 is therefore those debts contracted by the Government of the administering Power on behalf and for the account of the dependent territory. These are, properly speaking, the State debts of the predecessor State, the fate of which upon the emergence of a newly independent State is the subject-matter of the article.

(52) Also excluded are certain debts assumed by a successor State within the context of an agreement or arrangement providing for the independence of the formerly dependent territory. They include "miscellaneous debts" resulting from the take-over by the newly independent State of, for example, all public services. They do not appear to be debts of the predecessor State at the date of the succession of States but rather correspond to what the successor State pays for the final settlement of the succession of States. Indeed, such debts may be said to represent "debt-claims" of the predecessor State against the successor State for the settlement of a dispute arising on the occasion of the succession of States.<sup>405</sup>

<sup>403</sup> The Conference on International Economic Co-operation (sometimes referred to as the "North-South Conference") did not reach a final agreement on the issue of debt relief or reorganization.

<sup>404</sup> See paras. (15) *et seq.* of the commentary to articles 17 and 18.

<sup>405</sup> Another category of debts should be excluded, that of the "national" debt of the predecessor State. Such debts would be contracted by the predecessor State for its own account and for its own national metropolitan use, but part of which it was decided should be borne by its various dependent territories. This category

Finally, as explained above,<sup>406</sup> the Commission has left aside for the time being the question of drafting general provisions relating to the question of "odious debts".

(53) Further in regard to the scope of the present article, State practice concerning the emergence of newly independent States has shown the existence of another category of debts: those contracted by a dependent territory but with the guarantee of the administering Power. That is the case in particular with most loans contracted between dependent territories and IBRD.<sup>407</sup> The latter required a particularly sound guarantee from the administering Power. In most, if not all, guarantee agreements concluded between IBRD and an administering Power for a dependent territory, there are two important articles, articles II and III:

*Article II*

*Paragraph 2.01.* Without limitation or restriction upon any of the other covenants on its part in this Guarantee Agreement contained, the guarantor hereby unconditionally guarantees, as primary obligor and not as surety merely,\* the due and punctual payment of the principal of, and the interest and other charges on the loan ...

*Paragraph 2.02.* Whenever there is reasonable cause to believe that the borrower will not have sufficient funds to execute or to arrange the execution of the project in conformity with the Loan Agreement, the guarantor, in consultation with the Bank and the borrower, will take the measures necessary to help the borrower to obtain the additional funds required.

concerns the archaic practices of certain States during the time of colonial empires several centuries ago, which are irrelevant in the contemporary world. It also concerns certain rare cases occurring in modern times when the administering Power, in the face of national or international danger (such as the First and Second World Wars) may have contracted loans to sustain its war effort and associated its dependent territories in such efforts by requesting them to contribute. (This does not, of course, relate to military efforts directed against the dependent territory itself.) As this category of debts is exceptionally rare, it was decided to leave it aside in the present context.

<sup>406</sup> See paras. (42) to (44) of the commentary to articles 17 and 18.

<sup>407</sup> Several examples may be given: Guarantee Agreement (Northern Rhodesia — Rhodesia Railways Project) between the United Kingdom and IBRD, signed at Washington on 11 March 1953" (United Nations, *Treaty Series*, vol. 172, p. 115); Guarantee Agreement (Rhodesia Railways Project) between the Federation of Rhodesia and Nyasaland and IBRD and the United Kingdom and the Colony of Southern Rhodesia and the Territory of Northern Rhodesia, signed at Washington on 2 October 1954 (*ibid.*, vol. 201, p. 179); Guarantee Agreement (Rhodesia Railways Project) between the United Kingdom and IBRD, signed at New York on 16 June 1958 (*ibid.*, vol. 309, p. 35); Guarantee Agreement (Kenya — Land Settlement and Development Project) between the United Kingdom and IBRD, signed at Washington on 29 November 1961 (*ibid.*, vol. 426, p. 49); Guarantee Agreement (Southern Rhodesia — Electric Power Project) between the United Kingdom and IBRD, signed at Washington on 27 February 1952 (*ibid.*, vol. 159, p. 181); Guarantee Agreement (Kariba Project) between the United Kingdom and IBRD, signed at Washington on 21 June 1956 (*ibid.*, vol. 285, p. 317).

## Article III

*Paragraph 3.01.* It is the mutual understanding of the guarantor and the Bank that, except as otherwise herein provided, the guarantor will not grant, in favour of any external debt, any preference or priority over the loan . . .

(54) In the case of a guaranteed debt, the guarantee thus furnished by the administering Power legally creates a specific obligation for which it is liable, and a correlative subjective right of the creditor. If the succession of States had the effect of extinguishing the guarantee altogether and thus relieving the predecessor State of one of its obligations, a right of the creditor would unjustifiably disappear. The problem is not, therefore, to determine what happens to the debt proper to the dependent territory—which, it appears, is in fact normally assumed by the newly independent State—but rather to ascertain what becomes of the element by which the debt is supported, furnished in the form of a guarantee by the administering Power. In other words, what is at issue is not succession to the debt proper to the dependent territory but succession to the obligation of the predecessor State in respect of the territory's debt.

(55) The practice followed by IBRD in this regard seems clear. The Bank turns first to the newly independent State, for it considers that the loan agreements signed by the dependent territory are not affected by a succession of States as long as the debtor remains identifiable. For the purposes of these loan agreements, IBRD seems to consider, as it were, that the succession of States has not changed the identity of the entity which existed before independence. However, the World Bank considers—and the predecessor State which has guaranteed the loan does not in any way deny—that the legal effects of the contract of guarantee continue to operate after the territory has become independent, so that the Bank can at any time turn to the predecessor State if the successor State defaults. The practice of the World Bank shows that the predecessor State cannot be relieved of its guarantee obligation as the principal debtor unless a new contract is concluded to this effect between IBRD, the successor State and the predecessor State, or between the first two for the purpose of relieving the predecessor State of all charges and obligations which it assumed by virtue of the guarantee given by it earlier.

(56) Bearing these considerations in mind, the Commission considers it sufficient to note that a succession of States does not as such affect a guarantee given by a predecessor State for a debt assumed by one of its formerly dependent territories.

(57) In the search for a general solution to the question of the fate of State debts of the predecessor State upon the emergence of a newly independent State, some writers have stressed the criterion of the utility or actual benefit which the loan afforded to the formerly dependent territory.<sup>408</sup> While such a criterion

may appear useful at first glance, it is clear that to establish it as the basic rule governing the matter at issue would be extremely difficult to apply in practice. During a regional symposium held at Accra by UNITAR in 1971, the question was raised in the following terms:

To justify the transfer of debts to a newly independent State, it was argued . . . that, since in a majority of cases the metropolitan Power made separate fiscal arrangements for the colony, it would be possible to determine the nature and extent of such debts. One speaker argued that any debt contracted on behalf of a given colony was not necessarily used for the benefit of that colony. He suggested that perhaps the determining factor should be whether the particular debt was used for the benefit of the colony. Although this point was generally acceptable to several delegates, doubt was raised as regards how the utility theory would in practice be applied, i.e., who was to determine and in what manner the amount of the debt which had actually been used on behalf of the colony.<sup>409</sup>

(58) In the case of loans granted to the administering Power for the development of the dependent territory (criterion of intended use and allocation), the colonial context in which the development of the territory may take place as a result of these loans must be kept in mind. It is by no means certain that the investment in question did not primarily benefit a foreign colonial settlement or the metropolitan economy of the administering Power.<sup>410</sup> Even if the successor State retained some "trace" of the investment, in the form, for example, of public works infrastructures, such infrastructures might be obsolete or unusable in the context of decolonization, with the new orientation of the economy or the new planning priorities decided upon by the newly independent State.

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ing does not relate to decolonization: that of the transfer of former German colonies to administering Powers under the mandate system established under the League of Nations. According to article 257, paragraph 1, of the Treaty of Versailles (for reference to Treaty, see foot-note 276), neither the former colonial territory nor the Mandatory Power "shall be charged with any portion of the debt of the German Empire or States". The draft provision of the treaty to the same effect was objected to during the negotiations by the German delegation, which asked for reimbursement for expenditures made. This prompted a reply by the Allied and Associated Powers, which gave several reasons for the provision, including the following: the budget of the German colonies had often shown deficits and they were unable to assume part of the German debt; the indigenous inhabitants had derived no benefits from German investments; and German expenditures were generally of a military and unproductive nature, having been made in the exclusive interest of the metropolitan country. See Feilchenfeld, *op. cit.*, pp. 441-443, 548-566 and "Reply of the Allied and Associated Powers", *British and Foreign State Papers, 1919*, vol. CXII (London, H. M. Stationery Office, 1922), pp. 271-273, 290.

<sup>409</sup> Report of the United Nations Regional Symposium on International Law for Africa, Accra, Ghana, 14-28 January 1971, organized by UNITAR at the invitation of the Ghanaian Government, p. 9.

<sup>410</sup> Mention may be made of article 255, section 2, of the Treaty of Versailles, which provided that:

"In the case of Poland that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland shall be excluded from the apportionment to be made under Article 254"; *British Foreign and State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), p. 125.

<sup>408</sup> Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 296-297.

It may be of interest to note here a case which properly speak-

(59) Another factor to be taken into account in the drafting of a general rule concerning the subject-matter of this article is the capacity of the newly independent State to pay the relevant debts of the predecessor State. This factor has arisen in State practice in connexion with cases other than that of newly independent States. The Permanent Court of Arbitration, in the *Russian Indemnity* case<sup>411</sup> of 1912, recognized that

The defence of *force majeure* ... may be pleaded in public as well as in private international law: international law must adapt itself to political necessities.<sup>412</sup>

The treaties of peace concluded following the end of the First World War seem to indicate that, in the apportionment of predecessor State debts between various successor States, the financial capacity of the latter States, in the sense of future paying capacity (or contributing capacity), was in some cases taken into account.<sup>413</sup> One author quotes an example of State practice in 1932, in which the creditor State (the United States) declared in a note to the debtor State (the United Kingdom) that the principle of capacity to pay did not require that the foreign debtor should pay to the full limit of its present or future capacity as no settlement which was oppressive and which delayed the recovery and progress of the foreign debtor was in accordance with the true interest of the creditor.<sup>414</sup>

(60) Transposed to the context of succession to debts in the case of newly independent States, these considerations relating to the financial capacity of the debtor are of great importance to the search for a basic rule governing such succession. The Commission is not unaware of the fact that cases of "State default" involve debts already recognized by and assigned to the debtor whereas, in the cases with which this article is concerned, the debt is not yet "assigned" to the successor State and the whole problem is first to decide whether the newly independent State must be made legally responsible for such a debt before deciding whether it can assume it financially. Nevertheless, the two questions must be linked if practical and just solutions are to be found to situations in which "prevention is better than cure". It may be asked what purpose is served by affirming in a rule that certain debts are transferable to a newly independent State if its economic and financial difficulties are already known in advance to constitute a substantial impediment to the payment of such debts.<sup>415</sup> Admittedly, taking into account explicitly in a draft article the "financial capacity" of a

State would involve a somewhat vague phrase and may leave the way open for abuses. On the other hand, it is neither possible nor realistic to ignore the reasonable limits beyond which the assumption of debts would be destructive for the debtor and without result for the creditor.

(61) The above general considerations concerning the capacity to pay must be viewed in relation to the developments occurring in contemporary international relations concerning the principle of the permanent sovereignty of every people over its wealth and natural resources, which constitutes a fundamental element in the right of peoples to self-determination. That principle has been strongly affirmed not only in resolutions of the General Assembly<sup>416</sup> but also in treaties adopted within the framework of the United Nations. Thus article 1, paragraph 2, of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reads as follows:

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>417</sup>

(62) The General Assembly of the United Nations has only recently reiterated and developed that principle. By resolution 3201 (S-VI) of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order", the General Assembly declared that that order should be founded on full respect for various principles, including the following:

(e) Full permanent sovereignty of every State over its natural resources and all economic activities ...;

(f) The right of all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples.

In resolution 3202 (S-VI) of the same day, entitled "Programme of Action on the Establishment of a New International Economic Order", the General Assembly stated (sect. VIII):

All efforts should be made:

(a) To defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources.

The Charter of Economic Rights and Duties of States<sup>418</sup> provides in article 2, paragraph 1, that:

<sup>411</sup> United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 421.

<sup>412</sup> *Ibid.*, p. 443. [Translation by the Secretariat.]

<sup>413</sup> See Rousseau, *op. cit.*, pp. 442-447, 464-466, and Feilchenfeld, *op. cit.*, pp. 458-461, 852-856.

<sup>414</sup> Jèze, "Les défaillances d'Etats" (*loc. cit.*), p. 392.

<sup>415</sup> "Reconstruction of their economies by several new States have raised questions of the continuity of financial and economic arrangements made by the former colonial powers or by their territorial administrations." (International Law Association, *op. cit.*, p. 102.)

<sup>416</sup> See, for example, General Assembly resolutions 626 (VII) of 21 December 1952, 1803 (XVII) of 14 December 1962, 2158 (XXI) of 25 November 1966, 2386 (XXIII) of 19 November 1968 and 2692 (XXV) of 11 December 1970. See also Economic and Social Council resolutions 1737 (LIV) of 4 May 1973 and 1956 (LIX) of 25 July 1975.

<sup>417</sup> General Assembly resolution 2200 A (XXI) of 16 December 1966, annex.

<sup>418</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

Article 16, paragraph 1, of that Charter states:

It is the right and duty of all States, individually and collectively, to eliminate colonialism ... neocolonialism ... and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

(63) The principle of the permanent sovereignty of every people over its wealth and natural resources, as it emerges from United Nations practice, is of substantial significance in the context of the financial capacity of newly independent States to succeed to State debts of the predecessor State which may have been linked to such resources (which may for example have been pledged as security for a debt). Thus the traditional issue of "capacity to pay" must be seen in its contemporary framework, taking into account the present financial situation of newly independent States<sup>419</sup> as well as the implications of the paramount right of self-determination of peoples and the principle of the permanent sovereignty of every people over its wealth and natural resources.

(64) In attempting to draft a basic rule applicable to the succession to State debts of the predecessor State by newly independent States, the Commission has approached its task by drawing inspiration from Article 55 of the United Nations Charter:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health and related problems; and international cultural and educational co-operation; ...

The need for stability and orderly relations between States, necessary for peaceful and friendly relations, cannot be divorced from the principles of equal rights and self-determination of peoples or from the over-all efforts of the present-day international community to promote conditions of economic and social progress and to provide solutions of international economic problems. State practice and the writings of jurists do not provide clear and consistent answers to the question of the fate of State debts of the former metropolitan Power. Thus, the Commission is aware that, in drawing up rules governing the subject-matter, it is inevitable that a measure of progressive development of the law should be involved. State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles,

<sup>419</sup> See paras. 39-50 above.

and serious divergencies of views, which continue to manifest themselves many years after the purported settlement of a succession of States. It is true, nevertheless, that in many cases the State debts of the predecessor metropolitan State have not passed to the newly independent State. The Commission cannot but recognize certain realities of present-day international life, in particular, the severe burden of debt reflected in the financial situation of a number of newly independent States, nor can it ignore, in the drafting of legal rules governing succession to State debts in the context of decolonization, the legal implications of the fundamental right of self-determination of peoples and of the principle of the permanent sovereignty of every people over its wealth and natural resources. The Commission considered the possibility of drafting a basic rule along lines which would speak of the passage of such debts if the dependent territory actually benefited therefrom. But as indicated above,<sup>420</sup> that criterion taken alone seems difficult to apply in practice, and does not provide for stable and friendly resolution of the problems. It should not be forgotten that the subject-matter at issue—the succession to State debts of a metropolitan Power by a newly independent State—takes place wholly within the context of decolonization, which imports special and unique considerations not found in other types of succession of States. The latter consideration also implies the necessity to avoid such general language as "equitable proportion", which has proved appropriate in other types of succession but which would raise serious questions of interpretation and possible abuse in the context of decolonization.

(65) The Commission, in the light of all the above considerations, decided to adopt as a basic rule the rule of the non-passing of the State debt of the predecessor State to the successor State. This rule is found in the *first part of paragraph 1* of article 22, which states: "No State debt of the predecessor State shall pass to the newly independent State ...". Having thus provided for the basic rule of non-passage, however, the Commission did not wish to foreclose the important possibility of an agreement on succession to State debts being validly and freely concluded between the predecessor and successor States. The Commission was fully aware that newly independent States often need capital investment and that it should avoid formulating rules which might discourage States or financial international organizations from providing the necessary assistance. Thus, the *second part of paragraph 1* of article 22 is intended to follow the spirit of other provisions of the draft which encourage the predecessor and successor States to settle the question of the passing of State debts by agreement between themselves. Of course, it must be emphasized that such agreements must be validly concluded pursuant to the will freely expressed by both parties. To bring that consideration more sharply into focus, the second part of paragraph 1 has been drafted so as to spell out the necessary conditions

<sup>420</sup> See paras. 57 and 58 above.

under which such an agreement should be concluded. Thus, first, the State debt of the predecessor State must be "connected with its activity in the territory to which the succession of States relates." The language generally follows that found in other articles of the draft already adopted concerning succession to State property (see, in particular, article 11, and also articles 12, 13, 15 and 16). Its purpose is clearly to exclude from consideration debts of the predecessor State having nothing whatsoever to do with its activities as metropolitan Power in the dependent territory concerned. Second, that State debt of the predecessor State, connected with its activity in the territory concerned, is to be linked "with the property, rights and interests which pass to the newly independent State". If the successor State succeeds to certain property, rights and interests of the predecessor State, as provided for under article 13, it is only natural that an agreement on succession to State debts should take into account the corresponding obligations which may accompany such property, rights and interests. Thus articles 13 and 22 are closely connected in that respect. While the use of the criterion of "actual benefit" in general has been avoided, it could be seen that certain elements of that criterion have been usefully reflected here: the passing of debts may be settled by agreement in view of the passing of benefits (property, rights and interests) to which those debts are linked. The paragraph as a whole reads:

No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

(66) While the parties to the agreement envisaged in paragraph 1 may freely agree on the provisions to be included therein, the Commission felt it necessary to provide a safeguard clause to ensure that such provisions do not ignore the financial capacity of the newly independent State to succeed to such States or infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.<sup>421</sup> Such a safeguard, which is included in *paragraph 2*, is particularly necessary in the case of an agreement mentioned in paragraph 1, that is, one concluded between a former metropolitan Power and one of its former dependencies. By paragraph 2, it is intended to underline once again that the agreement must be concluded by the two parties on an equal footing. Thus agreements which purport to establish "special" or "preferential" ties between the predecessor and successor States (often termed "devolution agreements"), which in fact impose on the newly independent State terms that are ruinous to their economies, cannot be considered as the type of agreement envisaged in paragraph 1. The article presupposes, and paragraph 2 is intended to reinforce that supposition, that the agreements are to be negotiated in

full respect for the principles of political self-determination and economic independence. Hence the express reference to the principle of the permanent sovereignty of every people over its wealth and natural resources and to the fundamental economic equilibria<sup>422</sup> of the newly independent State. The Commission has already had occasion to take a position on these matters when, at its twenty-eighth session, it adopted article 13, concerning the succession of a newly independent State to State property of the predecessor State.<sup>423</sup> It may further be noted that the paragraph does not speak of the agreement itself but rather of its provisions and their implementation, as the question of the validity of the agreement itself is not the subject-matter under consideration. Thus paragraph 2 reads as follows:

The provisions of the agreement referred to in the preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibria of the newly independent State.

It may be noted that, in the English text, it was considered appropriate to use the word "should" to convey the intended meaning that, while the freedom of the parties to negotiate was not impaired, certain essential guidelines existed. Certain members also questioned the necessity and appropriateness of including the word "fundamental".

(67) The Commission would further recall certain decisions relating to other articles of the draft already adopted which bear upon article 22. The definition of "newly independent State" was adopted by the Commission at its twenty-eighth session as article 3 (*f*).<sup>424</sup> As in the case of article 13, article 22 is intended to apply to cases in which the newly independent State is formed from two or more dependent territories. Likewise, the article applies to cases where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations. As explained in the report on the work of its twenty-eighth session,<sup>425</sup> the Commission considered it more appropriate to deal with this latter case of succession within the context of the case of newly independent States, unlike the 1974 draft articles on succession of States in respect of treaties, which included that case under "succession in respect of part of territory" in the context of a simple transfer of territory. The association or integration of a formerly dependent territory with an

<sup>422</sup> In this connexion, attention may be drawn to the fact that the word "disequilibria" is found in article 60 of the Treaty instituting the European Coal and Steel Community (United Nations, *Treaty Series*, vol. 261, p. 191), and in article 3 (*g*), of the Treaty establishing the European Economic Community (*ibid.*, vol. 298, p. 16).

<sup>423</sup> *Yearbook... 1976*, vol. II (Part Two), pp. 139-140, 146-147, document A/31/10, chap. IV, sect. B.2, article 13 and paras. 27-33 of the commentary.

<sup>424</sup> *Ibid.*, p. 140, article 3 and para. 1 of the commentary.

<sup>425</sup> *Ibid.*, p. 129, document A/31/10, chap. IV, sect. B.2, para. 5 of the introductory commentary to section 2 of part I of the draft; and pp. 141 and 146, article 13, paras. 4 and 26 of the commentary.

<sup>421</sup> See paras. 39-50 and 59-63 above.

independent State (other than the former metropolitan Power) is a mode of implementing the right of self-determination of peoples and is therefore logically to be included in article 22, dealing with newly independent States. Finally, it will be recalled that article 13, concerning succession to State property, did not include a specific reference to the fate of property acquired by the dependent territory in its own name and in its own right prior to the date of the succession of States. Similarly, the Commission has not felt it necessary to deal with the self-evident case of debts of the predecessor State owed to the dependent territory, which continue to be payable, after the date of the succession of States, to the newly independent State.

(68) Certain members of the Commission were unable to support the text of article 22 and expressed reservations and doubts thereon, and one member expressed reservations on certain paragraphs of the commentary to this article as well.<sup>426</sup> One member proposed an alternative text for the article,<sup>427</sup> which received a measure of support from some members. The view was expressed that it was preferable, as a

<sup>426</sup> One member objected to the inclusion of paragraphs (39) to (50) of the present commentary, particularly on the grounds that they contain, in his view, economic exposition and analysis which are not within the sphere of the Commission's competence and that such exposition and analysis in some aspects are debatable. That member also considered it important, in relation to paragraph (62) of the commentary, to note that a number of States had dissented from the quoted elements of the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order.

<sup>427</sup> That text (A/CN.4/L.257) reads as follows:

*"Article 22. Newly independent States"*

"1. No debt contracted by the predecessor State on behalf or for the account of a territory which has become a newly independent State shall pass to the newly independent State unless the debt related to property, rights and interests of which the newly independent State is beneficiary and unless that passage of debt is in equitable proportion to the benefits that the newly independent State has derived or derives from the property, rights and interests in question.

"2. Any agreement concluded between the predecessor and the newly independent State for the implementation of the principles contained in the preceding paragraph shall pay due regard to the newly independent State's permanent sovereignty over its natural wealth and resources in accordance with international law."

matter of principle, to admit the possibility that a State debt of the predecessor State might pass to the successor State in some way other than by an agreement between the two States, even though in State practice such passage was normally effected by agreement. Such a passing other than by agreement would still, it was said, be severely limited, in much the same manner as that spelled out in paragraph 1 of the adopted text, concerning the conditions for the conclusion of an agreement, and would indeed provide an incentive for the conclusion of agreements between predecessor and successor States. Concerning the question of permanent sovereignty over natural resources, preference was expressed for the terminology found in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It was further believed that the text of article 22 as adopted could have the effect of discouraging loans to the remaining colonial territories. Another view expressed was that article 22 should have stated a certain number of legal rules: the basic principle of the non-passage of State debts of the predecessor State to the successor State and an exception to that rule based on equity, however limited. The provisions of the present paragraph 2 would then provide the procedures to be applied in the case of difficulties, namely, by agreement. According to that point of view, the article's major defects were that it did not allow for the slightest exception to the basic rule and that it mixed questions of principle with questions relating to the settlement of disputes, according a predominant place to the latter.

(69) To conclude, one member proposed on the other hand that the rule expressed in article 22 should be simplified by making it a straightforward statement of the principle that no State debt of the predecessor State is transferable to the newly independent State, unless both States otherwise agree.<sup>428</sup>

<sup>428</sup> That text (A/CN.4/L.254) reads as follows:

*"Article 22. Newly independent States"*

"No State debt of the predecessor State shall pass to the newly independent State unless an agreement between the newly independent State and the predecessor State provides otherwise."

## Chapter IV

## QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

## A. Introduction

61. The report of the Commission on the work of its twenty-sixth session<sup>429</sup> describes the circumstances in which the Commission came to undertake the study of treaties to which an international organization is a party as well as the method it decided to follow in so doing. The Commission continued its work on that topic in accordance with several General Assembly resolutions, of which those of 14 December 1974 (resolution 3315 (XXIX), section 1, paragraph 4) and 15 December 1975 (resolution 3495 (XXX), paragraph 4 (d)) recommended that the Commission should proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations. Since then, the General Assembly has recommended, in paragraph 4 (c) (ii) of its resolution 31/97 of 15 December 1976, that the Commission should:

(c) Proceed with the preparation, on a priority basis, of draft articles on:

...

(ii) Treaties concluded between States and international organizations or between international organizations.

62. At its twenty-sixth<sup>430</sup> and twenty-seventh<sup>431</sup> sessions, the Commission adopted provisions which corresponded in large measure to articles 1 to 18 of the Vienna Convention on the Law of Treaties.<sup>432</sup> At the twenty-seventh session, it also quickly considered articles 19 to 23 as submitted by the Special Rapporteur in his fourth report,<sup>433</sup> and referred them to the Drafting Committee, but it did not have time to consider them further. In 1976, on the basis of the views expressed in the Commission, the Special Rapporteur submitted a fifth report,<sup>434</sup> devoted to articles 19 to

23, which were thus the subject of further proposals. At its twenty-eighth session, however, owing to lack of time, the Commission was unable to continue its study of the question of treaties concluded between States and international organizations or between two or more international organizations.<sup>435</sup>

63. At its present session (1429th to 1442nd meetings), the Commission considered the texts of articles 19 to 38 submitted by the Special Rapporteur in his fourth and fifth reports and in his sixth report (A/CN.4/298),<sup>436</sup> and it referred all those texts to the Drafting Committee. At its 1446th, 1448th, 1450th, 1451st, 1458th and 1459th meetings, it adopted on first reading, on the report of the Drafting Committee, the texts of articles 2, paragraph 1 (j), 19, 19 bis, 19 ter, 20, 20 bis, 21, 22, 23, 23 bis, 24, 24 bis, 25, 25 bis, 26, 27, 28, 29, 30, 31, 32, 33 and 34.

64. The texts of all the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the Commission so far, followed by the texts of articles 2, paragraph 1 (j), and 19 to 34, and the commentaries thereto, adopted at the twenty-ninth session, are reproduced below for the information of the General Assembly.<sup>437</sup>

65. The articles considered by the Commission at the present session related to reservations and entry into force and provisional application of treaties; to the observance, application and interpretation of treaties; and to treaties, third States and third international organizations. The problems with which the Commission had thus to deal differed considerably in nature and difficulty from article to article. In accordance with the method adopted from the outset, the Commission endeavoured to follow the provisions of the Vienna Convention as closely as possible, but in doing so it met with problems of both drafting and

<sup>429</sup> *Yearbook... 1974*, vol. II (Part One), pp. 290 *et seq.*, document A/9610/Rev.1, chap. IV.

<sup>430</sup> *Ibid.*, pp. 294 *et seq.*, document A/9610/Rev.1, chap. IV, section B.

<sup>431</sup> *Yearbook... 1975*, vol. II, pp. 169 *et seq.*, document A/10010/Rev.1, chap. V.

<sup>432</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention is hereinafter referred to as "the Vienna Convention".

<sup>433</sup> *Yearbook... 1975*, vol. II, p. 25, document A/CN.4/285.

<sup>434</sup> *Yearbook... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1.

<sup>435</sup> *Ibid.*, vol. II (Part Two), p. 163, document A/31/10, para. 167.

<sup>436</sup> Reproduced in *Yearbook... 1977*, vol. II (Part One).

<sup>437</sup> See section B below. Subsection 1 contains the texts of all the provisions hitherto adopted by the Commission. Subsection 2 contains the texts of the provisions adopted at the twenty-ninth session and the commentaries thereto. For the commentaries to the articles adopted at the twenty-sixth session, see foot-note 429 above; for the commentaries to the articles adopted at the twenty-seventh session, see foot-note 431 above.

substance. With regard to purely drafting questions, it was able in some articles (such as articles 26, 28, 31, 32 and 33) to reproduce the corresponding provisions of the Vienna Convention without change; other articles required only slight alterations; and in yet others, such as article 30, the clarity of the Vienna Convention could only be preserved by strenuous efforts. Quite properly, however, the Commission concentrated its attention mainly on problems of substance.

66. The source of these substantive problems is easy to identify and was explained by the Commission in its report on its twenty-seventh session.<sup>438</sup> It lies in the contradictions which may arise as between consensus based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties. The rule stated in article 6, which reflects this basic truth, clearly shows the difference between international organizations and States. Moreover, although the number and variety of international agreements to which one or more international organizations are parties have continued to increase, international practice concerning certain basic questions, such as the participation of international organizations in open multilateral treaties, is still limited,<sup>439</sup> while in regard to

<sup>438</sup> *Yearbook... 1975*, vol. II, pp. 169 *et seq.*, document A/10010/Rev.1, paras. 123 *et seq.*

<sup>439</sup> In general terms, United Nations practice recognizes the existence of "groups" or "groups of States" which, at the regional level, can at least take the place of States. Thus, in the "Definition of Aggression" (General Assembly resolution 3314 (XXIX)), the explanatory note in article 1 provides that "... the term 'State': (b) includes the concept of a 'group of States' where appropriate." In particular, article 12, para. 2, of the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)) states:

"In the case of groupings to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of the present Charter, its provisions shall also apply to those groupings in regard to such matters, consistent with the responsibilities of such States as members of such groupings".

In a more precise context, reference may also be made to article 3 of the Agreement establishing the International Fund for Agricultural Development, adopted on 13 June 1976 (A/CONF.73/15), section 1 of which provides that:

"(b) Membership shall also be open to any grouping of States whose members have delegated to it powers in fields falling within the competence of the Fund, and which is able to fulfil all the obligations of a Member of the Fund".

As will be shown later, it is in fact mainly through certain econ-

other questions, such as that of reservations formulated by organizations, it is almost non-existent.

67. This does not mean, at least in the opinion of the great majority of the Commission, that a consistently negative position should be adopted on the status of international organizations under the law of treaties or that the problems involved should be overlooked. On the contrary, the Commission has sought to take a balanced view, denying organizations some of the facilities granted to States by the Vienna Convention and applying to organizations certain rules whose flexibility had been considered appropriate for States alone. However, it has maintained for international organizations the benefit of the general rules of consensus wherever that presented no difficulties and seemed to be consistent with certain trends emerging in the modern world.

68. The *question of reservations*, dealt with in articles 19, 19 *bis*, 19 *ter*, 20, 21, 22 and 23, occupied the Commission longest.<sup>440</sup> The system established by the Vienna Convention, which seems now to meet the needs of present international society, can be described as liberal because it is based on the fundamental principle of freedom to make reservations, each State being free, within certain limits, to formulate reservations and other States remaining free to accept those reservations or to object to them. The Commission had to decide whether it should give international organizations the same freedom, with all its incidental consequences concerning acceptance and objection, or whether it should make reservations formulated by international organizations subject to a stricter rule, the principle of which would be that they could formulate only reservations expressly authorized by the treaty in question. The latter régime, which can be taken as an invitation to contracting organizations and States to define the system of reservations to be applied in each particular case, is in fact a strict régime, because experience proves that the question of reservations is often a thorny one which negotiators prefer to pass over in silence. In such cases, a general rule allowing only reservations authorized by the particular provisions of each treaty actually amounts to a prohibition of reservations.

69. In his fourth report, the Special Rapporteur adopted a very liberal position, extending to interna-

omic agreements, such as those relating to commodities, that development is taking place in the practice of opening international conventions to participation by international organizations.

<sup>440</sup> The Commission did not adopt the suggestion made by one of its members that it should reconsider the question of powers (article 7) with a view to requiring special powers expressly authorizing the formulation of reservations when international organizations formulate reservations on signing a treaty.

tional organizations the rules applicable to States;<sup>441</sup> freedom to formulate reservations, apart from the express provisions of the treaty, was restricted only by the general rule (article 19 (c) of the Vienna Convention), according to which a reservation must be compatible with the object and purpose of the treaty. However, the Commission's discussions subsequently showed that, in fact, in very many treaties to which one or more international organizations are parties, a reservation formulated by an international organization is or may be incompatible with the object and purpose of the treaty. This is so particularly because, in most cases, the functions exercised by international organizations set them apart from States. Consequently, instead of restricting international organizations to the formulation of reservations authorized by the treaty—a rule which, in the opinion of the great majority of the Commission, would be unnecessarily strict<sup>442</sup>—it is necessary to establish a more varied régime, allowing freedom to make reservations as under the Vienna Convention when that is possible, but permitting only the reservations authorized by the treaty when that seems more prudent.

70. This is what the Commission finally decided to do, amending the proposals to that effect made by the Special Rapporteur in his fourth report.<sup>443</sup> It considered that the liberal régime established by the Vienna Convention should be generally maintained in the draft articles in regard to reservations formulated by States, whereas in regard to reservations formulated by international organizations it should be preserved in two cases only: that of treaties between several international organizations, and that in which the participation of an international organization in a treaty between States and one or more international organizations, or between international organizations and one or more States, is not essential to the object and purpose of the treaty (article 19 *bis*, paragraph 3). In the first case, since all contracting parties to the treaty are international organizations, it is quite natural that the rules of consensus should be extended to their reciprocal relations. In the second case, since the participation of the organization is not essential either to the object or to the purpose of the treaty, the organization might cease to be a contracting party without causing the treaty to lapse, and there is thus no reason to prevent it from reducing its commitments by means of a reservation. In the main, what is actually envisaged here is the situation where a multilateral treaty is open to participation by most

States and admits certain international organizations on a footing similar to that of States.

71. The position taken by the Commission on the question of the formulation of reservations made it necessary to adapt the provisions of the Vienna Convention relating to acceptance of, and objection to, reservations.<sup>444</sup> This involved not only a drafting problem but several issues of substance.

72. In view of the rather restrictive position taken by the Commission concerning the formulation of reservations by an organization, the question arose whether the position taken on organizations should not be extended to States as well: that is to say, in the case of treaties to which an international organization could formulate only authorized reservations, contracting States too should be able to formulate only authorized reservations. In his fifth report, the Special Rapporteur showed himself to be in favour of that.<sup>445</sup> On reflection, however, it seemed more in keeping with the spirit of the Vienna Convention to maintain the freedom of States to formulate reservations in principle, even though in many cases that freedom might not exist in fact because its exercise would be incompatible with the object and purpose of the treaty (article 19 *bis*, paragraph 1 (c)).

73. The question also arose whether the liberal régime for objections established by the Vienna Convention should be retained. Under that Convention, any reservation by a contracting State is open to objection by another contracting State. The Commission had no doubt that the rules of the Vienna Convention allowing States to object to a reservation should be retained in the case of reservations formulated by a State or an organization. It is not obvious, however, that the same applies to objections formulated by international organizations. In a treaty between several international organizations, freedom to object can go hand in hand with freedom to formulate reservations. But in the case of treaties between States and one or more international organizations or between international organizations and one or more

<sup>441</sup> *Yearbook... 1975*, vol. II, pp. 36–37, document A/CN.4/285, general commentary to section 2 of part II of the draft articles.

<sup>442</sup> This solution is the basis of the draft articles proposed by Mr. Ushakov (see foot-note 464 below).

<sup>443</sup> *Yearbook... 1975*, vol. II, pp. 37–38, document A/CN.4/285, articles 19–23.

<sup>444</sup> A cursory reading of the provisions of the Vienna Convention shows that reservations which are expressly authorized by a treaty do not require subsequent acceptance unless the treaty so provides (article 20, para. 1). It is sometimes concluded that, in such cases, there is no possibility of objecting to reservations, since objection appears to go hand in hand with acceptance. But this conclusion is somewhat hasty. When a State formulates a reservation which it claims to be authorized by a treaty, it may come up against another contracting State which maintains that the reservation, as formulated, is not authorized by the treaty; a similar situation may arise in regard to a prohibited reservation. Although there is no "objection" in the strict sense of the term, such "opposition" may have the same effect as an "objection". See the commentary to article 19 *ter* below.

<sup>445</sup> *Yearbook... 1976*, vol. II (Part One), p. 143, document A/CN.4/290 and Add.1, article 19 *bis*, para. 1.

States, it seemed difficult to accept an unrestricted right of the organizations to raise objections. The Commission has therefore distinguished two cases. If the participation of the organization is not essential to the object and purpose of the treaty, it has the right to object, just as it has the right to formulate its own reservations. In other cases, the organization is not entitled to object to a reservation unless that possibility is expressly granted to it or is a necessary consequence of the tasks assigned to the organization by the treaty. In these latter cases, the different nature of States and international organizations has thus been amply taken into account. Without express authorization, the organization may formulate objections only if that possibility is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to it by the treaty. This recognizes that the functions of an organization can afford it possibilities not afforded by its status as a contracting party alone. A separate article, article 19 *ter*, which is new in relation to the Vienna Convention, combines all the provisions concerning the formulation of objections.

74. The other rules of the Vienna Convention regarding the legal effects of reservations and objections to reservations, the withdrawal of reservations and objections to reservations and the procedure regarding reservations were the subject of drafting changes only.

75. The articles of the Vienna Convention relating to the entry into force, provisional application, observance, application and interpretation of treaties were adapted to the treaties to which the present draft articles relate. This raised no problems of substance, except in the case of article 27. The question of third States and third international organizations, on the other hand, proved to be extremely delicate and, after initially considering all the articles dealing with this question, the Commission, in the time available, was able to adopt only the first of them, which is the simplest of all.

#### **B. Draft articles on treaties concluded between States and international organizations or between international organizations**

76. The text of articles 1 to 4, 6 to 19,<sup>446</sup> 19 *bis*, 19 *ter*, 20, 20 *bis*, 21 to 23, 23 *bis*, 24, 24 *bis*, 25, 25 *bis* and 26 to 34, adopted by the Commission at its twenty-sixth, twenty-seventh and present sessions, and the text of articles 19, 19 *bis*, 19 *ter*, 20, 20 *bis*,

21 to 23, 23 *bis*, 24, 24 *bis*, 25, 25 *bis* and 26 to 34 and of article 2, paragraph 1 (*j*), and the commentaries thereto, adopted by the Commission at its present session, are reproduced below for the information of the General Assembly.

### 1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

#### PART I

#### INTRODUCTION

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

The present articles apply to:

- (a) treaties concluded between one or more States and one or more international organizations, and
- (b) treaties concluded between international organizations.

##### *Article 2. Use of terms*

1. For the purpose of the present articles:

- (a) "treaty" means an international agreement governed by international law and concluded in written form:
  - (i) between one or more States and one or more international organizations, or
  - (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for the purpose of negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, expressing the consent of the State to be bound by such a treaty, or performing any other act with respect to such a treaty;

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for the purpose of negotiating, adopting or authenticating the text of a treaty, communicating the consent of the organization to be bound by a treaty, or performing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization;

<sup>446</sup> The draft does not include provisions corresponding to article 5 of the Vienna Convention.

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State,
- (ii) an international organization

which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

- (i) a State,
- (ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

...

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or by the rules of any international organization.

*Article 3. International agreements not within the scope of the present articles*

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations

shall not affect:

- (a) the legal force of such agreements;
- (b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;
- (c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

*Article 4. Non-retroactivity of the present articles*

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

*Article 6. Capacity of international organizations to conclude treaties*

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

*Article 7. Full powers and powers*

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

*Article 8. Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

*Article 9. Adoption of the text*

1. The adoption of the text of a treaty takes place by the consent of all the participants in the drawing-up of the treaty except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

*Article 10. Authentication of the text*

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and international organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those international organizations of the text of the treaty or of the final act of a conference incorporating the text.

*Article 11. Means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty is established by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

*Article 12. Signature as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

(a) the treaty provides that signature shall have that effect;

(b) the participants in the negotiation were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect; or

(b) the intention of that organization to give that effect to the signature appears from the powers of its representative or was established during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the participants in the negotiation so agreed;

(b) the signature *ad referendum* by a representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature.

*Article 13. An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty*

1. The consent of States and international organizations to be bound by a treaty between one or more States and one or more international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those States and those organizations were agreed that the exchange of instruments should have that effect.

2. The consent of international organizations to be bound by a treaty between international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those organizations were agreed that the exchange of instruments should have that effect.

*Article 14. Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) the participants in the negotiation were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by an act of formal confirmation when:

(a) the treaty provides for such consent to be established by means of an act of formal confirmation;

(b) the participants in the negotiation were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was established during the negotiation.

3. The consent of a State to be bound by a treaty between one or more States and one or more international organizations, or the consent of an international organization to be bound by a treaty is established by acceptance or approval under conditions similar to those which apply to ratification or to an act of formal confirmation.

*Article 15. Accession as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;

(b) the participants in the negotiation were agreed that such consent might be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

2. The consent of an international organization to be bound by a treaty is established by accession when:

(a) the treaty provides that such consent may be established by that organization by means of accession;

(b) the participants in the negotiation were agreed that such consent might be given by that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be given by that organization by means of accession.

*Article 16. Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession*

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting international organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting international organizations or to the depositary, if so agreed.

*Article 17. Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles [19 to 23], the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting international organizations so agree.

2. Without prejudice to articles [19 to 23], the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting international organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

*Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

1. A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between one or more States and one or more international organizations when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. An international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between international organizations when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to an act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

*Article 19. Formulation of reservations in the case of treaties between several international organizations*

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

*Article 19 bis. Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States*

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

*Article 19 ter. Objection to reservations*

1. In the case of a treaty between several international organizations, an international organization may object to a reservation.

2. A State may object to a reservation envisaged in article 19 bis, paragraphs 1 and 3.

3. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, an international organization may object to a reservation formulated by a State or by another organization if:

- (a) the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty; or
- (b) its participation in the treaty is not essential to the object and purpose of the treaty.

*Article 20. Acceptance of reservations in the case of treaties between several international organizations*

1. A reservation expressly authorized by a treaty between several international organizations does not require any subsequent acceptance by the other contracting organizations unless the treaty so provides.

2. When it appears from the object and purpose of a treaty between several international organizations that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between several international organizations otherwise provides:

- (a) acceptance by another contracting organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;
- (b) an objection by another contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;
- (c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty between several international organizations otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

*Article 20 bis. Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States*

1. A reservation expressly authorized by a treaty between States and one or more international organizations or between international organizations and one or more States, or otherwise authorized, does not, unless the treaty so provides, require subsequent acceptance by the contracting State or States or the contracting organization or organizations.

2. When it appears from the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation formulated by a State or by an international organization requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides:

- (a) acceptance of a reservation by a contracting State or a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;
- (b) an objection to a reservation by a contracting State or a contracting organization does not prevent the treaty from entering into force between the objecting State and the reserving State, between the objecting State and the reserving organization, between the objecting organization and the reserving State, or between the objecting organization and the reserving organization unless a contrary intention is definitely expressed by the objecting State or organization;
- (c) an act expressing the consent of a State or an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted

by a contracting State or organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

*Article 21. Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 19 *ter*, 20 and 23 in the case of treaties between several international organizations, or in accordance with articles 19 *bis*, 19 *ter*, 20 *bis* and 23 *bis* in the case of treaties between States and one or more international organizations or between international organizations and one or more States:

(a) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving party, the provisions to which the reservation relates do not apply as between the two parties to the extent of the reservation.

*Article 22. Withdrawal of reservations and of objections to reservations*

1. Unless a treaty between several international organizations, between States and one or more international organizations or between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting organization only when notice of it has been received by that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the international organization which formulated the reservation.

4. Unless a treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or organization only when notice of it has been received by that State or organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

*Article 23. Procedure regarding reservations in treaties between several international organizations*

1. In the case of a treaty between several international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

2. If formulated when signing subject to formal confirmation, acceptance or approval a treaty between several international organizations, a reservation must be formally confirmed by the reserving organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

*Article 23 bis. Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States*

1. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated by a State when signing subject to ratification, acceptance or approval a treaty mentioned in paragraph 1 or if formulated by an international organization when signing subject to formal confirmation, acceptance or approval a treaty mentioned in paragraph 1, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to a confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3 ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

*Article 24. Entry into force of treaties between international organizations*

1. A treaty between international organizations enters into force in such manner and upon such date as it may provide or as the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty between international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating organizations.

3. When the consent of an international organization to be bound by a treaty between international organizations is established on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

*Article 24 bis. Entry into force of treaties between one or more States and one or more international organizations*

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

*Article 25. Provisional application of treaties between international organizations*

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

*Article 25 bis. Provisional application of treaties between one or more States and one or more international organizations*

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating State or States and organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

## PART III

## OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

## SECTION 1. OBSERVANCE OF TREATIES

*Article 26. Pacta sunt servanda*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

*Article 27. Internal law of a State, rules of an international organization and observance of treaties*

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

## SECTION 2. APPLICATION OF TREATIES

*Article 28. Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

*Article 29. Territorial scope of treaties between one or more States and one or more international organizations*

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

*Article 30. Application of successive treaties relating to the same subject-matter*

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41], [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

#### SECTION 3. INTERPRETATION OF TREATIES

##### *Article 31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

##### *Article 32. Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

##### *Article 33. Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

#### SECTION 4. TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS

##### *Article 34. General rule regarding third States and third international organizations*

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. TEXT OF ARTICLES 19, 19 *bis*, 19 *ter*, 20, 20 *bis*, 21 to 23, 23 *bis*, 24, 24 *bis*, 25, 25 *bis* and 26 to 34 AND OF ARTICLE 2, PARAGRAPH 1 (*j*), AND THE COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION

## PART II

### CONCLUSION AND ENTRY INTO FORCE OF TREATIES

...

#### SECTION 2. RESERVATIONS

##### *Article 19. Formulation of reservations in the case of treaties between several international organizations*<sup>447</sup>

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

<sup>447</sup> Corresponding provision of the Vienna Convention:

##### *Article 19. Formulation of reservations*

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

"(a) the reservation is prohibited by the treaty;

"(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

"(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

### Commentary

(1) The draft articles as a whole lay down different rules on the formulation of reservations by international organizations according to whether the reservations are to treaties between international organizations or to treaties between States and one or more international organizations or between international organizations and one or more States. The first case forms the subject of draft article 19 and the second that of draft article 19 *bis*.

(2) The process followed in article 19 is simple, since the article transposes to treaties between several international organizations the provisions of the Vienna Convention as regards treaties between States. This extension of the Vienna rules is perfectly justified here because, however they may differ in other respects, international organizations are on an equal footing with each other in the conventional mechanism envisaged. It need only be observed that, in fact, many treaties concluded between international organizations will fall under the prohibition in subparagraph (c)—probably more than in the case of States. For a number of treaties concluded between international organizations entail commitments which, by their object and purpose, constitute a balanced whole which a reservation would destroy. It was pointed out, however, that internal procedures enabling an organization to commit itself validly and definitively generally involve the intervention of an organ composed of representatives of member States, so that the opportunity for an international organization to formulate a reservation, even at the stage of formal confirmation, would afford the States members of that organization useful safeguards with respect to undertakings signed too hastily.

(3) This remark carried so much weight that it was argued that the system of reservations established by article 19 should be extended to the case of treaties between two international organizations. That raised the question whether the mechanism of reservations can operate generally in the case of bilateral treaties. Although the text of the Vienna Convention does not formally preclude this possibility,<sup>448</sup> the Commission's commentaries of 1966 leave no doubt that it regarded reservations to bilateral treaties as going beyond the technical mechanism of reservations and

leading to a proposal to reopen negotiations.<sup>449</sup> The Commission did not wish to start a debate on this question, although most of its members considered that the régime of reservations could not be extended to bilateral treaties without distorting the notion of a "reservation". Considered as a whole, however, the texts of draft articles 19 and 19 *bis* in fact relate to multilateral treaties.<sup>450</sup>

(4) The Commission also discussed the question of the practical significance of this article. Starting from the observation that the reservations mechanism developed in the Vienna Convention mainly concerned open multilateral treaties, members expressed doubt as to whether the reservation possibilities established by article 19 would actually be effective. The answer given was that the provisions of the Vienna Convention on the formulation of reservations make no mention of the general multilateral nature of treaties. Moreover, since international organizations comprise groups of States which are sometimes large, it is not possible to measure the "generality" of a treaty between international organizations by the same standard as that of a treaty between States. It is easy to conceive of a treaty between three or four international organizations which is open to participation by certain other international organizations. For example, three international organizations may conclude an agreement to standardize their publications or to unify certain provisions of their staff rules because their headquarters are in the same city; or several international banks having the status of international organization may conclude an agreement to exchange certain information or to adopt an identical policy on certain aspects of their activities; or again, international organizations which work at least partly in the field of scientific research may conclude an agreement to exchange information, to avoid overlapping programmes or even to pool certain results (in a "data bank"). In the immense field now open to international organizations in economics, finance, assistance, technology and scientific research, such agreements are eminently desirable and entirely possible; they could be open to participation by other organizations, and the faculty of other organizations to accede to such agreements, subject to certain reservations that are not incompatible with the object or purpose of the treaty, would constitute a first step towards the rationalization and regrouping of efforts;

<sup>448</sup> *Official Records of the United Nations Conference on the Law of Treaties* (second session), *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 28, 10th plenary meeting, para. 23. The Chairman of the Drafting Committee said that the deletion of the reference to *multilateral* treaties in the Commission's draft articles on reservations did not prejudice the question of reservations to bilateral treaties.

<sup>449</sup> *Yearbook... 1966*, vol. II, pp. 202–203 document A/6309/Rev.1, part. II, chap. II, articles 16–17, para. 1 of the commentary. The United Nations Conference on the Law of Treaties deleted the reference to multilateral treaties from the section of the Commission's draft articles entitled "Reservations to multilateral treaties".

<sup>450</sup> This is indisputable as regards all language versions of article 19 *bis*. The French version of article 19, which refers to treaties between "*plusieurs organisations*" covers both treaties between two organizations and treaties between more than two organizations. The English version, however, which speaks of treaties between "several international organizations" refers exclusively to treaties between more than two organizations.

as has often been observed, these are sometimes rather scattered.<sup>451</sup>

(5) In view of the foregoing considerations, article 19 seemed neither excessive nor superfluous to the great majority of the Commission. These considerations did not, however, seem sufficiently pertinent to one of its members, who maintained that for these categories of treaties only reservations expressly authorized by the treaty itself should be allowed.<sup>452</sup>

**Article 19 bis. Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States<sup>453</sup>**

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international

organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

*Commentary*

(1) A preliminary remark must be made on terminology. Instead of designating the category of treaties in question by the expression "treaty between one or more States and one or more international organizations", which is the term generally used in the present draft articles, the Commission, in the articles dealing with reservations, has used the more complex expression "treaties between States and one or more international organizations or between international organizations and one or more States". This is because the latter wording is particularly appropriate to the question of reservations; it stresses the need to consider at least one State or one organization faced by a group of partners comprising at least two international organizations or two States respectively. It is only under these conditions that the varied mechanisms constituting the juridical system of reservations in this and the subsequent articles all come into play.<sup>454</sup>

<sup>451</sup> Reference to the texts published under the auspices of UNCTAD in the document entitled "Economic co-operation and integration among developing countries" (TD/B/609/Add.1 (vols. I, II, III and Corr.1, IV, V) of August 1976) shows that many of the very numerous international economic organizations mentioned have "international juridical personality" and in some cases are expressly authorized, or even invited, to enter into agreements with other international organizations for co-operation or for operational purposes. See, for example, article VI, sect. 2, of the Agreement establishing the Inter-American Development Bank (TD/B/609/Add.1, vol. I, p. 16); articles 2, 15 (15), 31 (8) of the Agreement establishing the Latin American Economic System (*ibid.*, pp. 34, 38 and 42); article 20, paras. 1 and 3, of the Treaty establishing the Caribbean Community (*ibid.*, p. 163) and articles 63 and 70 of the Agreement establishing the Caribbean Common Market, which is associated with it (*ibid.*, pp. 194-195); articles 2, para. 2, 27, para. 2 (e), and 48, para. 2, of the Agreement establishing the Caribbean Development Bank (*ibid.*, pp. 212, 227 and 235); article 50 of the Agreement establishing the African Development Bank (*ibid.*, vol. III, p. 26); article 2 of the Treaty establishing the West African Economic Community (*ibid.*, p. 116); article 29, para. 2 (v), of the Agreement establishing the Islamic Development Bank (*ibid.*, vol. V, p. 39); articles 3 and 53 of the Agreement establishing the Arab Bank for Economic Development in Africa (*ibid.*, pp. 55 and 70); article 2 (v) of the Agreement establishing the Asian Development Bank (*ibid.*, p. 135).

<sup>452</sup> Article 19, para. 1, as proposed by this member, reads:

"An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized."

<sup>453</sup> Corresponding provisions of the Vienna Convention: see foot-note 447 above.

<sup>454</sup> This terminology does not, however, look beyond the niceties of drafting; it means that the Commission's draft articles fail to distinguish two subcategories appearing to require different régimes. A system along these lines was the subject of a proposal by one member of the Commission [see foot-note 464 below], but it has several disadvantages, at least in the opinion of most members of the Commission. First, the two subcategories would merge when as many States as international organizations were parties to the treaty; second, a much more general and deep-seated objection is that the respective numbers of international organizations and States parties to a treaty provide no reliable indication of its real nature, of the respective positions of the parties in the treaty mechanism and of what may be called the underlying structure of the treaty. Are all the different parties in a similar situation or are they divided into several groups? Is one of them in a very special position? The Vienna Convention does not deal with these problems; its articles only touch on them indirectly in connexion with reservations because of the importance attached to notions such as the object and purpose of the treaty and the "entirety" of treat-

(Continued on next page.)

(2) The purely descriptive nature of the position taken by the Commission in defining the treaties governed by article 19 *bis* implies that, as regards the reservations régime, the Commission is considering only the case of treaties to which there are at least three parties. As already explained in connexion with article 19 above, it is not the Commission's intention to take a position on the question of reservations to a bilateral treaty, which, so far as article 19 *bis* is concerned, means a treaty between a State and an organization. This case would require special study, which the Commission did not consider it necessary to undertake at present, although several members stressed the importance of reservations to bilateral treaties, especially for international organizations.

(3) The structure of article 19 *bis* is simple. It deals first, in paragraph 1, with the formulation of reservations by States, which is subject to the rules of the Vienna Convention;<sup>455</sup> then, in paragraphs 2 and 3, with the formulation of reservations by international organizations, distinguishing two cases. In the first case (paragraph 2), the participation of an international organization is essential to the object and purpose of the treaty; in other words, the treaty would lose its *raison d'être* and possibilities of practical application if the organization decided not to become a party to it. This applies, for example, to a treaty under which an organization provides technical and financial assistance to several riparian States bordering on the same lake to help them combat pollution in the lake; or a treaty for the provision of nuclear services by one State to another, with supervision by an organization to ensure peaceful use; or again, an agreement such as that of 29 July 1970 between the Unit-

ed Nations, Peru and Sweden,<sup>456</sup> providing for the participation of a Swedish unit in assistance rendered by the United Nations after a natural disaster. Under such agreements, an organization in fact performs assistance and supervisory *functions* which make its position as a party different from that of a State; hence it is natural that it should be able to formulate only those reservations which are expressly authorized by the treaty itself. In the second case (paragraph 3), the participation of the organization is not essential to the object and purpose of the treaty; this means that the organization is in the position of any other participant, without responsibility for a special *function*, and that the absence of one of the participants will not jeopardize the treaty's existence. The practical concern here is with non-universal organizations admitted to participation in a multilateral convention<sup>457</sup> in cases where, because of the powers delegated to them by States, they are at least partly substituted for their members. In this instance, the organizations benefit from the same reservations régime as States.

(4) One important consequence of the foregoing analysis must be stressed. The question whether an international organization is governed by paragraph 2 or paragraph 3 of article 19 *bis* depends on each particular treaty and organization. It follows that, where given organizations are parties to a treaty, paragraph 2 of article 19 *bis* could apply to one organization and paragraph 3 to another. For instance, under a treaty concerned with nuclear energy safety measures, a number of organizations (for example, the European Atomic Energy Community (Euratom), the European Company for the Chemical Processing of Irradiated Fuels (Eurochemic), the European Organization for Nuclear Research (CERN) might be responsible for certain installations, in which case, under article 19 *bis*, paragraph 3, they would be subject to the same reservations régime as the States parties to the treaty, whereas the International Atomic Energy Agency (IAEA), if it performed a supervisory function, would fall under the stricter provisions of article 19 *bis*, paragraph 2.<sup>458</sup>

(5) Considering the very limited extent to which international organizations have hitherto been admitted to participation in widely open multilateral treaties

(Foot-note 454 continued.)

ties. But in the case of treaties between one or more States and one or more international organizations, it does not seem that a *quantitative* assessment of the States and international organizations allowed to participate in the treaty can lead to practical conclusions regarding reservations. For example, why should different rules, based on the numbers of States and international organizations which are parties, be applicable to an operational assistance treaty concluded between a group of international organizations and a single State (the general case of agreements concluded under UNDP—see the examples quoted in the United Nations *Juridical Yearbook* and the UNDP *Field Manual*) and to an agreement concluded between a single organization and the States concerned in joint public health or environmental activities in a particular region? For instance, an agreement concluded on 1 November 1973 between WHO and seven African States concerning an Onchocerciasis Control Programme in the Volta River Basin area was supplemented by an agreement between five non-African States and four international organizations on the collection of funds to facilitate the execution of the first agreement; the second agreement is widely open to participation by new donors (American Society of International Law, *International Legal Materials* (Washington D.C.), vol. XIII, No. 3, May 1974, p. 517). Neither of these agreements contains provisions relating to reservations and it is difficult to see that their rules should differ on this point.

<sup>455</sup> The Commission has thus maintained the principle laid down in article 3(c) of the Vienna Convention, which provides, in regard to relations between States, for "the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties". But the present article 19 *bis* goes still further: it accords to States the benefit of the Vienna Convention rules on the formulation of reservations in general.

<sup>456</sup> United Nations, *Juridical Yearbook, 1970* (United Nations publication, Sales No. E.72.V.1), p. 36.

<sup>457</sup> This is why the Special Rapporteur, in his fifth report, tried to define these treaties by reference to international conferences open to participation by international organizations (draft article 9, para. 2). (*Yearbook... 1976*, vol. II (Part One), p. 144, document A/CN.4/290 and Add.1, commentary to article 19 *bis*.)

<sup>458</sup> A good example of this is the agreement concluded at Brussels on 5 April 1973 between Belgium, Denmark, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, the European Atomic Energy Community and the International Atomic Energy Agency (IAEA, document INFCIRC/193/Add.1), pursuant to article III, paragraphs 1 and 4, of the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 (United Nations, *Treaty Series*, vol. 729, p. 172); however, the object and purpose of this agreement, which is silent on the question of reservations, is such that all reservations to it are possibly prohibited.

between States,<sup>459</sup> it seems open to question how far the régime established by article 19 *bis*, paragraph 3, would have practical effect. There are, in fact, already in existence treaties relating to commodities which are open to participation by international organizations coming within a well-defined category. These include:

The Fifth International Tin Agreement<sup>460</sup> (article 54), which entered into force provisionally on 1 July 1976. It contains no provisions on reservations; certain "declarations" were made at the time of signature although it was not established whether they constitute reservations; one international organization has become a party to it.

The International Cocoa Agreement, 1975<sup>461</sup> (article 4), which entered into force provisionally on 1 October 1976 with the participation of one international organization; this prohibits any reservations (article 70).

The International Coffee Agreement, 1976<sup>462</sup> (article 6), which entered into force provisionally on 1 October 1976. This prohibits any reservations (article 63); one international organization is a party to it.<sup>463</sup>

<sup>459</sup> Caution must be exercised in analysing certain situations which are still evolving. The admission of the United Nations Council for Namibia, a subsidiary organ of the United Nations, to certain international conferences does not necessarily imply that the United Nations as such will become a party to the conventions which may result from those conferences. In this case, the United Nations would seem to be acting only on the basis of *representation* and would commit, rather than itself, the potential State it represents (see "Possibilities of participation by the United Nations in international agreements on behalf of a territory: study prepared by the Secretariat" (*Yearbook... 1974*, vol. II (Part Two), p. 8, document A/CN.4/281)). To the same effect, see the legal opinion prepared for the Under-Secretary-General, Office for Inter-Agency Affairs and Co-ordination, on the representation of national liberation movements in United Nations organs (United Nations, *Juridical Yearbook, 1974* (United Nations publication, Sales No. E.76.V.1), pp. 149-156, paras. 32-45). Similarly, the question of the opening of a future convention or future conventions on the law of the sea to participation by certain international organizations was still pending at the time this report was prepared (see *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VI (United Nations publication, Sales No. E.77.V.2), p. 127, document A/CONF.62/L.13, foot-note 12).

<sup>460</sup> *United Nations Tin Conference, 1975* (United Nations publication, Sales No. E.76.II.D.4), p. 5.

<sup>461</sup> *United Nations Cocoa Conference, 1975* (United Nations publication, Sales No. E.76.II.D.9), p. 5.

<sup>462</sup> International Coffee Organization, *International Coffee Agreement, 1976* (London, 1976).

<sup>463</sup> The wording used in these Agreements varies. The following is the text of article 4, para. 1, of the Cocoa Agreement:

"1. Any reference in this Agreement to a 'Government' shall be construed as including a reference to any intergovernmental organization having responsibilities in respect of the negotiation, conclusion and application of international agreements, in particular commodity agreements. Accordingly, any reference in this Agreement to signature or to deposit of instruments of ratification, acceptance or approval or to notification of provisional application or to accession by a Government shall, in the case of such intergovernmental organizations, be construed as including a reference to signature, or to deposit of instruments of ratification, acceptance or approval, or to notification of provisional application, or to accession, by such intergovernmental organizations."

(6) One member submitted to the Commission a system based on different ideas. This proceeds from the premise that the differences between States and international organizations are so general and so great that international organizations may not in any event formulate reservations other than those expressly authorized by the treaty or otherwise agreed. In addition, the treaties to which article 19 *bis* relates would be divided into two subcategories, each with a different régime. As regards the formulation of reservations to treaties between States and one or more international organizations, States would be subject to the same conditions as are laid down in the Vienna Convention, except if the participation of an international organization was essential to the object and purpose of the treaty; in the latter situation, even as between States but *a fortiori* as between States and international organizations, only reservations expressly authorized or otherwise agreed would be permitted. As regards the formulation of reservations to treaties between international organizations and one or more States, States would be subject, even as between themselves, to the same régime as international organizations; in other words, they would be able to formulate only those reservations expressly authorized by the treaty or otherwise agreed.<sup>464</sup>

#### *Article 19 ter. Objection to reservations*<sup>465</sup>

1. In the case of a treaty between several international organizations, an international organization may object to a reservation.

2. A State may object to a reservation envisaged in article 19 *bis*, paragraphs 1 and 3.

3. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, an international organization may object to a reservation formulated by a State or by another organization if:

(a) the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty; or

(b) its participation in the treaty is not essential to the object and purpose of the treaty.

<sup>464</sup> Text proposed (A/CN.4/L.253):

#### *"Article 19. Formulation of reservations*

"1. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

"2. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations, may formulate a reservation unless:

"(a) the reservation is prohibited by the treaty;

"(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(Continued on next page.)

*Commentary*

(1) The Vienna Convention is relatively cautious on the question of objections to reservations. It contains no definition of the notion of an objection<sup>466</sup> and mentions the matter only in the title and paragraphs 4 (b) and 5 of article 20, in the title and paragraph 3 of article 21, in the title and paragraphs 2 and 3 (b) of article 22 and in paragraphs 1, 3 and 4 of article 23. Furthermore, it does not settle all the questions concerning the mechanism of objections.

(2) With regard to the treaties which are the subject of the present draft articles, the Commission has not sought either to fill the gaps in the Vienna Convention or to interpret its provisions. However, having twice accepted (in article 19 and article 19 *bis*, paragraph 3) that international organizations are free to formulate reservations on the same terms as States, it had necessarily to deal with the question whether international organizations are also entitled to formulate objections to reservations.<sup>467</sup>

*(Foot-note 464 continued.)*

"(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

"3. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

"4. If the participation of an international organization in the treaty mentioned in paragraph 2 is essential for its object and purpose, a State may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

"5. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between international organizations and one or more States, and

"a State, when signing, ratifying, accepting, approving or acceding to the said treaty,

"may formulate a reservation if the reservation is expressly authorized by the treaty or if the reservation is otherwise authorized."

<sup>465</sup> There are no corresponding provisions in the Vienna Convention.

<sup>466</sup> This omission not only creates uncertainty but also makes it impossible to invoke limits to objections similar to the limits which are applicable to the formulation of reservations as a result of the definition of reservations given in article 2, para. 1 (d), of the Vienna Convention and in the present draft articles.

<sup>467</sup> May an objection be made to a reservation which the reserving contracting State considers to be authorized, but which another State considers not to fall within the category of authorized reservations? The latter State may certainly "oppose" the reservation, but does this "opposition" have the same technical characteristics as an "objection"? It is clearly based on more restricted grounds, namely, breach of the treaty, than an "objection" proper, which may be made for any reason whatsoever, including the mere defence of an interest. Under the Vienna Convention, "opposition" to an allegedly authorized reservation would definitely not be subject to the time conditions set out in article 20, para. 5. It would seem, however, that such "opposition" could produce the same effects as an objection, since it is based on grounds which have greater legal weight than an objection. This question was brought up during the Commission's discussions. The text adopted by the Commission follows the guidance given by the Vienna Convention and, in one instance (article 19 *ter*, para. 2), is even more specific than the Convention; however, by the texts of its draft articles, the Commission certainly did not intend to preclude the possibility of "opposition" to a reservation, with ef-

(3) To make the draft more readily comprehensible, the essential provisions of article 19 *ter* are spread over three paragraphs: the first deals with treaties between several international organizations, while the second and third deal with treaties between States and one or more international organizations or between international organizations and one or more States. A State in the latter cases, like an international organization in the former, may make objections just as both may make reservations. There remains the situation of an organization in the case of treaties between international organizations and one or more States or between States and one or more organizations. Here, the possibility of formulating an objection exists in two instances:

1. If the participation of the organization in the treaty is not essential to the object and purpose of the treaty. This is the case in which the organization has the faculty to formulate reservations (article 19 *bis*) and hence in which the right to object and the right to formulate a reservation are symmetrical, understandably so since the international organization enjoys the same rights as a State.

2. If the possibility of objecting is expressly granted to an organization by the treaty or is a necessary consequence of the tasks which the treaty assigns to it. In this case, the organization has in principle no need, subject to what has been said in foot-note 467, to make objections properly so-called to reservations by other organizations, since those other organizations cannot formulate reservations which are not expressly authorized or otherwise agreed (article 19 *bis*, para. 2). However, since in a treaty of this kind the contracting States may formulate reservations which are not expressly authorized or otherwise agreed (article 19 *bis*, para. 1), the question arises whether an organization may object to such reservations. Generally speaking, the answer is in the negative, which once again marks a difference between States and international organizations. Nevertheless, the possibility of objecting exists, not only when it is expressly recognized by the treaty but also when it is a necessary consequence of the tasks assigned by the treaty to the organization. Consider the case of a treaty whose object is to ensure observance by the contracting States and any contracting organizations of rules relating, for example, to the protection of a certain environment; a particular organization is made responsible for verifying the observance of the rules by all the other contracting entities. The treaty contains no provision concerning reservations, and a contracting State formulates a reservation which, although not contrary to the object and purpose of the treaty,<sup>468</sup> is

facts as extensive as those of an objection proper. It also follows that, in order to prevent disputes as to the lawfulness of reservations and the problems they cause, it is not enough to reduce the permissible reservations to those which are expressly authorized by the treaty or otherwise agreed.

<sup>468</sup> If such a reservation is contrary to the object and purpose of the treaty, it is prohibited by article 19 *bis*, para. 1, and then, as in the case discussed in foot-note 467 above, the question which arises is not that of an objection proper but of "opposi-

calculated to restrict the organization's performance of its tasks in a particular respect; the organization does not have the right to formulate reservations (article 19 *bis*, para. 2), but it does have the right to raise an objection.

(4) Two further explanations must be given regarding the terminology used in article 19 *ter*. In paragraph 3 (a), the words "possibility of objecting" have been used in preference to the expressions "right to object" or "faculty to object", because the latter seem to refer to an organic and permanent capacity of the organization. The question of that capacity does, of course, arise, and it must be settled by reference to article 6,<sup>469</sup> which governs not only the articles on reservations but the whole draft: it is a prerequisite of any action which an organization may take under the draft articles that the organization shall have the capacity to take that action under its relevant rules. This capacity is the framework within which the treaty in question affords "possibilities" to the organization. Similarly, the term "tasks" has been used<sup>470</sup> to make it clear that the reference is not to the functions conferred on the international organizations by its constituent instrument (a treaty between States to which it is not a party), but to new and specific responsibilities which form part of the general functions conferred on it by its constituent instrument and have their legal origin in a treaty between States and one or more international organizations or between international organizations and one or more States.

**Article 20. Acceptance of reservations in the case of treaties between several international organizations<sup>471</sup>**

**1. A reservation expressly authorized by a treaty between several international organizations does not**

require any subsequent acceptance by the other contracting States unless the treaty so provides.

require any subsequent acceptance by the other contracting States unless the treaty so provides.

<sup>469</sup> See section B.I above.

<sup>470</sup> The same intention governs article 51, para. 1, of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. This paragraph provides that:

"The host State shall accord to the delegation all necessary facilities for the performance of its tasks". (*Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 217.)

The Commission decided to use the term "tasks" instead of "functions" throughout part III of the draft articles because of its more concrete and specific nature (*ibid.*, p. 37, document A/Conf.67/4, article 51, para. 2 of the commentary.

<sup>471</sup> Corresponding provisions of the Vienna Convention:

"Article 20. Acceptance of and objection to reservations

"1. A reservation expressly authorized by a treaty does not

require any subsequent acceptance by the other contracting organizations unless the treaty so provides.

2. When it appears from the object and purpose of a treaty between several international organizations that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between several international organizations otherwise provides:

(a) acceptance by another contracting organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;

(b) an objection by another contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty between several international organizations otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was

require any subsequent acceptance by the other contracting States unless the treaty so provides.

"2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

"3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

"4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

"(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

"(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

"(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

"5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

### Commentary

(1) For greater clarity of wording, the provisions of the draft corresponding to article 20 of the Vienna Convention have been divided into two articles, 20 and 20 *bis*, according to whether they refer to treaties between several international organizations or to treaties between States and one or more international organizations or between international organizations and one or more States.

(2) Certain differences from article 20 of the Vienna Convention should be noted. First, the title of the article no longer refers to "objection to reservations" since that is the title of article 19 *ter* but, like article 20 of the Vienna Convention, the draft twice mentions the question of objection to reservations and makes objections subject to similar rules.

(3) Second, draft article 20 contains no provisions parallel to article 20, paragraph 3, of the Vienna Convention. There might conceivably be an organization all of whose members were international organizations, but it would no longer come within the definition of an international organization given in paragraph 1 (*i*) of draft article 2.<sup>472</sup> The Commission considered that it could disregard such a special case, particularly since a rule similar to that in article 20, paragraph 3, of the Vienna Convention could not easily be made mandatory by means of a convention alone.

(4) Lastly, paragraph 2 has been simplified by the omission of any reference to the limited number of negotiating participants. The object of article 20, paragraph 2, of the Vienna Convention is to place treaties under a special régime in cases where "the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty". That text gives two criteria for the nature of such consent: the limited number of negotiating States and the object and purpose of the treaty. The second criterion is perfectly valid for treaties between several international organizations, but the first is not and has therefore been discarded. The limited degree of participation in a negotiation cannot indeed be measured in the same way for treaties between States as for treaties between international organizations, since the membership of international organizations already represents a multiplicity of States.

**Article 20 bis. Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States<sup>473</sup>**

1. A reservation expressly authorized by a treaty between States and one or more international organizations or between international organizations and one or more States, or otherwise authorized, does not, unless the treaty so provides, require subsequent acceptance by the contracting State or States or the contracting organization or organizations.

2. When it appears from the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation formulated by a State or by an international organization requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides:

(a) acceptance of a reservation by a contracting State or a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;

(b) an objection to a reservation by a contracting State or a contracting organization does not prevent the treaty from entering into force between the objecting State and the reserving State, between the objecting State and the reserving organization, between the objecting organization and the reserving State, or between the objecting organization and the reserving organization

unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting State or organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

<sup>472</sup> See section B.1 above.

<sup>473</sup> Corresponding provisions of the Vienna Convention: see foot-note 471 above.

## Commentary

(1) Article 20 *bis* differs from the preceding article mainly by reason of the drafting difficulties involved in stating the same principles but applying them to a much more complicated situation. In many cases, particularly in paragraph 3, it was not possible to propose wording which combines precision with elegance. The introduction of new definitions in article 2 of the draft might perhaps make it possible to simplify the text without sacrificing its clarity. This is an aspect of the matter which the Commission intends to consider later, on second reading.

(2) The same differences from the Vienna Convention are to be noted as in the previous draft article. However, although the Commission again proposes no provision parallel to article 20, paragraph 3, of the Vienna Convention, the participation of an international organization having the status of member of an organization composed mainly of States is no longer a purely theoretical possibility. As the Special Rapporteur pointed out in his previous reports,<sup>474</sup> there are already certain cases in which an international organization participates, with a special status, in another international organization; this also applies to the organizations set up under the commodity agreements referred to above.<sup>475</sup> However, although under the most recent agreements the international organization is assimilated to a *party to the treaty*, it is given special status as a *member of the organization*. Moreover, it is also open to question whether the definition of an international organization in article 2, paragraph 1 (*i*),<sup>476</sup> that is to say, an intergovernmental organization only, could cover the presence of a few international organizations as members among a body of States.<sup>477</sup>

(3) Lastly, it will be noted that the rule in paragraph 2, concerning treaties in respect of which a reservation must be accepted by all the parties, is designed to maintain all the provisions of the text as between all the parties, irrespective of their number, whereas the rule in paragraph 2 of article 19 *bis*, concerning the same kind of treaty but dealing with the possibility of *formulating* reservations, operates differently: it is not concerned with the question whether the same rules are applicable as between all the parties, but with whether the participation of a given organization is essential to the object and the purpose of the treaty, and if so, as has been seen, the organization may formulate only those reservations which are expressly authorized or otherwise agreed.<sup>478</sup>

<sup>474</sup> See, for example, *Yearbook... 1972*, vol. II, p. 194, document A/CN.4/258, para. 73, foot-note 178.

<sup>475</sup> Commentary to article 19 *bis*, para. 5.

<sup>476</sup> See section B.1 above.

<sup>477</sup> In its report on the work of its twenty-sixth session, the Commission seems to have decided that it could (*Yearbook... 1974*, vol. II, Part One, p. 295, document A/9610/Rev.1, chap. IV, sect. B, article 2, para. (7) of the commentary).

<sup>478</sup> The member of the Commission who proposed a draft article under which international organizations could never formu-

### Article 21. *Legal effects of reservations and of objections to reservations*<sup>479</sup>

#### 1. A reservation established with regard to another party in accordance with articles 19, 19 *ter*, 20 and 23 in the case of treaties between several international organizations, or in accordance with articles 19 *bis*,

late reservations unless they were expressly authorized or otherwise agreed, or formulate objections, prepared a draft article 20 corresponding to articles 20 and 20 *bis* adopted by the Commission. This draft article 20 adapts article 20 of the Vienna Convention to his positions of principle and reads as follows (A/CN.4/L.253):

#### "Article 20. *Acceptance of reservations and objections to reservations*

"1. A reservation expressly authorized by a treaty between several international organizations or otherwise authorized does not require subsequent acceptance by the other contracting organizations unless the treaty so provides.

"2. A reservation expressly authorized by a treaty between States and one or more international organizations or otherwise authorized does not require subsequent acceptance by the other contracting States and the contracting organization or organizations, or by the contracting States and the other contracting organizations, as the case may be, unless the treaty so provides.

"3. A reservation expressly authorized by a treaty between international organizations and one or more States or otherwise authorized does not require subsequent acceptance by the other contracting organizations and the contracting State or States, or by the contracting organizations and the other contracting States, as the case may be, unless the treaty so provides.

"4. When it appears from the limited number of the negotiating States and the object and purpose of a treaty between States and one or more international organizations that the application of the treaty between all the States parties is one of the essential conditions of the consent of each one of them to be bound by the treaty, a reservation formulated by a State requires acceptance by all the States parties.

"5. In cases not falling under paragraphs 2 and 4 and unless the treaty between States and one or more international organizations otherwise provides:

"(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

"(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

"(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

"6. For the purposes of paragraphs 4 and 5 and unless the treaty between States and one or more international organizations otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

<sup>479</sup> Corresponding provisions of the Vienna Convention:

#### "Article 21. *Legal effects of reservations and of objections to reservations*

"1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

"(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

"(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

"2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

(Continued on next page.)

**19 ter, 20 bis and 23 bis** in the case of treaties between States and one or more international organizations or between international organizations and one or more States:

(a) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving party, the provisions to which the reservation relates do not apply as between the two parties to the extent of the reservation.

### Commentary

Article 21 follows the text of article 21 of the Vienna Convention; the wording has been adapted to the various categories of treaties covered by the present draft articles, but no changes of substance have been made.<sup>480</sup>

(Foot-note 479 continued.)

"3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

<sup>480</sup> The same applies to the proposal made by one member and based on different premises from those of the Commission itself (A/CN.4/L.253):

#### "Article 21. Legal effects of reservations and of objections to reservations"

"1. A reservation established with regard to another party in accordance with article 19, paragraph 1, article 20, paragraph 1, and article 23, paragraphs 1, 5, 6 and 7:

"(a) modifies for the reserving international organization in its relations with that other party the provisions of the treaty between several international organizations to which the reservation relates to the extent of the reservation; and

"(b) modifies those provisions to the same extent for that other party in its relations with the reserving organization.

"2. A reservation established with regard to a party in accordance with article 19, paragraphs 2, 3 and 4, article 20, paragraphs 2, 4, 5 and 6, and article 23, paragraphs 2, 4, 5, 6 and 7:

"(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty between States and one or more international organizations to which the reservation relates to the extent of the reservation; and

"(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

"3. A reservation established with regard to another party in accordance with article 19, paragraph 5, article 20, paragraph 3, and article 23, paragraphs 2, 4, 5, 6 and 7:

"(a) modifies for the reserving international organization or State in its relations with that other party the provisions of the

### Article 22. Withdrawal of reservations and of objections to reservations<sup>481</sup>

1. Unless a treaty between several international organizations, between States and one or more international organizations or between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting organization only when notice of it has been received by that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the international organization which formulated the reservation.

4. Unless a treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or organization only when notice of it has been received by that State or organization;

treaty between international organizations and one or more States to which the reservation relates to the extent of the reservation; and

"(b) modifies those provisions to the same extent for that other party in its relations with the reserving international organization or State.

"4. The reservation does not modify the provisions of the treaties mentioned in the preceding paragraphs for the other parties to those treaties *inter se*.

"5. When a State objecting to a reservation has not opposed the entry into force, between itself and the reserving State, of the treaty between States and one or more international organizations, the provisions to which the reservation relates do not apply between the two States to the extent of the reservation."

<sup>481</sup> Corresponding provisions of the Vienna Convention:

#### "Article 22. Withdrawal of reservations and of objections to reservations"

"1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

"2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

"3. Unless the treaty otherwise provides, or it is otherwise agreed:

"(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

"(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation."

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

*Commentary*

Article 22 follows the text of article 22 of the Vienna Convention; the wording has been adapted to the various categories of treaties covered by the present draft articles, but no changes of substance have been made.<sup>482</sup>

**Article 23. Procedure regarding reservations in treaties between several international organizations<sup>483</sup>**

1. In the case of a treaty between several international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

2. If formulated when signing subject to formal confirmation, acceptance or approval a treaty between several international organizations, a reservation must be formally confirmed by the reserving organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

<sup>482</sup> The same applies to the proposal made by one member and based on different premises from those of the Commission itself (A/CN.4/L.253):

*"Article 22. Withdrawal of reservations and of objections to reservations"*

"1. Unless the treaty between several international organizations otherwise provides, a reservation may be withdrawn at any time and the consent of the international organization which has accepted the reservation is not required for its withdrawal.

"2. Unless the treaty between States and one or more international organizations otherwise provides, a reservation may be withdrawn at any time and the consent of the State or of the international organization which has accepted the reservation is not required for its withdrawal.

"3. Unless the treaty between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the organization or of the State which has accepted the reservation is not required for its withdrawal.

"4. Unless the treaty between States and one or more international organizations otherwise provides, an objection to a reservation may be withdrawn at any time.

"5. Unless the treaties mentioned in paragraphs 1, 2 and 3 otherwise provide, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State or another contracting organization only when notice of it has been received by that State or international organization.

"6. Unless the treaty between States and one or more international organizations otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation."

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

*Commentary*

The provisions of article 23 of the Vienna Convention have been transposed to the present draft. Their wording has been adapted to the various categories of treaties to which the draft articles relate, without any changes of substance being made. However, in order to simplify the text, the relevant paragraphs have been divided into two separate articles, 23 and 23 bis, according to whether they relate to treaties between several international organizations, or to treaties between States and one or more international organizations or between international organizations and one or more States.

**Article 23 bis. Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States<sup>484</sup>**

1. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated by a State when signing subject to ratification, acceptance or approval a treaty mentioned in paragraph 1 or if formulated by an international organization when signing subject to formal confirmation, acceptance or approval a treaty mentioned in paragraph 1, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

<sup>483</sup> Corresponding provisions of the Vienna Convention:

*"Article 23. Procedure regarding reservations"*

"1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

"2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

"3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

"4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

<sup>484</sup> Corresponding provisions of the Vienna Convention: see foot-note 483 above.

3. An express acceptance of, or an objection to, a reservation made previously to a confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

#### Commentary

The provisions of article 23 of the Vienna Convention have been transposed to the present draft. Their wording has been adapted to the various categories of treaties to which the draft articles relate, without any changes of substance being made. However, in order to simplify the text, the relevant paragraphs have been divided into two separate articles, 23 and 23 *bis*, according to whether they relate to treaties between several international organizations, or to treaties between States and one or more international organizations or between international organizations and one or more States.<sup>485</sup>

<sup>485</sup> The proposal made by one member and based on different premises from those of the Commission itself consists of only one article, corresponding to draft articles 23 and 23 *bis* (A/CN.4/L.253):

#### "Article 23. Procedure regarding reservations

"1. In the case of a treaty between several international organizations, a reservation and an express acceptance of a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

"2. In the case of a treaty between States and one or more international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States, to the other States entitled to become parties to the treaty and to the contracting organizations.

"3. In the case of a treaty between international organizations and one or more States, a reservation and an express acceptance of a reservation must be formulated in writing and communicated to the contracting organizations, to the other international organizations entitled to become parties to the treaty and to the contracting States.

"4. If formulated when signing a treaty, as mentioned in paragraphs 2 and 3, subject to ratification, acceptance or approval of the treaty, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

"5. If formulated when signing a treaty, as mentioned in paragraphs 1, 2 and 3, subject to formal confirmation, acceptance or approval of the treaty, a reservation must be formally confirmed by the reserving international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

"6. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

"7. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

<sup>486</sup> Corresponding provisions of the Vienna Convention:

#### "Article 24. Entry into force

"1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

"2. Failing any such provision or agreement, a treaty enters

#### SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

#### Article 24. Entry into force of treaties between international organizations<sup>486</sup>

1. A treaty between international organizations enters into force in such manner and upon such date as it may provide or as the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty between international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating organizations.

3. When the consent of an international organization to be bound by a treaty between international organizations is established on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

#### Commentary

For reasons of clarity, the provisions which correspond to article 24 of the Vienna Convention are set out in two separate and symmetrical articles, 24 and 24 *bis*, the texts of which differ from the Vienna Convention only by the drafting changes needed to adapt them to cover the two categories of treaties with which the present articles are concerned. The section concerning reservations being concluded, it is now possible, for the designation of those two categories of treaties, to revert to the more general terminology used in article 2, paragraph 1 (a),<sup>487</sup> which distinguishes treaties between one or more States and one or more international organizations from treaties between international organizations.

into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

"3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

"4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text."

<sup>487</sup> See section B.1 above.

**Article 24 bis. Entry into force of treaties between one or more States and one or more international organizations<sup>488</sup>**

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

*Commentary*

The comments made on article 24 also apply to article 24 bis.

**Article 25. Provisional application of treaties between international organizations<sup>489</sup>**

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

<sup>488</sup> Corresponding provisions of the Vienna Convention: see foot-note 486 above.

<sup>489</sup> Corresponding provisions of the Vienna Convention:

*"Article 25. Provisional application"*

"1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

"(a) the treaty itself so provides; or

"(b) the negotiating States have in some other manner so agreed.

"2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

(b) the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

*Commentary*

For reasons of clarity, the provisions which correspond to article 25 of the Vienna Convention are set out in two separate symmetrical articles, 25 and 25 bis, the texts of which differ from the Vienna Convention only by the drafting changes needed to adapt them to cover the two categories of treaties with which the present draft articles are concerned.

**Article 25 bis. Provisional application of treaties between one or more States and one or more international organizations<sup>490</sup>**

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating State or States and organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

<sup>490</sup> Corresponding provisions of the Vienna Convention: see foot-note 489 above.

*Commentary*

The comments made on article 25 also apply to article 25 *bis*.

## PART III

## OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

## SECTION 1. OBSERVANCE OF TREATIES

*Article 26. Pacta sunt servanda*<sup>491</sup>

**Every treaty in force is binding upon the parties to it and must be performed by them in good faith.**

*Commentary*

This text calls for no comment other than that it may be said to constitute a definition of the very essence of treaties, thus recognizing that international organizations are genuine parties to legal instruments which are genuine treaties, even if some differences exist between their participation and that of States.

*Article 2. Use of terms*

## 1. For the purposes of the present articles:

...

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.<sup>492</sup>

*Commentary*

(1) Until draft article 27 was adopted, the Commission had employed the term "rules" as corresponding for international organizations to the expression "internal law" used in the case of States.<sup>493</sup> On this point, it had drawn on article 5 of the Vienna Convention and had used the term in draft article 2, paragraph 2, and draft article 6.<sup>494</sup> It had not until then, however, considered it necessary to define the meaning of the expression "rules of the organization".

(2) In the discussion on draft article 27, paragraph 2, it was argued that a definition would prove useful and that reference should be made in particular to

<sup>491</sup> The title and text are identical with those of article 26 of the Vienna Convention.

<sup>492</sup> This is a new provision by comparison with the Vienna Convention.

<sup>493</sup> *Yearbook... 1974*, vol. II (Part One), p. 296, document A/9610/Rev.1, chap. IV, sect. B, article 2, para. 2, paras. (14) *et seq.* of the commentary.

<sup>494</sup> See section B.1 above.

the definition that had recently been given in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (article 1, para. 1 (34)).<sup>495</sup> The Commission accordingly adopted the present draft subparagraph, which reproduces verbatim the definition given in that Convention.

(3) This is only a provisional solution, which will have to be re-examined later in the light of all the provisions of the draft in which the expression is used. The transposition of this definition to the draft articles as a whole already raises certain questions which will have to be clarified at a late stage. Some members of the Commission pointed out, in particular, that, in the context of the present draft articles, it was not perhaps quite correct to place the constituent instrument and other rules of an organization on the same footing, as appears from the commentary to article 27 below.<sup>496</sup>

*Article 27. Internal law of a State, rules of an international organization and observance of treaties*<sup>497</sup>

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

*Commentary*

(1) From the purely drafting point of view, the preparation of a draft article adapting article 27 of the Vienna Convention to the treaties covered by the present draft quickly led to a proposal containing three paragraphs, dealing respectively with the case of States, the case of international organizations and the reservation of article 46, which is common to both those cases.

<sup>495</sup> For reference, see foot-note 470 above.

<sup>496</sup> It may be added that the question also arises whether the treaties concluded by an organization are not themselves part of the "rules of the organization" (*Yearbook... 1975*, vol. II, p. 40, document A/CN.4/285, article 27, para. (4) of the commentary). Moreover, does "established practice" differ from "practice"? (*Yearbook... 1972*, vol. II, pp. 186-187, document A/CN.4/258, para. 51; *Yearbook... 1974*, vol. II (Part One), p. 299, document A/9610/Rev.1, chap. IV, sect. B, article 6, para. (6) of the commentary.)

<sup>497</sup> Corresponding provision of the Vienna Convention:

"Article 27. *Internal law and observance of treaties*

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

(2) It soon appeared, however, that the case of international organizations raised major difficulties for some members of the Commission. They considered that the "rules of the organization", as newly defined in article 2, paragraph 1 (*j*), could not be assimilated to the internal law of a State since those rules themselves constituted rules of international law; treaties concluded by an international organization to implement those rules, far from being exempt from compliance with them, must be subject to them so that, at least in one member's opinion, the international organization should have the right to modify the treaties in question, whenever that was necessary for the legitimate and harmonious exercise of its functions. Various examples were given. For instance, resolutions of the Security Council concerning the dispatch of peace-keeping forces could result in treaties being concluded between certain States and the United Nations, but no such treaty could prevent the Council from amending the resolutions it had adopted. Again, an organization might undertake by treaty to supply certain assistance to a State, but the treaty could not prevent the organization from suspending or terminating that assistance if it decided that the State in question had failed in its obligations concerning, for example, respect for human rights. Another member of the Commission did not accept the foregoing line of argument, but maintained that international organizations are no less bound by their treaties than are States and that, consequently, international organizations are not free to amend their resolutions or to take other measures which absolve them from their international obligations without engaging their responsibility under international law.

(3) The Commission held a broad exchange of views on these matters, and it was possible to establish certain points without opposition. On others, there were differences of opinion which remained to the last, though all the members finally agreed to the text of draft article 27 as a compromise on first reading.

(4) One point is certain: article 27 of the Vienna Convention pertains more to the régime of international responsibility than to the law of treaties. It can thus be seen as an incomplete reference to problems which the Convention did not purport to deal with (article 73),<sup>498</sup> even though some of its articles are not

unconnected with questions of responsibility (for example, articles 18, 48, 49, 50, 60). Hence it cannot be claimed that article 27 provides an answer to all the questions arising from the rules of international responsibility, nor can the article be transposed to the case of international organizations in the expectation of finding such an answer. According to the principles of international responsibility, a State may invoke a wrongful act of another State in order to deny it the benefit of performance of a treaty. An international organization may deny a contracting State the benefit of performance of a treaty if that State has committed a wrongful act against the organization, no matter whether that wrongful act consists in a breach of the treaty or of a general rule of international law, *or in a breach of the rules of the organization if the State is also a member of the organization*. Here then is a very clear case in which an international organization may invoke the rules of the organization, or rather a breach of the rules of the organization, as a ground for its own non-performance of a treaty. However, this involves the operation of the rules of responsibility, a process which must be fully reserved in accordance with article 73 of the Vienna Convention.

(5) Another equally certain point is that article 27 contemplates only valid treaties which have been properly concluded. Where that is not the case, invalidity and not international responsibility is involved.<sup>499</sup> The problem thus becomes much more specific. Each organization has certain limits to the treaties it may conclude concerning the exercise of its functions and powers. If those limits are overstepped, the question of the validity of the treaties will arise; if they are respected, the treaties will be valid.<sup>500</sup> It must therefore be acknowledged that, to an extent to be determined for each organization, the possibility exists for an organization to bind itself by treaty in regard to the exercise of its functions and powers. Not to recognize this would simply be to deny the organization the right to bind itself otherwise than under purely discretionary conditions. It must be recognized, however, that it may be a delicate matter to determine the margin within which each organization can commit itself.

(6) The significance of the compromise solution accepted by the entire Commission, subject to certain reservations to be dealt with later, now becomes apparent. For although the organization has some mar-

<sup>498</sup> Article 27 is the result of an amendment (A/CONF.39/C.1/L.181), which was discussed at the United Nations Conference on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, first session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 151-158, 28th meeting of the Committee of the Whole, para. 58, to 29th meeting, para. 76). The amendment was adopted, but not before the Expert Consultant had expressed his doubts about the acceptance of a text which related mainly to international responsibility (*ibid.*, p. 158, 29th meeting, Committee of the Whole, para. 73). After consideration by the Drafting Committee, the text was approved as a separate article from article 23 (which became article 26) because it could not be placed on the same footing as the *pacta sunt servanda* rule (*ibid.*, pp. 427-428, 72nd meeting of the Committee of the Whole, paras. 29-48).

<sup>499</sup> However, the problem is somewhat complicated by the express reservation of article 46, which was introduced into article 27 on the initiative of the Drafting Committee of the Conference on the Law of Treaties (see foot-note 498 above). Although the Commission has not yet established the possible effect of article 46 as regards treaties between one or more States and one or more international organizations, it may justifiably be assumed that an objection of unconstitutionality raised by an international organization in respect of a treaty it has concluded *with one of its member States* will be highly effective, since a member State must be considered to be fully acquainted with the rules concerning the constitutionality of treaties concluded by an organization of which it is a member.

<sup>500</sup> This is a matter for future study by the Commission.

gin of freedom, constitutionally, to bind itself by treaty in regard to the exercise of its functions, the treaty which the organization concludes must still make it clear that such is its object and purpose, and this depends essentially on the will of the parties to the treaty, i.e. on their intention. There are two conceivable hypotheses. The first is that the organization freely and unilaterally takes a decision in the form of a resolution of one of its organs, which it reserves the right to revoke and alter unilaterally, and for the sole purpose of implementing that resolution it concludes a treaty, which is thus entirely dependent on the resolution and automatically follows its fate.<sup>501</sup> The second hypothesis is that the organization binds itself to the provisions of the treaty, which is not purely a measure to implement a resolution of the organization. Since both solutions are possible in theory, the unfettered choice of the parties will determine which is applied; the problem thus comes down quite simply to the interpretation of the treaty<sup>502</sup> at the unfettered discretion of the parties, i.e. according to their intention.

(7) At this point however, some members of the Commission, although considering the draft article an acceptable compromise on first reading, expressed widely divergent opinions. One view was that it would have been preferable to delete the reference to the intention of the parties in paragraph 2 because the issue was not so much the intention of the parties as the interpretation of the rules of the organization, and it would be for the organization alone to interpret those rules. Another opinion was that article 27 as a whole relates to general rules of the law of treaties concerning the capacity of international organizations, and to the rules of interpretation of treaties. Accordingly, it was pointless to include in paragraph 2 an apparent exception to the rule stated, and the paragraph should have had the same structure as paragraph 1. Moreover, reference should have been made not only to article 46 but also to other articles, such as articles 6 and 31, and the whole régime of responsibility should have been reserved in more explicit terms. Other views were also expressed on various aspects of the problem. It was argued that the reference to the intention of the parties was insuffi-

cient, and that recourse should be had to a system of presumptions. It was also pointed out that the discussions in the Commission had in fact referred primarily to the United Nations (sometimes expressly), and that, if the case of regional organizations had been borne in mind, the debate might have taken a different turn. However, most of the Commission considered that the article proposed was not without merit, quite apart from its value as a compromise solution for certain members.

## SECTION 2. APPLICATION OF TREATIES

### *Article 28. Non-retroactivity of treaties*<sup>503</sup>

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

#### *Commentary*

Neither the machinery nor the régime of the treaties covered by the present draft articles offer any reasons for departing from the text of the Vienna Convention.

### *Article 29. Territorial scope of treaties between one or more States and one or more international organizations*<sup>504</sup>

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

#### *Commentary*

(1) Article 29 of the Vienna Convention, which stems from the International Law Commission's draft and an amendment adopted by the United Nations Conference on the Law of Treaties, expresses a fundamental principle: that with regard to its international commitments, a State is bound indivisibly in respect of all its parts.

(2) This principle can be extended without difficulty, by modifications of wording, to the obligations of States under treaties between one or more States and one or more international organizations, but is it pos-

<sup>501</sup> This hypothesis would also be conceivable in the case of a treaty between States. The following are two examples. The constitution of a State grants its nationals the right to vote even if they are resident abroad; to implement this provision, the State concluded a treaty with another State. Or again, a national law grants certain benefits to aliens who are resident in the country and satisfy certain conditions; the State concludes treaties which determine the régime of administrative evidence and certification required from the country of origin to enable these aliens actually to secure without difficulty the benefits provided for by the national law. The treaties concluded for this purpose do not effect any international consolidation of the national law.

<sup>502</sup> If the interpretation does not lead to a choice between two constructions that are equally possible as regards the constitutionality of the commitment, but offers a choice between one construction in favour of an unconstitutional commitment and another in favour of a legally valid commitment, the latter construction should be preferred, even if it reduces the scope of the commitment.

<sup>503</sup> The title and text are identical with those of article 28 of the Vienna Convention.

<sup>504</sup> Corresponding provision of the Vienna Convention:

*"Article 29. Territorial scope of treaties*

*"Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."*

sible to imagine a parallel provision concerning the obligations of international organizations? Despite the somewhat loose references which are occasionally made to the "territory" of an international organization,<sup>505</sup> we cannot speak in this case of "territory" in the strict sense of the word. However, since this is so and since account must nevertheless be taken of the variety of situations which the multiple functions of international organizations may involve, it seemed preferable to avoid a formula which was too rigid or too narrow. If the draft articles said that, in the case of an international organization which is a party to a treaty, the scope of application of the treaty extended to the entire territory of the States members of that organization, the draft would diverge from article 29 of the Vienna Convention by raising the question of the scope of application of a treaty, which is not expressly covered by that Convention.

(3) A problem comparable to that affecting States, and one which might in fact arise for international organizations in different and yet parallel terms, is the question of the extension of treaties concluded by an international organization to all the entities, subsidiary organs, connected organs and related bodies which come within the orbit of that international organization and are incorporated in it to a greater or lesser extent. It would be useful to make it clear that, unless there is a properly established indication to the contrary, when an international organization binds itself by treaty, it also binds all these other bodies. Conversely, a treaty concluded on behalf of a subsidiary organ should bind the entire organization as well. However, as pointed out elsewhere,<sup>506</sup> this is an area in which notions, vocabulary and the practice of international organizations are not settled, and it seemed wisest to leave aside a subject which it is too early to codify.

**Article 30. Application of successive treaties relating to the same subject-matter<sup>507</sup>**

**1. The rights and obligations of States and international organizations parties to successive treaties re-**

<sup>505</sup> "Postal territory" (Constitution of UPU, art. 1 (United Nations, *Treaty Series*, vol. 611, p. 64)); "territory of the Community" (Court of Justice of the European Communities, *Reports of Cases before the Court, 1974-8* (Luxemburg), vol. XX, p. 1421); and other examples relating for instance to the territory of a customs union.

<sup>506</sup> *Yearbook... 1973*, vol. II, pp. 85-86, document A/CN.4/271, paras. 65-68.

<sup>507</sup> Corresponding provisions of the Vienna Convention:

*"Article 30. Application of successive treaties relating to the same subject-matter"*

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

"2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

"3. When all the parties to the earlier treaty are parties also

lating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41,] [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

*Commentary*

(1) The adoption, in regard to the treaties which form the subject-matter of the present draft articles,

to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

"4. When the parties to the later treaty do not include all the parties to the earlier one:

"(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

"5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

of a text similar to article 30 of the Vienna Convention raised only one question of substance, which the Commission discussed but failed to settle, and which its proposed draft article 30 does not solve. Article 30 of the Vienna Convention begins with a reservation: "Subject to Article 103 of the Charter of the United Nations...". Could this provision, about which there can be no question so far as States are concerned, be extended to international organizations as well? Article 103 provides that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Two arguments were advanced in the Commission. The first was that the provision extends to international organizations as well as to States because the membership of the United Nations is quasi-universal, because international organizations constitute instruments for collective action by States and because it is inconceivable that, in regard to collective action, States should rid themselves of limitations to which they are subject individually. The second argument was that Article 103 does not mention international organizations, which can therefore conclude any agreement whatsoever without having to take account of the Charter, to which they are not and cannot be parties. Besides the fact that these two arguments are diametrically opposed, some members considered that it was not the Commission's function to interpret the Charter and that the Commission should state the proviso regarding Article 103 of the Charter in such a way that both interpretations would be possible. To that end, the reservation of Article 103 has been separated from paragraph 1 of the draft article and placed at the end of the article as paragraph 6, in terms which are deliberately ambiguous.

(2) Paragraphs 1, 2, 3 and 5 of draft article 30 reproduce the corresponding article of the Vienna Convention almost word for word; an exception is the square brackets, which have been inserted to draw attention to the fact that the references they contain relate to articles which the Commission has not yet examined. The simplicity of wording is attributable to the fact that, in accordance with the definitions given in article 2, paragraphs 1 (a) and (g),<sup>508</sup> it was possible to use the terms "treaty" and "party" and to dispense with references to States and international organizations. This was not possible in paragraph 4, the ponderous nature of which is the inevitable price of ensuring the necessary clarity. Moreover, the last member of the sentence in paragraph 5, although retaining the sense of the corresponding passage in the Vienna Convention, differs from it somewhat in wording. The adopted text spells out the idea that the Vienna Convention contemplates the following hypothesis: where the conclusion and application of the first treaty prove incompatible, for one of the parties to that treaty, with the obligations arising for

that party from a second treaty towards a party to the second treaty only, the rights of the latter party are reserved.

### SECTION 3. INTERPRETATION OF TREATIES

#### *General commentary to section 3*

(1) Draft articles 31, 32 and 33 below reproduce unchanged articles 31, 32 and 33 of the Vienna Convention. This is rendered possible by the fact that, in substance, these articles of the Convention are based on the fundamental characteristics of a consensus of wills, whoever the parties to the consensus may be, and that, in form, none of these articles defines the nature of the parties, for instance by using the term "State".

(2) This by no means implies that the practical application of the rules stated in these articles will not differ according to the parties to the treaty, its object or some other characteristic of the treaty. This is true of treaties between States, and no less true of treaties between international organizations or between one or more States and one or more international organizations. For example, it has been pointed out that "preparatory work" may have specific aspects, particularly for international organizations. The international engagement of an international organization generally entails intervention by a number of bodies and work and discussion in public of a kind likely to confer on the preparatory work various features whose importance should not be underestimated.

#### *Article 31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

<sup>508</sup> See section B.1 above.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32. Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

*Article 33. Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES  
OR THIRD INTERNATIONAL ORGANIZATIONS

*Article 34. General rule regarding third States and third international organizations*<sup>509</sup>

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

<sup>509</sup> Corresponding provision of the Vienna Convention:

*“Article 34. General rule regarding third States*

*“A treaty does not create either obligations or rights for a third State without its consent.”*

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

*Commentary*

(1) The very brief negative formula used in the Vienna Convention prompted the inclusion in the present draft articles of two paragraphs, devoted respectively to treaties between international organizations and to treaties between one or more States and one or more international organizations. For each category, it was necessary to envisage the case of third States and that of third organizations.

(2) The negative formula used in the draft article implies that rights and obligations may be created with the consent of third States and third organizations. This forms the subject-matter of draft articles 35 *et seq.* (A./CN.4/298), which the Commission examined on first reading but which were not examined by the Drafting Committee in the time available. However, subject to what will be stated in a future report of the Commission, when articles 35 to 37 are submitted in their final form, a few examples can be given at the present stage to illustrate the hypotheses which this point involves. There may, for example, be the case of two international organizations, each of which has made loans to a State whose economic difficulties prevent it from honouring its financial commitments; the two organizations conclude a treaty between themselves the object of which is to offer that State a moratorium and a reduction in its payment liabilities; this treaty cannot have the slightest effect as regards the State concerned, so long as the latter has not expressed its consent in the matter; if it consents, rights and obligations will arise for its benefit and liability. Again, in connexion with environmental protection and the control of natural disasters, an international organization might conclude with WMO a treaty whose object is to make a joint offer to one or more States; for those States, that offer would entail both assistance and the obligation to furnish certain information regularly, for example, to WMO.<sup>510</sup>

<sup>510</sup> Examples of treaties between States which have the effect of offering rights and obligations to an international organization are particularly numerous. Very often, such treaties entrust to an international organization new tasks involving rights and obligations, and the organization's acceptance of those tasks will create the rights and obligations concerned. See also article 20 of the draft articles on succession of States in respect of matters other than treaties (p. 68 above).

## Chapter V

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Most-favoured-nation clause

77. At its twenty-eighth session, in 1976, the Commission completed the first reading of the draft articles on the most-favoured-nation clause. As recommended by paragraph 4 (a) of General Assembly resolution 31/97 of 15 December 1976, the Commission intends to complete the second reading of the draft articles at its 1978 session. During the present session, at its 1415th meeting, held on 10 May 1977, the Commission appointed Mr. Nikolaï A. Ushakov Special Rapporteur for the topic of the most-favoured-nation clause, to succeed Mr. Endre Ustor, who had not stood for re-election for the term of office starting 1 January 1977.

78. Paragraph 4 (a) of General Assembly resolution 31/97 recommended that the Commission should complete at its 1978 session the second reading of the draft articles on the most-favoured-nation clause, in the light of comments received not only from Member States but also "from organs of the United Nations which have competence on the subject-matter and from interested intergovernmental organizations". Pursuant to that recommendation, the Commission, at its 1458th meeting, held on 12 July 1977, instructed the Secretariat to transmit the draft articles to a number of such organs and organizations for their comments, in addition to Member States to whom the draft articles had already been sent for the same purpose. The newly appointed Special Rapporteur will therefore submit to the Commission at its next session a report on the topic, taking into account the comments received from both Member States and such organs and organizations.

#### B. Law of the non-navigational uses of international watercourses

79. At its 1415th meeting, held on 10 May 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, to succeed Mr. Richard D. Kearney, who had not stood for re-election for the term of office starting 1 January 1977. The newly appointed Special Rapporteur will proceed with the study of the topic and submit to the Commission, at an early juncture, reports thereon as a basis for the consideration by the Commission of the law of the non-navigational uses of

international watercourses, as requested by paragraph 4 (d) of General Assembly resolution 31/97 of 15 December 1976.

#### C. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

80. In 1976, at its thirty-first session, the General Assembly decided to include in its agenda of that session an item entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961". The item was allocated to the Sixth Committee, which had before it a report by the Secretary-General<sup>511</sup> containing comments and observations submitted by 15 Member States pursuant to General Assembly resolution 3501 (XXX) of 15 December 1975. The Sixth Committee recommended to the General Assembly a draft resolution on the item, which was subsequently adopted by the latter on 13 December 1976 as resolution 31/76.<sup>512</sup>

81. After recognizing in its preamble "the advisability of studying the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". General Assembly resolution 31/76 provides in its paragraphs 3, 4, 5 and 6 the following:

3. *Invites* Member States to submit or to supplement their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and on the desirability of elaborating provisions concerning the status of the diplomatic courier in accordance with paragraph 4 of General Assembly resolution 3501 (XXX), with due regard also to the question of the status of the diplomatic bag not accompanied by diplomatic courier;

4. *Requests* the International Law Commission at the appropriate time to study, in the light of the information contained in the report of the Secretary-General on the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and other information on this question to be received from Member States through the Secretary-General, the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961;

<sup>511</sup> Document A/31/145 and Add.1.

<sup>512</sup> See *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 112, document A/31/403, para. 9.

5. Requests the Secretary-General to submit to the General Assembly at its thirty-third session an analytical report on ways and means to ensure the implementation of the Vienna Convention on Diplomatic Relations of 1961 on the basis of comments and observations on this question received from Member States and also taking into account the results, if available and ready, of the study by the International Law Commission of the proposals on the elaboration of the above-mentioned protocol;

6. Decides to include in the provisional agenda of its thirty-third session the item entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: Report of the Secretary-General".

82. Pursuant to the request contained in paragraph 4 of the resolution quoted above, the Commission included in the agenda of its present session an item entitled:

Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

The Commission had before it a note by the Secretariat relating to the item (A/CN.4/300).<sup>513</sup>

83. In order to ascertain the most suitable ways and means of dealing with the topic, the Commission established, at its 1425th meeting, held on 23 May 1977, a Working Group composed of Mr. El-Erian (Chairman), Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Ushakov and Mr. Yankov. The Working Group held three meetings on 2 and 9 June and 13 July 1977, agreeing to recommend to the Commission the following conclusions:

(a) The topic "Status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier" should be inscribed on the programme of work of the Commission, for study, as requested by paragraph 4 of General Assembly resolution 31/76;

(b) The Commission should undertake the study of the topic during its 1978 session in order to allow the Secretary-General to take into account the results of such a study in the report that he has been requested to submit to the General Assembly at its thirty-third session pursuant to paragraph 5 of General Assembly resolution 31/76;

(c) The study of the topic during the 1978 session of the Commission should be done without curtailing the time allocated to the consideration of the topics on the current programme of work of the Commission to which priority has been given pursuant to relevant recommendations of the General Assembly and corresponding decisions of the Commission;

(d) As a procedure similar *mutatis mutandis* to the one followed by the Commission in connexion with the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law seems more appropriate to fulfil the aims described under (b) and (c) above, the Working Group is prepared, if the

Commission so decides, to itself undertake the first stage of the study of the topic and to report thereon to the Commission without the need of appointing a special rapporteur;

(e) The Working Group would proceed to study the topic on the basis of the relevant proposals, comments and observations submitted by Member States pursuant to General Assembly resolutions 3501 (XXX) and 31/76;

(f) For the benefit of the work to be done by the Working Group, members of the Commission wishing to do so would be invited to submit written papers, preferably before the beginning of the 1978 session of the Commission, in the light of paragraph 4 of General Assembly resolution 31/76;

(g) To facilitate the task of the Working Group, and ultimately of the Commission itself, the Secretariat would be requested: (i) to remind Member States of the Commission's intention to study the topic during its 1978 session and of the convenience of making available to the Commission, by that time, their proposals, comments and observations thereon, as well as any information, relevant facts or developments subsequent to the adoption of the 1961 Vienna Convention on Diplomatic Relations which might be useful for the implementation of the request contained in paragraph 4 of General Assembly resolution 31/76; (ii) to prepare a paper presenting systematically the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier contained in the comments and observations submitted by Member States pursuant to General Assembly resolutions 3501 (XXX) and 31/76.

84. At its 1462nd meeting, held on 18 July 1977, the Commission considered the report of the Working Group (A/CN.4/305), as introduced by its Chairman, Mr. El-Erian, and approved the conclusions reached by the Group concerning the ways and means of dealing with the item.<sup>514</sup>

#### D. Second part of the topic "Relations between States and international organizations"

85. In its report on the work of its twenty-eighth session, the Commission included the following paragraph:

The Commission also approved the recommendation of the [Planning] Group, which was submitted to it by the Enlarged Bureau, that at least three meetings should be set aside for a discussion of the second part of the topic "relations between States and international organizations". In considering the question of diplomatic law in its application to relations between States and international organizations, the Commission concentrated first on the part relating to the status, privileges and immunities of representatives of States to international organizations. The draft articles which it adopted on this part at its twenty-third session in 1971 were referred by the General Assembly to a diplomatic con-

<sup>513</sup> Reproduced in *Yearbook... 1977*, vol. II (Part One).

<sup>514</sup> Recorded in paragraph 83 above.

ference. This conference met in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The Commission requested the Special Rapporteur on the topic, Mr. Abdullah El-Erian, to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States.<sup>515</sup>

86. By its resolution 1289 (XIII) of 5 December 1958, the General Assembly invited the Commission to consider the question of relations between States and intergovernmental international organizations "at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly".

87. In 1963, the Special Rapporteur presented to the Commission a first report,<sup>516</sup> and a working paper,<sup>517</sup> on relations between States and intergovernmental organizations, in which he made a preliminary study with a view to defining the scope of the subject and determining the order of future work on it. In 1964, he submitted a working paper<sup>518</sup> as a basis of discussion for the definition of the scope and mode of treatment of his topic.

88. This working paper contained a list of questions, some of which related to:

(a) The scope of the subject [interpretation of General Assembly resolution 1289 (XIII)];

(b) The approach to the subject (either as an independent subject or as collateral to the treatment of other topics);

(c) The mode of treatment (whether priority should be given to "diplomatic law" in its application to relations between States and international organizations).

89. The conclusion which the Commission reached on the scope and mode of treatment of the topic, after discussing the preliminary study and list of questions mentioned above, was recorded in its report on the work of its sixteenth session (1964) in the following terms:

At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agree-

ing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and intergovernmental organizations should receive priority.<sup>519</sup>

90. At its 757th meeting, held on 2 July 1964, the Special Rapporteur indicated to the Commission his intention to contact the Office of Legal Affairs of the United Nations. Consultations at that stage of the work centred on the manner in which the legal advisers of the United Nations and the specialized agencies could best assist the Special Rapporteur in furnishing to him the necessary data and legal opinions on the problems which arose in practice concerning his topic. Pursuant to those consultations, two questionnaires were prepared and addressed by the Legal Counsel of the United Nations to the legal advisers of the specialized agencies and IAEA. The first questionnaire related to the "status, privileges and immunities of representatives of Member States to specialized agencies and IAEA" and the second to the "status, privileges and immunities of the specialized agencies and of IAEA other than those relating to representatives". The questionnaires were carefully prepared so as to be as comprehensive as possible, with a view to eliciting all information that would be useful to the Commission. The agencies to which the questionnaires were addressed were reminded, however, that the questions might not be exhaustive of the subject. They were therefore requested to describe in their replies any problems not covered by the questionnaire which might have arisen in their organizations and which they thought should be brought to the attention of the Special Rapporteur. The agencies were further reminded that, as the questionnaire was designed for all the specialized agencies, its terminology might not be completely adapted to a particular organization, which should in such case endeavour to apply the question to its special position. After receiving replies from the organizations concerned, the Secretariat of the United Nations, issued in 1967 a study entitled: "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities."<sup>520</sup>

91. At its 886th meeting, held on 8 July 1966, the Special Rapporteur suggested to the Commission that it should divide the subject into two parts and should concentrate its work first on the status, privileges and immunities of representatives of States to international organizations and that the second part of the subject, namely, the status, privileges and immunities of international organizations, should be deferred to a later stage. The Special Rapporteur stated that:

With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the

<sup>515</sup> *Yearbook... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.

<sup>516</sup> *Yearbook... 1963*, vol. II, p. 159, document A/CN.4/161 and Add.1.

<sup>517</sup> *Ibid.*, p. 186, document A/CN.4/L.103.

<sup>518</sup> *Yearbook... 1964*, vol. II, p. 226, document A/5809, para. 41.

<sup>519</sup> *Ibid.*, para. 42.

<sup>520</sup> *Yearbook... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

topic had been discussed in 1963 and 1964; those apprehensions related to the position of the General Conventions on the privileges and immunities of the United Nations and the specialized agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect.<sup>521</sup>

92. The suggestion by the Special Rapporteur was accepted by the Commission and the work on the subject of relations between States and international organizations proceeded in the manner indicated above.<sup>522</sup>

93. At the present session of the Commission, the Special Rapporteur submitted a preliminary report on the second part of the topic of relations between States and international organizations (A/CN.4/304)<sup>523</sup> The report consisted of five chapters. Chapter I described the background of the preliminary study and defined its scope. Chapter II traced the evolution of the international law relating to the legal status and immunities of international organizations. Chapter III analysed recent developments in the field of relations between States and international organizations which had occurred since the adoption by the Commission in 1971 of its draft articles on the first part of the topic of relations between States and international organizations and which had a bearing on the subject-matter of the report. Chapter IV of the report dealt with a number of general questions of a preliminary character. They included: the place of custom in the law of international immunities; differences between inter-State diplomatic relations and relations between States and international organizations; legal capacity of international organizations; and scope of privileges and immunities and uniformity or adaptation of international immunities. Chapter V contained a series of conclusions and recommendations.

94. The Commission discussed the preliminary report at its 1452nd, 1453rd and 1454th meetings, held on 4, 5 and 6 July 1977. Among the questions raised in the course of the discussion were the need for an analysis of the practice of States and international organizations in the field of international immunities and its impact on the United Nations system, the need to study the internal law of States regulating international immunities, the possibility of extending the scope of the study to all international organizations, whether universal or regional, the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations, and the need to reconcile the functional requirements of international organizations and the security interests of host States.

95. At its 1454th meeting, held on 6 July 1977, the Commission decided to authorize the Special Rapporteur to continue with his study on the lines indicated in his preliminary report and to prepare a further report on the second part of the topic of relations between States and international organizations, having regard to the views expressed and the questions raised during the present debate. The Commission also agreed to the Special Rapporteur seeking additional information and expressed the hope that he would carry out research in the normal way, including investigations into the agreements and practices of international organizations, whether within or outside the United Nations family, and also the legislation and practice of States.

#### E. Programme and methods of work of the Commission

96. At its 1430th meeting, held on 31 May 1977, the Commission decided again to establish a Planning Group of the Enlarged Bureau for the present session. The Group was composed of Mr. José Sette Câmara (Chairman); Mr. Roberto Ago; Mr. Emmanuel Kodjoe Dadzie; Mr. Stephen M. Schwebel; Mr. Senjin Tsuruoka; and Mr. N. A. Ushakov. It was entrusted with the task of considering the future programme and methods of work of the Commission and of reporting thereon to the Enlarged Bureau of the Commission. The Planning Group met on 24 June and 7 July 1977. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

97. On the recommendation of the Planning Group, the Enlarged Bureau approved paragraphs 98 to 130 below and recommended them to the Commission for inclusion in the report to the General Assembly on the work done at the present session. At its 1472nd meeting, held on 28 July 1977, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of those recommendations, adopted the following paragraphs of this section for inclusion in the present report.

##### (a) *Implementation of the current programme of work*

98. Being in accordance with the most recent relevant resolutions of the General Assembly, the broad goals set forth by the Commission at its twenty-seventh session, in 1975, for completing either the first or second readings of draft articles in fields under active consideration by the conclusion of the Commission's five-year term of office ending in 1981 should be maintained. Without the adoption of any rigid schedule of operation, such broad goals will therefore continue to provide the main guideline for decision-making by the Commission in matters relating to the implementation of its current programme of work.

<sup>521</sup> *Yearbook... 1966*, vol. I (Part Two), p. 279, 886th meeting, para. 8.

<sup>522</sup> Paragraph 85.

<sup>523</sup> Reproduced in *Yearbook... 1977*, vol. II (Part One).

99. As scheduled in 1975, the Commission completed at its twenty-eighth session, in 1976, the first reading of the draft articles on the most-favoured-nation clause, and these have been referred to Member States, organs of the United Nations having competence on the subject-matter and interested intergovernmental organizations for comments and observations. The former Special Rapporteur for the topic not having stood for re-election, the Commission appointed at its present session a new Special Rapporteur as indicated above.<sup>524</sup> As requested by General Assembly resolution 31/97 of 1515 December 1976, the Commission intends to complete at its thirtieth session, in 1978, in the light of the comments and observations received and on the basis of a report by the new Special Rapporteur, the second reading of the draft articles on the most-favoured-nation clause and to submit them with its recommendations to the General Assembly. This will complete the work of the Commission on this topic.

100. The Commission is very conscious of the importance attached by the General Assembly and Member States to the codification and progressive development of the rules of international law governing State responsibility. It will therefore continue during its present term of office to give the highest priority to the elaboration of the draft articles under preparation on State responsibility for internationally wrongful acts, as requested by the General Assembly. The utmost efforts will be devoted, as in the past, to meeting the goals set forth in 1975 concerning the elaboration of such a fundamental and complex draft. Thus the first reading of the set of articles constituting part I of the draft (The origin of State responsibility) should be completed, as envisaged in 1975, during the first part of the term of office of the present Commission. This would permit the submission of this set of articles to Governments, and the receipt of governmental comments in sufficient time for the second reading of the articles to take place before that term of office expires. The final completion of these articles could thus be expected by 1981 at the latest, but with the possibility of earlier completion. Such goals are without prejudice, if time allows, to the consideration by the Commission during its present term of office of articles relating to part II of the draft (The content, forms and degrees of international responsibility) or possibly part III (The settlement of disputes and the "implementation" ("*mise en œuvre*") of international responsibility).

101. With regard to another priority topic, namely, succession of States in respect of matters other than treaties, the Commission considered, in 1975, that the completion on first reading of a set of articles in respect of succession of States to public property and public debts should be the minimum goal for the 1976-1981 term of the Commission. The progress already made by the Commission in the study of State property and State debts now makes it possible to en-

visage the possibility that it will be able to complete the first reading of draft articles relating to this aspect of succession of States to public property and public debts by next year. If this is confirmed, the Commission could finalize the draft articles on succession to State property and State debts and, if possible, the special study on archives before the end of its present term of office. The advisability of codifying other aspects of the topic of succession of States in respect of matters other than treaties would be examined by the Commission when the draft articles under consideration are near completion or completed.

102. As regards the fourth topic under active consideration, namely, the question of treaties concluded between States and international organizations or between two or more international organizations, the Commission, in 1975, considered that the completion of the second reading of the corresponding draft articles by or prior to 1981 was a justifiable goal. In 1976, the Commission was unable, because of the time required for other topics, to take up this subject. At the present session, however, the Commission has made a considerable step forward in the first reading of the draft articles concerned and considers that progress in the study of the topic continues at a good pace. Bearing in mind that General Assembly resolution 31/97 recommends that the preparation of these draft articles should proceed on a priority basis, the Commission will try during its present term of office to allocate as much time as possible for that preparation.

103. For the study of the fifth topic on its active programme, the law of the non-navigational uses of international watercourses, no general goals were set in 1975 as the Commission was awaiting responses to the questionnaire on this subject that had been sent by the Secretary-General to States Members of the United Nations. A general debate on the subject, however, took place in the Commission in 1976 on the basis of a report submitted by the former Special Rapporteur on the topic. That debate was reflected in chapter V of the report of the Commission on the work of its twenty-eighth session.<sup>525</sup> The former Special Rapporteur not having stood for re-election, the Commission, at the present session, appointed a new Special Rapporteur for the topic.<sup>526</sup> During its present term of office, the Commission will continue its work on the law of the non-navigational uses of international watercourses on the basis of reports to be submitted by the new Special Rapporteur, as requested by resolution 31/97 and other previous resolutions of the General Assembly.

104. The Commission should also study the item "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the dip-

<sup>524</sup> See para. 77 above.

<sup>525</sup> *Yearbook... 1976*, vol. II (Part Two), document A/31/10.

<sup>526</sup> See para. 79 above.

omatic bag not accompanied by diplomatic courier”, as requested by General Assembly resolution 31/76. Such a study will be done during the 1978 session, in the light of the recommendations submitted by the Working Group and approved by the Commission,<sup>527</sup> and in accordance with a procedure that would not curtail the time required for the consideration of topics to which priority has been given pursuant to the relevant recommendations of the General Assembly.

105. Regarding the second part of the topic “Relations between States and international organizations”, the Special Rapporteur submitted at the present session the preliminary report requested by the Commission in 1976. The conclusions reached by the Commission, following its consideration of that report,<sup>528</sup> do not require, for the time being, any decision by it as to the formulation of goals for the study of that part of the topic.

106. In the light of the above-mentioned considerations, the Commission intends, at its thirtieth session in 1978, to conclude the second reading of the draft articles on the most-favoured-nation clause, to continue on a high-priority basis the preparation of the draft articles on State responsibility for internationally wrongful acts, and to proceed with the preparation of the draft articles on succession of States to public property and public debts with a view to completing at that session the first reading of the draft articles on State property and State debts. The Commission also intends to continue with the preparation of the draft articles on treaties concluded between States and international organizations or between international organizations. The study of the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, requested by General Assembly resolution 31/76, will also be done by the Commission at its 1978 session, following the procedure described above.<sup>529</sup> The study of the law of non-navigational uses of international watercourses will be continued by the newly appointed Special Rapporteur with a view to the subject being taken up again in the Commission at an early juncture. As to the allocation of time at its thirtieth session for the topics described above, the Commission would take the appropriate decisions at the beginning of that session in the course of adoption of the corresponding agenda.

(b) *Possible additional topics for study following the implementation of the current programme of work*

107. In view of the progress accomplished in the study of the topics under active consideration since the establishment of the 1975 goals, and the expected

early completion of the work on the draft articles on the most-favoured-nation clause, the time has come to start thinking about the additional topics which should be selected from the general programme of work of the Commission for active consideration in the relatively near future. With this in mind, the Commission held, at the present session, a preliminary exchange of views on the matter and reached a few tentative conclusions, which are described below for the benefit of delegations participating in the work of the thirty-second session of the General Assembly.<sup>530</sup>

108. One of the subjects which gained the attention of the Commission as susceptible of active consideration is the topic entitled “International liability for injurious consequences arising out of acts not prohibited by international law”. Placed on the general programme of work of the Commission as a separate topic in 1974,<sup>531</sup> pursuant to the recommendation contained in paragraph 3 (c) of General Assembly resolution 3071 (XXVIII) of 30 November 1973, this question continues to attract much attention from delegations participating in the work of the Sixth Committee of the General Assembly. In 1974 and 1975, the General Assembly reiterated that the topic should be taken up by the Commission “as soon as appropriate” (resolutions 3315 (XXIX) and 3495 (XXX)), which expression was replaced in resolution 31/97 of 15 December 1976 by the expression “at the earliest possible time”. The Commission considers that the topic should be placed on the active programme of the Commission at the earliest possible time, having regard, in particular, to the progress made on the draft articles on State responsibility for internationally wrongful acts.

109. The Commission agreed that there are two topics on the general programme of work of the Commission, referred to it long ago by the General Assembly, which do not appear at present to require active consideration in the near future, namely, “Juridical régime of historic waters, including historic bays” (referred by General Assembly resolution 1453 (XIV) of 7 December 1959) and “Right of asylum” (selected for codification in 1949 by the Commission and referred by General Assembly resolution 1400 (XIV) of 21 November 1959). The referral to the Commission of the topic entitled “Juridical régime of historic waters, including historic bays” may be considered in the light of the outcome of the Third United Nations Conference on the Law of the Sea. With regard to “Right of Asylum”, the Commission is aware of the holding in January/February 1977 of a first session of the United Nations Conference on Territorial Asylum, convened by the Secretary-General in consultation with the United Nations High Commissioner for Refugees, pursuant to General Assembly resolution 3456 (XXX) of 9 December 1975.

<sup>527</sup> See para. 83 above.

<sup>528</sup> See para. 95 above.

<sup>529</sup> See para. 83 above.

<sup>530</sup> See paras. 108–111.

<sup>531</sup> *Yearbook... 1974*, vol. II (Part One), p. 305, document A/9610/Rev.1, para. 163.

The Conference recommended that the General Assembly, at its thirty-second session, should consider the question of convening at an appropriate time a further session of the Conference.<sup>532</sup> The question of diplomatic asylum was discussed by the Sixth Committee at the thirtieth session at the General Assembly but the debate was inconclusive. By its resolution 3497 (XXX) of 15 December 1975, the General Assembly decided to give further consideration to the question at a future session.

110. The Commission has also considered topics of international law selected for codification by the Commission in 1949, pursuant to article 18, paragraph 1, of its Statute, on which general codification work has not yet been done by the United Nations, namely: "Recognition of States and Governments", "Jurisdictional immunities of States and their property", "Jurisdiction with regard to crimes committed outside national territory" and "Treatment of aliens". From all these topics, the question entitled "Jurisdictional immunities of States and their property" is the one that the Commission recommends for selection in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance and its suitability for codification and progressive development. Moreover, as the document entitled "Survey of international law", prepared in 1971 by the Secretary-General, points out, "it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic".<sup>533</sup>

111. The Commission also addressed the question of reviewing some drafts prepared by it several years ago at the request of the General Assembly. One of the drafts which, in the opinion of the Commission, could be reviewed in the future if the General Assembly so wishes is the draft Code of Offences against the Peace and Security of Mankind, as submitted by the Commission to the Assembly in 1954.<sup>534</sup> By its resolution 1186 (XII) of 11 December 1957, the General Assembly decided to defer consideration of the draft code until such time as it again took up the question of defining aggression. The "Definition of Aggression" was approved by General Assembly resolution 3314 (XXIX), of 14 December 1974. Since then, the question of the draft Code of Offences against the Peace and Security of Mankind has not been included in the agenda of subsequent sessions of the General Assembly but support has been expressed by some delegations at the Sixth Committee for considering the topic again. Any review of the draft code would, of course, take duly into account the developments which have occurred in international law since the elaboration of the draft code by the Commission in 1954.

<sup>532</sup> See A/CONF.78/12, para. 25.

<sup>533</sup> *Yearbook...* 1971, vol. II (Part Two), p. 20, document A/CN.4/245), para. 75.

<sup>534</sup> *Yearbook...* 1951, vol. II, pp. 133-137 and *Yearbook...* 1954, vol. II, pp. 149-152.

### (c) *Methods of work*

112. The methods of work followed by the Commission are based on the provisions embodied in its Statute as well as on the arrangements governing its sessions. The object, nature and composition of the Commission as well as the established procedural stages for codifying and progressively developing a given topic have a direct bearing on such methods. However, out of the need to incorporate elements of both *lex lata* and *lex ferenda* in the rules to be formulated, the Commission follows, generally speaking, a single consolidated method, which incorporates the various procedures set forth in articles 16 to 23 of its Statute.

113. Such a method comprises basically the formulation by the Commission of a plan of work on the topic concerned, the appointment of a Special Rapporteur, the request for data and information from Governments and for research projects, studies, surveys and compilations from the Secretariat, the discussion of the reports submitted by the Special Rapporteur of the Commission at plenary meetings and of the proposed draft articles in plenary and within a Drafting Committee established by the Commission, the elaboration of draft articles with commentaries and their submission to Governments for observations, the revision of provisional draft articles in the light of the written and oral observations from Governments, and the submission of final drafts with recommendations to the General Assembly.

114. Three different stages in the consideration of a given topic may be distinguished within the method followed by the Commission: a first preliminary stage, devoted mainly to the organization of the work and the gathering of relevant materials and precedents; a second stage, during which the Commission proceeds to a first reading of the draft articles submitted by the Special Rapporteur; a third and final stage, devoted to a second reading of the draft articles provisionally adopted. The role performed by the Special Rapporteurs is of paramount importance, particularly during the second and third stages referred to above. The work done by the Drafting Committee during those stages is also essential. The Secretariat is also entrusted with various tasks and it is frequently called upon to make contributions, especially during the first preliminary stage.

115. The method followed by the Commission regarding the codification and progressive development of a topic of international law may be said to have passed the test of suitability successfully. The achievements of the Commission so far, the authority attached to its work, and the high degree of support and acceptability that its draft articles receive in the Sixth Committee and in conferences of plenipotentiaries are the best proof of the merits of that method. It must also be added that the Commission has applied the method in a flexible manner, making within the general framework provided by the

method the adjustments that the specific features of the topic concerned demand.

116. Moreover, the Commission has always felt able to adopt special methods of work when entrusted with special tasks. In cases, for instance, where it has been called upon by the General Assembly to act as a kind of advisory body of legal experts rather than to codify or progressively develop, properly speaking, a particular field of international law, the Commission has not hesitated to make departures from the method normally followed. To special assignments it has normally applied special methods. The methods followed by it in connexion with topics such as the question of international criminal jurisdiction (1950), the question of definition of aggression (1951), reservations to multilateral conventions (1951), and extended participation in general multilateral treaties concluded under the auspices of the League of Nations (1963) illustrate that conclusion.

117. Departures from the basic method of work followed by the Commission have also been made in matters involving codification work when it was considered necessary or advisable in the light of the nature of the topic and the terms of reference provided by the General Assembly for its study. The draft Declaration on the Rights and Duties of States (1949), the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950), the draft Code of Offences against the Peace and Security of Mankind (1954) and, most recently, the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (1972) may be mentioned as examples of cases in which, in one way or another, variations were introduced in the basic method of work of the Commission. The draft articles on the prevention and punishment of crimes against diplomatic agents, for example, were elaborated with the assistance of a Working Group and not of a Special Rapporteur and were not subject to the two-readings procedure; the draft Declaration on the Rights and Duties of States was examined by the Commission on the basis of a draft submitted by a Member State.

118. From time to time, the Commission has also proceeded to a general review of its methods of work and the organizational pattern of its sessions, in the light of comments or suggestions made in the Sixth Committee or in the Commission itself, aimed at a speeding-up or streamlining of its procedure to respond more readily to its tasks. For example, at its tenth session, in 1958, the Commission examined a working paper on the matter prepared by the Chairman of its 1957 session.<sup>535</sup> During its twentieth session, in 1968, the Commission reviewed its programme and methods of work and had before it a working paper prepared by the Secretariat, which was

<sup>535</sup> *Yearbook...* 1958, vol. II, pp. 107-108, document A/3859, paras. 57-67.

annexed to its report of that session.<sup>536</sup> The question of the Commission's methods of work was alluded to in 1973 when, at its twenty-fifth session, the Commission considered the item "Review of the Commission's long-term programme of work".<sup>537</sup> Most recently, the Commission discussed in some detail the matter at its twenty-sixth session in 1974 in connexion with the remarks of the report of the Joint Inspection Unit.<sup>538</sup>

119. As a result of the review made on these occasions, a series of actions were taken leading, for example, to Governments being given more time to comment on first-reading drafts, to the Drafting Committee being constituted as a negotiating committee when the Commission so decides, or to the length of the annual session of the Commission being established as 12 weeks. Some of these actions have helped to accelerate the pace of work of the Commission in accordance with comments made in the Sixth Committee of the General Assembly. However, the Commission, in its new composition, wishes to reiterate its position that a still quicker pace should not be made at the price of impairing the quality, value or acceptability of its drafts. As the Commission itself put the matter in 1958: "In the course of the years what would matter was the quality of the work, not whether a greater or lesser period had been spent in producing it".<sup>539</sup> In the Commission's view, to submit to the General Assembly every two or three years a final set of draft articles of a high technical value and a high degree of acceptability to the whole international community on essential areas of international law could not be considered a slow pace at all. Moreover, a quicker pace could put an excessive burden on States, jeopardizing in the last resort the entire process of the codification and progressive development of international law. The legal services at the disposal of foreign ministries are limited and subject to large competing demands, including those of international conferences.

120. In the light of the above-mentioned considerations, the Commission decided, at the present session, to reaffirm the conclusion reached unanimously in 1974 that the:

... procedures, methods of work, and organizational pattern of the Commission are correct and appropriate and that they also represent the most effective means of carrying out the task entrusted to it by the General Assembly under Article 13, paragraph 1 (a), of the Charter. Hence, the Commission sees no reason why its Statute should be amended or the present basic method of work and organizational pattern modified.<sup>540</sup>

<sup>536</sup> *Yearbook...* 1968, vol. II, pp. 223-224 and 226-243, document A/7209/Rev.1, paras. 95-102 and annex.

<sup>537</sup> *Yearbook...* 1973, vol. II, pp. 225-231, document A/9010/Rev.1, paras. 134-176.

<sup>538</sup> *Yearbook...* 1974, vol. II (Part One), pp. 308-311, document A/9610/Rev.1, paras. 192-212.

<sup>539</sup> *Yearbook...* 1958, vol. II, p. 110, document A/3859, para. 68, *in fine*.

<sup>540</sup> *Yearbook...* 1974, vol. II (Part One), p. 311, document A/9610/Rev.1, para. 212.

This conclusion notwithstanding, the Commission intends to keep constantly under review, as in the past, the possibility of improving its present method of work and procedures in the light of the specific features presented by the individual topics under consideration, so as to carry out as efficiently as possible the tasks entrusted to it, as requested by General Assembly resolution 31/97 of 15 December 1976. It is with these considerations in mind that it approved, at its present session, the method of work described above<sup>541</sup> for dealing with the study of the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

121. Regarding the question of the desirability of establishing the Planning Group as a permanent committee, which was left in 1976 for decision by the Commission in its new composition, the Commission is of the opinion that the best course of action would be to approach the matter pragmatically, setting up the Group when needed. The Commission will therefore establish such a Planning Group, entrusted with the task of advising the Enlarged Bureau of the Commission on matters relating to its programme, organization and methods of work, unless at a particular session it considers it unnecessary.

122. Finally, the Commission would like to recall that, in order mainly to speed up the first preparatory stage of the codification of a given topic, it recommended, in 1968 and 1973, to the General Assembly the pressing need to increase the staff of the Codification Division of the Office of Legal Affairs so as to enable it to give to the Commission and its Special Rapporteurs all the assistance required by the increasing demands of its work, especially in the area of research projects and studies. The Commission reiterates that recommendation at the present time.

123. The Commission would also like to call to the attention of the Secretary-General the fact that, in implementing regulations for the control and limitation of documentation originating in the Secretariat, due regard should be paid to the nature of the research projects and studies requested from the Codification Division, so as not to jeopardize that contribution whenever required by the work of the Commission. In the matter of legal research—and codification of international law demands legal research—limitations on the length of documents cannot be imposed.

(d) *Form and presentation of the report of the Commission to the General Assembly*

124. During the thirtieth (1975) and thirty-first (1976) sessions of the General Assembly, certain representatives made reference in the Sixth Committee to matters relating to the form of the annual report

submitted by the Commission to the Assembly. Some representatives considered that the report was of excessive length and that it should be shortened by streamlining, in particular, the introduction to the various chapters and the commentaries to the draft articles contained therein. Other representatives who referred to the matter did not, however, share such a view and stressed that the report of the Commission should provide the most complete account possible of Commission discussions as well as sufficient legal precedents and related materials so that ministries of foreign affairs and delegations without adequate research facilities or staff could familiarize themselves, easily and without additional research, with the various issues and their history.

125. To such practical considerations, it may be added that, according to article 20 of its Statute, the Commission shall submit its draft articles to the General Assembly together with a commentary containing: (a) adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine; (b) conclusions relevant to (i) the extent of agreement on each point in the practice of States and doctrine; (ii) divergencies and disagreement which exist, as well as arguments invoked in favour of one or another solution. The Commission must therefore, according to its Statute, justify its proposals to the General Assembly and ultimately to States, on the evidence of existing law and the requirements of its progressive development in the light of the current needs of the international community. The Commission's commentaries are an essential element of the codification process, facilitating, at the first stage of that process, the contribution of individual States through comments and observations and, during and after the final stage, the understanding and interpretation of the rules embodied in the codification conventions. They are an important part of the *travaux préparatoires* of those conventions, being frequently referred to or quoted in the diplomatic correspondence of States as well as by the International Court of Justice.

126. The length of a given Commission report actually depends on a series of variable factors which have a direct effect thereon: for example, the duration of the session of the Commission (which is now 12 weeks), the number and nature of the topics discussed during the session (a completely new topic normally requires more explanatory material than topics related to areas in which codification work has already been done), the inclusion in the report of a complete set of draft articles on a topic (the 1976 report, for instance, reproduces for the convenience of ministries and delegations all draft articles and commentaries thereto on the most-favoured-nation clause, including those adopted at previous sessions), etc. It is submitted, therefore, that the length of a given report of the Commission is not a matter that can be decided *a priori* and without regard to the provisions of the Statute of the Commission and to the position of the Commission in the process of codifi-

<sup>541</sup> See para. 83 above.

cation as a whole. To fix in advance and *in abstracto* any maximum or minimum so far as the length of the report is concerned does not seem, therefore, a course of action that the Commission could endorse. The report on the work done by the Commission at a particular session should be short or long according to the Commission's perception of the need for explaining and justifying the draft articles contained therein to the General Assembly and Member States.

127. Although, as indicated above, some of the comments made in the Sixth Committee related to the length of the Commission's report, the main pre-occupation running throughout the discussion would actually appear to be the question of the time available between the issuing of the Commission's report and the moment of its consideration by the Sixth Committee. At present, the Commission approves its report at the end of July when it closes its annual session. Afterwards, the report is edited by the substantive Secretariat of the Commission, which takes about a week, and is then submitted to the documents control section at the Palais des Nations. The technical services of the Secretariat need about five weeks to process the report for circulation in the various official languages of the General Assembly. As a result of all these unavoidable stages, the report of the Commission is not normally available to delegations in New York before the second week of September, and sometimes even a week later. The Sixth Committee begins its work by the end of September and customarily takes up the item entitled "Report of the International Law Commission" as one of its first items. Delegations thus have, in fact, a short time to become acquainted with the contents of the Commission's report before the debate starts.

128. In order to put an end to such a situation, the Commission has considered in detail this year a series of suggestions aimed at the earlier circulation of the report. Thus the idea was advanced that a solution could be to circulate the report in parts, so that one or more parts could be circulated earlier without waiting for the final adoption of the whole report. It was also suggested for the same purpose that the report be divided into two parts, one devoted to organization and administrative matters, contained at present in the first and last chapters, which could be issued earlier, and another containing the chapters dealing with substantive topics. Such suggestions would, however, imply certain departures from the present organization of work during the Commission's session and might prove to be impracticable and of doubtful value for the purpose intended. Hence the prevailing view within the Commission was that the best course of action would be for the Sixth Committee to postpone its consideration of the Commission's report until later in the Assembly's session to allow fully a sufficient period of time for representatives to examine carefully, reflect upon and prepare statements on the contents of the Commission's report.

129. Bearing these considerations in mind, the Commission decided to suggest that its report be taken up by the Sixth Committee later during the session of the General Assembly. To begin consideration of the report of the Commission during the last week of October would probably help to overcome the difficulties presently encountered by some delegations and would still provide sufficient time for the preparation of the report of the Sixth Committee—which also contains a detailed summary of the debate—on the report of the Commission. In making the above-mentioned suggestion, the Commission has merely ventured to indicate a practical way of overcoming existing difficulties, the Sixth Committee being, of course, the only one entitled to decide upon its organization of work and the approximate dates of consideration of each item on its agenda.

130. As to the substantive content of its report, the Commission concluded that the present pattern should not be changed. The form of the report, with its division into chapters and sections, appears also to the Commission to be logical and clear. The Commission will provide headings and subheadings within each individual chapter or section and reflect them in the table of contents, so as to make consultation of the report by Governments and delegations easier, and it may also consider, whenever practicable, the provision of summaries. Finally, the Commission has also decided that, immediately after the closing of its session, the Secretariat should publish and circulate a document containing the text of all draft articles adopted at that session, with the explanation that background information and the commentaries on the articles would appear in the report of the Commission.

## F. Co-operation with other bodies

131. The International Law Commission wishes to reaffirm the great importance which it attaches to the co-operation with bodies engaged in the progressive development of international law and its codification at the regional level and, in particular, with the co-operation established on the basis of the Statute of the Commission with the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. The aspirations of the States of the regions concerned regarding the development of international law being also reflected in the respective agendas of these bodies, the Commission intends to pay due attention to topics on such agendas when reviewing in the future its own programme of work.

### 1. INTER-AMERICAN JURIDICAL COMMITTEE

132. The Inter-American Juridical Committee held its last two sessions at Rio de Janeiro (Brazil) in July-August 1976 and January-February 1977. The Commission was unable to send an observer to those ses-

sions. It expects, however, to send an observer to the forthcoming session in July-August 1977. Bearing in mind the Committee's standing invitation to the Commission to send an observer to attend its sessions, the Commission, at its present session, requested its Chairman, Sir Francis Vallat, to attend one of the 1978 sessions of the Committee or, if he was unable to do so, to appoint another member of the Commission for this purpose.

133. The Inter-American Juridical Committee was represented at the twenty-ninth session of the Commission by Mr. H. Valladão, who addressed the Commission at its 1437th meeting, held on 9 June 1977. After recalling the history of the codification activities of the Inter-American Juridical Committee and its predecessor, the International Commission of American Jurists, Mr. Valladão stated that the Committee had continued its work of preparing draft treaties and conventions of public and private international law. Comparing the mandate of the International Law Commission and that of the Committee, he noted that, although both had the task of promoting the progressive development of international law and its codification, the Inter-American Juridical Committee served also as an advisory body of OAS. The Committee had studied problems relating to the integration of the developing countries of the American continent and to the possibilities of harmonizing their legislation, and had also become involved in revising existing conventions on legal matters adopted on the basis of its drafts, and in preparing draft reforms relating to certain aspects of the Bustamante Code of 1928. At its most recent sessions in 1976 and 1977, the Committee had approved several draft conventions, which would be submitted to the Second Inter-American Specialized Conference on Private International Law, to be held at Montevideo. Mr. Valladão also said that a third international law course had been organized by the Committee in 1976 and that a fourth course would be held in July and August 1977, at the same time as the Committee's session. He finally informed the Commission that the Committee's next session would focus on two priority topics: the principle of self-determination and its field of application, and conflict of laws and the need for a uniform law relating to cheques in international circulation.

## 2. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

134. The Chairman of the Commission at its twenty-eighth session, Mr. Abdullah El-Erian, attended the eighteenth session of the Asian-African Legal Consultative Committee, held at Baghdad (Iraq) in February 1977, as an observer for the Commission and made a statement before the Committee. Mr. El-Erian reported to the Commission at its 1470th meeting, held on 27 July 1977, on his attendance at the Committee's session, informing it that the agenda of that session included succession of States in respect of treaties as a topic arising out of the work of the

Commission. Other topics on the agenda of the Committee related to the law of the sea, reciprocal assistance in respect of economic offences, international trade law and environmental law.

135. At the present session of the Commission, the Committee was unable to be represented. The Commission, which has a standing invitation to send an observer to the Committee's sessions, requested its Chairman, Sir Francis Vallat, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for the purpose.

## 3. EUROPEAN COMMITTEE ON CO-OPERATION

136. The Chairman of the Commission at its twenty-eighth session, Mr. Abdullah El-Erian, attended the twenty-sixth session of the European Committee on Legal Co-operation held at Strasbourg (France) in December 1976, and made a statement before the Committee. During the Commission's present session, at its 1469th meeting, held on 27 July 1977, Mr. El-Erian made an oral report on his attendance at the Committee's session. He informed the Commission that the agenda for that session included, *inter alia*, such subjects as acquisition of nationality, protection of environment, and legal problems relating to stateless nomads.

137. The Committee was unable to be represented at the present session of the Commission. The Commission, which has a standing invitation to send an observer to the Committee's sessions, requested its Chairman, Sir Francis Vallat, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for this purpose.

## G. Date and place of the thirtieth session

138. The Commission decided to hold its next session at the United Nations Office at Geneva from 8 May to 28 July 1978.

## H. Representation at the thirty-second session of the General Assembly

139. The Commission decided that it should be represented at the thirty-second session of the General Assembly by its Chairman, Sir Francis Vallat.

## I. Gilberto Amado Memorial Lecture

140. As a result of the new composition of the Commission, changes were made in the composition of the Advisory Committee on the Gilberto Amado Memorial Lecture. The Committee now comprises the following members: Mr. Ago, Mr. Castañeda, Mr.

El-Erian, Mr. Sette Câmara, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat and Mr. Yankov.

141. The Committee held one meeting, under the chairmanship of Sir Francis Vallat on 2 June 1977, to discuss the organization of the lecture at the present session but, owing to material difficulties inherent in the very short time available if the lecture was to be given during the session of the International Law Seminar, in accordance with the decision taken in 1971,<sup>542</sup> the Commission accepted the Committee's proposals that the lecture be postponed until the next session and that Judge Taslim O. Elias of the International Court of Justice be invited to give the Gilberto Amado Memorial Lecture at that session.

### J. International Law Seminar

142. Pursuant to General Assembly resolution 31/97 of 15 December 1976, the United Nations Office at Geneva organized, during the Commission's twenty-ninth session, a thirteenth session of the International Law Seminar for advanced students of this subject and junior government officials who usually have to consider questions of international law in the course of their work. In order to associate the seminar with the Commission's tribute to the memory of Mr. Edvard Hambro, this thirteenth session was named the "Edvard Hambro Session".

143. Eleven meetings of the Seminar, devoted to lectures followed by discussions, were held between 6 and 24 June 1977.

144. The following eight members of the Commission generously gave their services as lecturers: Mr. Dadzie (The law of refugees); Mr. El-Erian (Diplomatic law and its application in relations between States and international organizations); Mr. Reuter (On equity); Mr. Šahović (Revision of the Charter and strengthening of the United Nations); Mr. Tabibi (Reaffirmation of the right of land-locked countries to free access to the sea); Mr. Ushakov (The principle of peaceful co-existence in contemporary international law); Sir Francis Vallat (Succession of States in respect of treaties in the light of the United Nations Conference); and Mr. Verosta (Considerations on the definition of aggression). Mr. Pilloud, Director of the Department of Principles and Law of the International Committee of the Red Cross, spoke about the results of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian

Law Applicable in Armed Conflicts,<sup>543</sup> held at Geneva from 1974 to 1977. Mr. van Boven, Director of the Division of Human Rights of the United Nations Secretariat, spoke on "The development of United Nations efforts in the field of human rights". Mr. Raton, Director of the Seminar, gave an introductory talk on the International Law Commission and its work. The Commission wishes to record its gratitude to Mr. Raton and his assistant, Miss M. K. Sandwell, for their effectiveness in organizing the Seminar.

145. The 20 participants,<sup>544</sup> all from different countries, also attended meetings of the Commission and a film show given by the United Nations Information Service. They were supplied, free of charge, with the basic documents necessary for following the Commission's discussions and the lectures of the Seminar. Participants were also able to obtain, or to purchase at reduced prices, United Nations documents which are unavailable or difficult to find in their countries of origin. They had access to the facilities of the United Nations Library.

146. As in the past, none of the cost of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants. The Governments of Denmark, Finland, the Federal Republic of Germany, the Netherlands, Norway and Sweden once again offered fellowships to participants from developing countries; Kuwait joined them in doing so at the present session. The fellowships, ranging in value from \$2,000 to more than \$4,000, were awarded to 13 candidates. The award of fellowships makes it possible to achieve a satisfactory geographical distribution of the participants and to bring deserving candidates from distant countries who would otherwise be unable to attend for purely pecuniary reasons. Thanks to the increased generosity of the Governments which were already donors and the new contribution by Kuwait, the situation in regard to the fellowship budget has improved. The interest of Governments must be maintained, however, since travel and living expenses are continually increasing. It must be emphasized that, in accordance with the constant policy of the organizers of the Seminar, donor Governments are notified of the names of the beneficiaries, while the beneficiaries are always informed of the source of their fellowship.

<sup>542</sup> *Yearbook... 1971*, vol. II (Part One), p. 534, document A/8410/Rev.1, para. 164.

<sup>543</sup> In conformity with paragraph 3 of General Assembly resolution 3032 (XXVII) of 18 December 1972.

<sup>544</sup> Twenty-three candidates were selected, but for various reasons three of them were unable to participate in the session.