

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1981

*Volume II*  
*Part One*

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

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UNITED NATIONS





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UNITED NATIONS

New York, 1983



## NOTE

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

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1980*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of Special Rapporteurs and other documents;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed text of the volumes of the *Yearbook* issued as United Nations publications.

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The reports of the Special Rapporteurs and other documents considered by the Commission during its thirty-third session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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## ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance
EEC	European Economic Community
EFTA	European Free Trade Association
FAO	Food and Agriculture Organization
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICRC	International Committee of the Red Cross
I.C.J.	International Court of Justice
ILO	International Labour Organisation
IMF	International Monetary Fund
IMCO	Inter-Governmental Maritime Consultative Organization
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
P.C.I.J.	Permanent Court of International Justice
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
WMO	World Meteorological Organization

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<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., Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series B</i>	<i>P.C.I.J., Collection of Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i> (beginning in 1931)

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## NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

## **FILLING OF CASUAL VACANCIES (ARTICLE 11 OF THE STATUTE)**

[Agenda item 1]

### **DOCUMENT A/CN.4/337**

#### **Note by the Secretariat**

[*Original: English*]  
[9 February 1981]

1. Following the election on 15 January 1981 of Mr. Stephen M. Schwebel as judge of the International Court of Justice, a seat has become vacant on the International Law Commission.

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

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

Article 2 reads:

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

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

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

Article 8 reads:

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

3. The term of office of the member to be elected by the Commission will expire at the end of 1981.





# SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 2]

DOCUMENT A/CN.4/345 and Add.1-3

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

[Original: French]  
[6 and 29 May, 5 and 16 June 1981]

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#### EXPLANATORY NOTE

The text of the draft articles on succession of States in respect of matters other than treaties, adopted by the Commission on first reading, is reproduced in *Yearbook . . . 1980*, vol. II (Part Two), pp. 7 *et seq.*

The *oral comments* of representatives of Member States at the Sixth Committee of the General Assembly are recorded:

For 1979, in "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fourth session of the General Assembly" (A/CN.4/L.311);

For 1980, in "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326).

The *written comments of Governments*, which were originally reproduced as mimeographed documents (A/CN.4/338 and Add.1–4), are reproduced in *Yearbook . . . 1981*, vol. II (Part Two), annex 1.

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#### *Conventions referred to in the present report*

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)

Hereinafter referred to as "1969 Vienna Convention" (*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)

Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)

Hereinafter referred to as "1978 Vienna Convention"  
(*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185)

## Introduction

1. For the purpose of facilitating a second reading of the draft articles on succession of States in respect of matters other than treaties, the Special Rapporteur, who has received very few comments from only a small number of States, sets out below the written comments of Governments and, where he has deemed it necessary, the comments made orally by representatives of Member States during the discussion in the Sixth Committee of the General Assembly, at its thirty-fourth session, in 1979, and its thirty-fifth session, in 1980.

In a task of this kind, the usual and the most appropriate approach in evaluating such comments is to consider the draft articles one by one.

## Comments on various provisions of the draft articles

### PART I: INTRODUCTION

#### ARTICLE 1. (Scope of the present articles)

2. In view of General Assembly resolution 33/139 of 19 December 1978, recommending that the Commission should aim at completing at its thirty-first session the first reading of the "draft articles on succession of States in respect of State property and State debts", the Commission considered the question of reviewing the words "*matters other than treaties*" in order to reflect that further limitation in scope. The Commission decided, however, to do so at its second reading of the draft, in the light of the comments of Governments and any decision on the future programme of work on this topic. At its thirty-first session, in 1979, the Commission nevertheless decided to replace the definite article "*les*" by "*des*" before the word "*matières*" in the French version of the title of the topic, and consequently the title of the present set of draft articles and the text of article 1, so as to align that version with the other language versions.<sup>1</sup>

#### *Oral comments—1979*

3. In the Sixth Committee, in 1979, one representative expressed his agreement with the Commission that the term "effects" should be used to indicate that the draft provisions were concerned, not with the replacement of one State by another in the responsibility for international relations of territory, but with its legal effects, i.e., the rights and obligations deriving from it.

4. In the opinion of another representative, article 1, which was meant to serve as an introduction to the draft as a whole, missed the point in that respect. In particular, the expression "matters other than treaties" was too negative. He suggested that the article should be redrafted with the aim of stating specifically the matters to which the articles did apply, rather than implying the matters to which they did not apply. In that regard, article 1 of the 1969 Vienna Convention would provide a better model than article 1 of the 1978 Vienna Convention.

#### *Written comments*

5. The *German Democratic Republic* endorses article 1 and welcomes the Commission's decision to seek on second reading a more precise formulation of the field of application of the article and hence of the title of the future convention. It would seem possible, in its view, to make explicit reference to the matters that are the subject of the draft, i.e. State property, State archives and State debts.

6. *Italy* also considers that the title should reflect the matters dealt with in the draft and therefore proposes that the text of article 1 should be amended accordingly. In fact, it considers that the part of the draft on States archives should, because of its special nature, be distinct

from the other two parts and should form the object of an autonomous body of rules. In practice, this would mean clarifying the articles on State property so as to exclude archives from the general category of State property and find a place for them in the new arrangement.

7. *Austria* also takes the view that the vague nature of the title of the draft is unsatisfactory as the title for an international instrument and does not make it immediately apparent what matters are covered by the draft articles. It proposes that the Commission should amend the wording of the title and of article 1, and thus indicate that the draft has dealt with only three matters.

8. *Czechoslovakia* is of the same opinion as the German Democratic Republic and Austria in considering that the wording of the title and of article 1 is too broad in scope and, in view of the more limited content of the draft, might well be misleading.

9. The Czechoslovak Government, pointing out that several delegations in the Sixth Committee had expressed the wish that the draft articles should be harmonized with the 1978 Vienna Convention, is of the opinion that such harmonization should also cover the fields of application of the two texts. However, it states that:

Article 1 of the [Vienna] Convention limits the scope of the Convention to treaties between States. In the case of article 1 [of the present draft], in view of the conception of debts contained in article 16, where State debts are defined much more widely than merely as debts between States, the parallel between the 1978 Vienna Convention.<sup>2</sup>

#### OPINION OF THE SPECIAL RAPporteur

10. The Commission's decision to replace the definite article "*les*" by "*des*" before the word "*matières*" in the French title of the draft has unquestionably improved the text, for unlike the previous title, it is now clear that the draft covers not *all* matters other than treaties but only *some* matters. Nevertheless, it has to be recognized that this new title is still not satisfactory, because it does not enumerate from the outset *which* matters are covered by the draft articles.

It would seem desirable for the matters actually dealt with to be reflected more comprehensively in the title. Besides, the parallelism between this set of draft articles and the articles on succession in respect of treaties does not in any way imply that the title of the present draft should be retained; that would have been the case if the draft covered *all* matters other than treaties, which was the original intention. The matters would have been so great in number that they could not have been listed exhaustively in the draft articles. Since the Commission has limited the scope to State property and debts, the situation is quite different, and such parallelism now requires articles on succession in respect of State property and debts, in the same way as articles exist on succession in respect of treaties.

<sup>1</sup> See *Yearbook* ... 1979, vol. II (Part Two), p. 15, para. (3) of the commentary to article 1.

<sup>2</sup> *Yearbook* ... 1981, vol. II (Part Two), annex I. sect. 4, para. 5.

11. A problem does arise, however, in the case of State archives. Some members of the Commission and some States consider that State archives are indeed State property, but they are so special in character that they must be distinguished from State property. Accordingly, the title, if it is to reflect the content of the draft articles faithfully, should read: "Succession of States in respect of State property, archives and debts".

The Special Rapporteur has always maintained that State archives do indeed form a special category of State property, but they are none the less State property in essence. Here, the concern of the Commission should be not only to reflect in the title all of the matters actually dealt with in the draft but also to prevent any problems of *substance* from arising. If State archives form a category of State property, they must be governed by the provisions concerning State property and also by the more specific provisions concerning State archives. If State archives were listed separately both in the title of the draft and in the body of the draft as a set of autonomous rules contained in a special part, the implication might be that the rules on State property could in no case apply, even on a residual basis, to State archives.

12. The Special Rapporteur none the less considers that the risk is not very great and that the Commission can avoid it by adding somewhere in the text on archives a suitable formula clearly indicating that State archives form a category of State property. He therefore suggests that the Commission should agree to the following title:

"Draft articles on succession of States in respect of State property, archives and debts"

and reformulate article 1 accordingly.

13. The point of departure of the Czechoslovak Government's comment concerning harmonization of the draft articles with the 1978 Vienna Convention from the standpoint of their field application, is the fact that State debts are not defined as debts owed by a State exclusively to another State. The Czechoslovak Government believes that the inter-State relationship (between the successor or predecessor State on the one hand and the third State on the other) in succession of States in respect of treaties is a feature of the succession of States, whereas it is in fact only a feature of the treaty. In the case of property, or archives, a legal relationship between the predecessor or successor State and the third State does not necessarily exist in the context of State succession. Such a relationship does, on the other hand, exist in succession of States in respect of treaties, and also in respect of debts when the debt is owed to a State. Hence it is not a question of the field of application of the draft articles but rather a question of the essence or the specific nature of each matter: property, debts, archives or treaties.

## ARTICLE 2. (Use of terms)

### *Oral comments*

1979

14. In the Sixth Committee, in 1979, it was considered fitting that the definitions of terms in article 2 corre-

sponded to those contained in the 1978 Vienna Convention, since the Convention and the draft articles referred to the same phenomenon in a number of instances.

### *Subparagraph 1(e)*

15. Doubts were expressed as to whether the definition of the term "newly independent State" was the most appropriate, since in providing that the territory of such a State should have been a dependent territory "immediately before the date of the succession of States" it seemed intended to eliminate cases which there was no reason to exclude, such as the emergence of a new State as a consequence of the separation of part of an existing State or from the uniting of two or more existing States. It was maintained that the definition was very restrictive; it should have included all new and emergent State or States which became independent by means other than voluntary transfer of part of the territory of a State, and the benefit conferred on the "newly independent State" formed from a dependent territory should be conferred upon all new States without distinction.

### *Subparagraph 1(f)*

16. In regard to the definition of "third State", the view was expressed that it was necessary to avoid attributing new, and not necessarily clear, meanings to established expressions. It was incumbent on the Commission, given its central role in the development of international law, to preserve the integrity and clarity of the lexicon of that law.

### *Paragraph 2*

17. It was also pointed out that terminology was a secondary matter; the real purpose of the provision, as conceived in the law of treaties, was to safeguard the internal law and usages of States in general.

1980

18. In the opinion of one representative in the Sixth Committee, there appears to be a contradiction between subparagraph 1(a) and subparagraph (b) of article 16 (see para. 142 below).

19. Another representative considered that paragraph 2 is superfluous because it repeats what is said in paragraph 1, and also because every treaty is an autonomous text, a "closed system" of legal rules. Moreover, it is unnecessary to refer to the "use" of terms or even to refer to "the meanings which may be given to them". If the paragraph is to be maintained, the words "or in international treaties" should be added.

### *Written comments*

20. The German Democratic Republic welcomes draft article 2. Czechoslovakia suggests that the article should be supplemented by the definitions of the terms "State property", "State debts" and "State archives", which are at present scattered throughout the various parts of the draft. In addition, it considers that the definition of the term "third State" is not very clear.

## OPINION OF THE SPECIAL RAPPORTEUR

21. No remarks or objections have been made in connection with subparagraphs 1(a), (b), (c) and (d) of article 2, and they seem to command general acceptance. A problem has been raised in connection with the definition of "*newly independent State*" in subparagraph 1(e). Admittedly, the Commission may not have found the most suitable terminology, but it is quite clear that it has sought to deal here with succession of States resulting from decolonization. Through the rules it has elaborated, it has clearly shown the very special nature of this type of succession. The difference between "*newly independent States*" formed as a result of decolonization and "*new States*" created by the separation of part of an existing State or the uniting of two or more existing States lies in the situation of "dependence" of the territory of the newly independent State up to the eve of the succession of States.

The Special Rapporteur is not in favour of complete and straightforward assimilation of these two different types of State succession, despite certain similarities between them.

22. For the purposes of the draft articles, the Commission has given the most straightforward, well-balanced and appropriate definition of the term "third State", contained in article 2, subparagraph 1(f). The Special Rapporteur does not believe that the definition will create confusion regarding the intelligibility of a concept that is indeed well established in international law. In any case, he does not see how the proposed definition could be improved on.

23. The Commission could well adopt the Czechoslovak Government's suggestion that article 2 should be supplemented by the definitions of the terms "State property", "State debts" and "State archives". This would simply mean transferring to article 2 the definitions contained in article 5, article 16 and article A. However, it has to be realized that the definitions contained in article 2 were placed there because they apply to the draft as a whole and are frequently used in all parts of the draft; this does not apply in the case of State property, State debts or State archives, for the relevant terms are used only in the parts relating specifically to those matters. It was for this reason that the definitions of each matter were proposed at the beginning of each of the parts concerned.

24. It has been recommended that the provision contained in paragraph 2 should be deleted, but the Special Rapporteur regards it as useful and recommends that it should be retained.

## ARTICLE 3. (Cases of succession of States covered by the present articles)

## Oral comments—1979

25. Some representatives stressed the importance of article 3. It was said, with reference to this provision, that the draft articles did not seek to undo what succession of States had entailed in the past. The draft looked to the future, instead of attempting to harmonize past practices.

It was also pointed out that the 1978 Vienna Convention contained a similar rule in its article 6.

26. One representative said that, in principle, article 3 was acceptable for the time being, for in the light of the commentaries to article 6 of the 1978 Vienna Convention and the Commission's report on its work on the article at its twenty-fourth session,<sup>3</sup> it appeared to reflect settled law. However, the time had come for a more dispassionate appraisal of the rules of international law as embodied in the Charter of the United Nations. In the recent past, those rules had been flagrantly abused to serve selfish national interests, and wars of aggression had been waged by States on the pretext that they had been acting in self-defence or collective defence authorized by the Charter. Those acts of aggression, which were in no way proportionate to the acts that had prompted them, often resulted in armies of occupation becoming entrenched, and were not in conformity with the rules of international law as laid down in the Charter.

27. One representative, while approving of article 3, nevertheless considered that the text should be amended, since it incorrectly referred to the Charter of the United Nations, which was an instrument of an essentially political character. In the opinion of another representative, it would have been better if that article had been phrased in more general terms and had stipulated that the articles "apply to the effects of a succession of States occurring in conformity with international law".

## Written comments

28. The *German Democratic Republic* finds the wording of article 3 acceptable. *Czechoslovakia* also regards the article as acceptable.

## OPINION OF THE SPECIAL RAPPORTEUR

29. Article 3 is unquestionably useful and even necessary. Moreover, it has its counterpart in article 6 of the 1978 Vienna Convention. The drafting could still be improved, but to state simply, as was proposed, that the articles "apply to the effects of a succession of States occurring in conformity with international law" could well lead to endless debate on what "international law" is. It will be remembered that, in the draft of the Charter of the Economic Rights and Duties of States, the industrialized countries had maintained that nationalization should be carried out "in accordance with international law".<sup>4</sup> To require States to conform to international law meant, at that stage in the development of international law, imposing the idea of "prompt, adequate and effective compensation" and, therefore, confining them to a system of traditional norms that have evolved in the meanwhile. At its Sixth Special Session, the General Assembly had therefore been compelled to give up the idea of making nationalization dependent on its "conformity with international law".

<sup>3</sup> *Yearbook* . . . 1972, vol. II, p. 236, document A/8710/Rev.1, chap. II, sect. C, commentary to article 6.

<sup>4</sup> TD/B/AC.12/4 and Corr. 1, p. 10.

30. In formulating article 3, the Commission did not simply refer to a succession of States occurring in conformity with international law. It also mentioned the principles of international law embodied in the Charter of the United Nations. It is true that the Charter is a political document, but it would be rash to maintain that it is a political document without any juridical framework and that it does not contain any principles of international law. Again, through the reference to the Charter, the article incorporates other principles set forth in major resolutions

of the General Assembly that are viewed as interpreting the Charter, such as the momentous resolution adopted on 24 October 1970, namely resolution 2625 (XXV), which set forth the seven "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

Hence, the Special Rapporteur takes the view that the Commission should retain the present wording of article 3.

## PART II: STATE PROPERTY

### SECTION 1. GENERAL PROVISIONS

#### ARTICLE 4. (Scope of the articles in the present Part)

##### *Oral comments—1979*

31. One representative thought that articles 4 and 15 could have been combined for the purposes of defining the scope and application of the draft articles.

##### *Written comments*

32. The *German Democratic Republic* generally agrees with the definition of State property in Part II, section 1 (arts. 4 to 9) and the rules governing succession. State property is, in particular, a vital material basis for establishing a State and ensuring its sovereignty.

33. *Czechoslovakia* proposed that article 4 (and article 15, its equivalent in the case of State debts) should be deleted, once article 1 is reformulated to make express reference to State property, State archives and State debts as the matters dealt with by the draft.

#### OPINION OF THE SPECIAL RAPPORTEUR

34. The purpose of article 4, as pointed out in the commentary thereto, is simply to make it clear that the articles in Part II deal with only one category of the "matters other than treaties" referred to in article 1.<sup>5</sup> It seems difficult to do without such an article, or to do without article 15, which is its counterpart in the case of State debts. The Special Rapporteur does not see how, in response to the comment by one representative in the Sixth Committee, articles 4 and 15 could be combined for the purpose of defining the scope and application of the draft articles. In fact, the scope and application of the draft as a whole were already determined in article 1. The field of application of the articles in each part on each matter then had to be made clear. This was the object of article 4, concerning State property, and of article 15, concerning State debts.

35. Unlike the Czechoslovak Government, the Special Rapporteur does not think that article 4 can be deleted by rewording article 1 to mention specifically each of the

matters covered. The purpose of article 4 is quite different from that of article 1. Whereas article 1 indicates the matters covered by the draft, the purpose of article 4 is to indicate that the articles on each matter apply exclusively to that matter. This will also raise the problem, mentioned earlier, of whether the articles on State property apply to State archives if the latter are regarded as constituting a special category of State property.

#### ARTICLE 5. (State property)

##### *Oral Comments*

##### *1979*

36. One representative suggested that the definition of State property be included, together with the definitions of State debt and State archives, under article 2, so as to provide a ready indication of the matters covered by the draft.

37. Another representative considered that the definition, which contained a *renvoi* to the internal law of the predecessor State, would have to be re-examined later. Such a *renvoi* appeared logical, as the question of succession to State property would not have arisen had the property not been owned by the predecessor State under its internal law. However, the possibility could not be ruled out that the same property could be owned by several States under their respective internal laws, which might conflict, or that the property might be part of the common heritage of mankind, such as the sea-bed or the subsoil beyond national jurisdiction, which was regulated by international law and not by internal law. Thus, further reference to international law or to settlement by the international legal system might be necessary.

##### *1980*

38. The representative of the United Arab Emirates proposed that the words "movable or immovable" should be added to the text and the title of article 5, concerning State property.

39. Since article 5 contains a definition, it should form part of article 2, paragraph 1. Moreover, because "property" means rights and the term "interests" makes sense only if it means "rights", the representative of

<sup>5</sup> See *Yearbook* . . . 1979, vol. II (Part Two), p. 17.

Greece wondered why three terms have been used to define "State property".

In article 5, the words "including private international law" should be inserted after the words "internal law", because a State may have rights in accordance with the law of another State if the private international law of the first State so provides.

#### *Written comments*

40. The *German Democratic Republic* welcomes the fact that article 5 contains an all-embracing definition of State property that is justifiable under international law. This allows a universal regulation which does not refer to the internal structures of individual countries' State property (for instance, the division of State property into public domain and private domain).

41. *Czechoslovakia* finds that the reference to the internal law of the predecessor State, as a criterion for defining the concept of "State property" is logical. It none the less notes that:

the fact that the same property may, according to the internal law of the predecessor State, be regarded as property belonging to that State, while according to the internal law of another State or according to international law, it may be regarded as property belonging to a State other than the predecessor State, requires that this question be studied again by the Commission. It is desirable that, at least to some extent, international law should also be brought into the solution of this question.<sup>6</sup>

#### OPINION OF THE SPECIAL RAPPORTEUR

42. In his reports, the Special Rapporteur had made it clear that the reference to the internal law of the predecessor State, as the criterion for determining State property, was logical because the question of the succession of States would not arise if the property in question had not belonged to the predecessor State according to its internal law. In determining what property belongs to the predecessor State or the property that the predecessor State considers as such, its internal law inevitably has to be consulted. But the Special Rapporteur had also cited numerous historical examples<sup>7</sup> in which the internal law of the predecessor State had not been applied either by the successor State, which had substituted its own internal law, or by international courts, which had preferred their own decisions. The situation was one that had not escaped the attention of the Commission, which had nevertheless decided to opt for the most logical, usual and frequent solution.

43. This position ought not to be affected by the views, either of representatives in the Sixth Committee or of Governments themselves, to the effect that a place should also be given to international law. Admittedly, some property may belong to two or more States according to their internal law or other property may belong to the predecessor State according to international law, for

example, according to the new law of the sea, which provides in particular for an exclusive economic zone and a common heritage of mankind. But it is clear that the texts of international law which establish that particular property belongs to a State are generally incorporated in the internal law of that State. For example, ratification of the future convention of the law of the sea will make it possible for every State ratifying it to "absorb" that convention in its own internal law. Accordingly, the criterion adopted for determining the property of the predecessor State is the internal law of that State, as supplemented by the "absorption" of all of the relevant texts of international law.

44. It remains to be seen whether reference should not also be made to private international law, as has been suggested. If property can be regarded as the property of the predecessor State in the light of the rules of private international law, here again it is likely that these rules of "characterization" or "*renvoi*" form an integral part of the internal law of the predecessor State. Besides, it is not possible for a (predecessor) State to have rights according to the law of another State and in application of the private international law in force in that State without allied "absorption" of that property in the internal law of the predecessor State. The law, *lato sensu*, of that State will have expressed the "taking over" of that property in the assets of that State.

45. The words "property, rights and interests" have been criticized by the representative of Greece. In his earlier reports on this topic the Special Rapporteur has afforded numerous examples of how the concept of "property" can be covered. In fact, it covers everything that can constitute an asset, ranging from corporeal property, through straightforward "interests", to incorporeal property such as rights, debt-claims, shares, bonds, etc. As the Special Rapporteur has pointed out in earlier reports, the formula "property, rights and interests" has often been used in international legal instruments. The Commission pointed this out in its commentary to this article.<sup>8</sup> The Special Rapporteur suggests that this formula and, generally speaking, the existing wording of article 5, should be retained.

#### ARTICLE 6. (Rights of the successor State to State property passing to it)

##### *Oral comments—1979*

46. One representative considered that the rule laid down in article 6 should deal with any legal encumbrances, rights and duties on or over the property which passed to the successor State. Assuming, for example, that the predecessor State had granted a concession for the instalment of kiosks and snackbars in the stations of its State-owned railway system, the Government of the successor State should not be obliged to maintain that

<sup>6</sup> *Yearbook* ... 1981, vol. II (Part Two), annex I, sect. 4, para. 9.

<sup>7</sup> See "Third report on succession of States in matters other than treaties", *Yearbook* ... 1970, vol. II, pp. 137 et seq., document A/CN.4/226.

<sup>8</sup> *Yearbook* ... 1979, vol. II (Part Two), p. 18, para. (10) of the commentary to article 5.

concession on a proper passing of the State property from the predecessor State to the successor State. That was the view expressed by the Supreme Court of his country and one that his Government accepted.

47. Another representative said that the term "arising" did not embrace all the possible cases of succession of States that article 6 was supposed to cover, particularly the possible case of a territory which had had the structures of a State prior to colonization. In the latter case, instead of speaking of rights as "arising", it might be more appropriate to say that they had "arisen once again" after having been suspended during the colonial period. That view appeared to be supported by the choice of terms normally used in the same context in the international agreements cited in paragraph (2) of the commentary to article 6.<sup>9</sup> In using the terms "to acquire" and "to cede", the Treaties of Lausanne, Versailles, Saint-Germain-en-Laye, Neuilly-sur-Seine and Trianon expressed the idea of continuity in the existence of rights. It should be added that the last part of article 6 provided clarification by means of the idea of the "passing" of the State property of the predecessor State to the successor State.

48. The same representative considered that, in order to introduce the idea of the continuity of the existence of rights, it would be tempting to use the term "acquire", which conveyed the idea of the prior existence and the survival of those rights, but the adoption of that notion was problematic owing to the way it was used in the context of private international law, particularly regarding nationality. He recalled that the Commission and the Conference on Succession of States in Respect of Treaties had not only adopted the basic principle of *tabula rasa* in that regard but also combined it with the need for continuity, which was an essential element in the juridical security of international relations. Just as succession of States in respect of treaties did not always mean starting *ex nihilo*, succession of States in respect of State debts and State property, even though it entailed, *de facto* and *de jure*, the extinction of the rights of the predecessor State, did not always entail the "arising" of rights for the successor State. In order to introduce those clarifications into draft article 6, he wished to propose the following formulation:

"A succession of States entails the extinction of the rights of the predecessor State and the obtaining by the successor State of those same rights in respect of such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part."

#### Written comments

49. The German Democratic Republic considers that the provisions whereby a succession of State entails the extinction of the rights of the predecessor State and the arising of those of the successor State are important and appropriate.

50. Czechoslovakia takes up the question of the terms "extinction" and "arising" of rights and wonders whether the elements of a *break* in the legal relationship concealed behind those two terms are in accord with the other term used in article 6, i.e., the *passing* of property, and above all with the idea of the *continuity* of the legal relationship. It therefore urges the Commission to reflect on the terminology used.

#### OPINION OF THE SPECIAL RAPPORTEUR

51. The problem has been raised as to whether the extinction of the rights of the predecessor State to State property involves the disappearance of all "legal encumbrances, rights and duties on or over the State property passing to the successor State". The question is not only very delicate but also highly complex; it deserved to be raised, because it was not dealt with so radically as by the representative who had brought up the point in the Sixth Committee.

This part of the draft relates to property and, therefore, to everything that constitutes an *asset* of the nation. The subsequent part of the draft deals with a *liability* of the nation, i.e., debts, which were in fact studied by the Commission, but the latter did not, in that context, have time to consider succession to other aspects of liability, such as succession to encumbrances or to contractual or other kinds of obligations. But it is difficult in the part under discussion, relating to property and rights, to bring in questions pertaining to encumbrances and obligations.

52. In conclusion, it may therefore be said that the sole object of article 6 is to deal with the fate of the rights that pass to the successor State, without prejudice to what is to become of related obligations and encumbrances. The latter are governed by the next part of the draft, on State debts, in cases where, for example, the predecessor State has contracted debts in order to create the property or has accepted mortgages or various other encumbrances on the property in question. As to any other obligations connected with the property, the Commission has not examined the overall problem of succession to obligations. Beneath the surface lies, more particularly, the problem of the acquired rights of third States or third persons.

53. Hence, it is difficult to affirm with any certainty that all encumbrances and obligations disappear with the extinction of the rights to the property that passes to the successor State. The opposite may even be inferred, not only on the basis of the provisions of the part of the draft dealing with succession to State debts, or the general theory of obligations, but also, indirectly, on the basis of draft article 9, which provides that:

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

It is possible in this context to think of certain property "encumbrances and obligations" that constitute, for the third State, the "rights and interests" mentioned in and protected by draft article 9.

54. The comment by one representative who referred to the case of a territory which had the structures of a State

<sup>9</sup> *Ibid.*, p. 19.



prior to colonization is indeed relevant. The rights of the successor State do not "arise" in that instance; they arise once again. But the formula suggested by that representative for article 6 does not take account of his own remark, for he proposes that "A succession of States entails the extinction of the rights of the predecessor State and the *obtaining* by the successor State of those same rights in respect of such of the State property as passes to the successor State in accordance with the provisions of the articles of the present Part". The word "obtaining", which is very weak, does not take sufficient account of the fact that the rights of the successor State *arise once again*.

55. Czechoslovakia has expressed a wish for the terminology of article 6 to be reconsidered, so as to take better account of the element of legal continuity encountered in practice, an element which is not taken into account in article 6 because of the emphasis on a break implied by the words "extinction" and "arising". Similarly, one representative in the Sixth Committee stressed that the successor State did not, in practice, immediately benefit from the passing of the property and the "arising" of its right. The Special Rapporteur admits that he does not know how to take these remarks into consideration in the context of the wording of article 6.

#### ARTICLE 7. (Date of the passing of State property)

##### *Oral comments*

1979

56. One representative considered that, in view of the existence of various types of succession of States, article 7 should stipulate that the date of the passing of State property should be determined by the type of succession involved.

57. Some representatives criticized the phrase "unless otherwise agreed or decided", which occurred in article 7 and elsewhere in the draft. In the opinion of one representative, the expression was a pleonasm, and its use could not be justified by the explanation given in paragraph (4) of the commentary to article 7. He therefore suggested that it be replaced by "unless otherwise determined". Another representative considered that article 7 should be brought into line with article 2, subparagraph 1(d). He was pleased to note that the same phrase did not appear in article 11, and he fully endorsed the views set forth in the commentary to article 11, particularly the statement in paragraph (5) explaining why the phrase had been omitted. In his view, there should be no loophole that could operate to the detriment of newly independent States when the date of the passing of State property or State archives was determined. Article 7, as drafted, was too permissive and would favour the interests of those metropolitan countries that were reluctant to relinquish their claims to certain State property or works of art and culture expropriated by them. He therefore trusted that the Commission would examine the article objectively at its thirty-second session.

1980

58. With reference to draft articles 7 and 8, and in particular to the words "unless otherwise agreed or decided", the representative of Greece points out that the decision could be either bilateral or unilateral; yet if it is bilateral it will be agreement, and decision therefore means a unilateral decision, in which case the question arises of who is to take the decision. In article 13, paragraph 1, and article 14, paragraph 1, there is no reference to a decision.

##### *Written comments*

59. The *German Democratic Republic* agrees with the wording of article 7.

60. *Austria* criticizes the expression "unless otherwise agreed", which appears in a number of articles and notably in article 7. The Austrian Government writes:

"Such frequent reference to the freedom of States to deviate from the rules set forth in the draft articles would seem to call into question the notion of codification as such, and indeed raises doubt as to the appropriateness of codifying rules which obviously are meant to be only of a residual character. It is true that similar language is also used in existing instruments of codification, but in those cases such language is authorizing almost exclusively deviations in form or procedure, and not in substance."<sup>10</sup>

#### OPINION OF THE SPECIAL RAPPORTEUR

61. The date of the passing of State property should normally coincide with that of the succession of States. But what happens in fact is that State property passes gradually as the implementation agreements regulate the detailed procedure for the passing of the property or the successor State effectively takes possession, sector by sector, of the State property to which it is entitled. It is nevertheless true that some predecessor States take advantage of certain situations in order to delay the passing of State property to the successor State for as long as possible.

62. The Special Rapporteur drew attention ten years ago, in his fourth report,<sup>11</sup> to the complexity of the problem of the date of the passing of State property. This may depend in the first place on the date of determination or particularization of the property. In the case of the peace treaties that brought the First World War to an end, one of the first points of reference was the date of ratification of the peace treaties which involved territorial changes giving rise to problems of succession of States. A second point of reference was the date by which the Reparation Commission set up under the treaties was to define the transferable property and determine what it consisted of, thus clarifying the meaning and scope of the expressions "all property, rights and interests" or "all goods and property" found in several articles of the peace treaties. In addition to determining what constituted the

<sup>10</sup> *Yearbook* ... 1981, vol. II (Part Two), annex I, sect. 1, para. 3.

<sup>11</sup> *Yearbook* ... 1971, vol. II (Part One), pp. 170 *et seq.*, document A/CN.4/247 and Add.1, commentary to article 3.

property, the Commission had also to assess it, and its value was to be deducted from the reparations which Germany was required to pay to the various Allied and Associated Powers.

63. In fact, the Reparation Commission was not able to complete its task of assessing the "property, rights and interests". It drew up a list of the property, a list which it stated could not be exhaustive but only declaratory, and left the successor State free and entitled to consider itself retroactively in possession of the property designated by the Commission, as from the date of ratification of the peace treaties.

64. The Special Rapporteur also provided numerous historical examples, in his fourth report, of the fixing by treaty of the date of the passing of State property. In the first place, the passing may be effected *de jure* where no period of time or date is laid down in the agreement. In this case, the passing of the State property is legally effected as soon as the agreement enters into force, by virtue of the general law of treaties, i.e. normally from the date on which the instrument is ratified.

65. But the Special Rapporteur also discussed a second case in which State property is passed before ratification. He cited the Treaty of Versailles, which is decidedly an instrument containing a little of everything. Article 51 retroactively fixed the date of the return of Alsace-Lorraine to France, and consequently of the passing of State property, as from the date of the Armistice on 11 November 1918.

66. Furthermore, in some cases it has been decided that the property passes after a fixed period of time or by instalments, or again the passing may have been dependent upon the fulfilment of a suspensive condition. Sometimes too, an agreement is concluded with a reference to another agreement, to be concluded subsequently, which will fix the date of the passing of property. Lastly, there have been occasions when it was decided to restore sovereignty retroactively, as happened with Ethiopia or Albania, and in this case the problem of the date of the passing of the property does not arise legally, for the property is considered as never having left the possession of the restored State.<sup>12</sup>

67. These few examples show clearly the variety and complexity of *de facto* situations which cannot be ignored. While it is true that unfair treaties can be imposed on a newly independent State for the purpose of unduly delaying the passing of certain State property, the Special Rapporteur would none the less point out, in order to allay the concern expressed in the Sixth Committee, that the articles applying to this type of succession of States, such as article 11, on State property, and article B, on State archives, include *in fine* provisions which make it possible to invalidate such one-sided agreements.

In conclusion, the Special Rapporteur is of the opinion that the Commission's text is appropriate and that it meets not only some concerns expressed in the Sixth Committee but also the variety of cases known to international practice. In particular, it does not seem wise to respond to

the call to delete or alter the formula "unless otherwise agreed or decided", which covers all the eventualities of international life, involving as it does special agreements of all kinds, as well as legal decisions on this problem.

#### ARTICLE 8. (Passing of State property without compensation)

##### *Written comments*

68. The *German Democratic Republic*, has stated that, in general, it agrees with the text of article 8 and that it attaches importance to the provisions stipulating that State property shall pass without indemnification or compensation.

69. The *Union of Soviet Socialist Republics* considers that the draft articles (and consequently the article under discussion here) can as a whole be used as an acceptable basis for drafting the corresponding international legal instrument.

#### OPINION OF THE SPECIAL RAPPORTEUR

70. The Special Rapporteur notes that no objection has been raised regarding draft article 8. He therefore proposes that the Commission should retain it in its present form.

#### ARTICLE 9. (Absence of effect of a succession of States on third party State property)

##### *Oral comments*

1979

71. Some representatives approved of article 9. One representative considered that it could be safely deleted. Another representative wondered whether it was absolutely necessary to retain it, since it was perfectly clear that the articles relating to the passing of property dealt only with property owned by the predecessor State or States and not with the property of other States.

72. One representative noted that, although it followed from article 5 that the draft articles did not apply to property owned by third States, the Commission had decided to include article 9. While he agreed with the terms of the article, he considered that the wording should be simplified. It seemed unnecessary to refer to property, rights and interests "situated in the territory of the predecessor State" for succession does not, *a fortiori*, affect property, rights and interests situated outside the territory of the predecessor State. Deletion of the reference to the location of third State property, rights and interests would also improve the drafting of the article and remove the practical difficulty of determining the geographical location of a right or interest.

1980

73. In the opinion of one representative, the words "including private international law" should be added after the words "internal law", because a State might have

<sup>12</sup> For all these historical examples, *ibid.*, sect. B-D of commentary.

rights in accordance with the law of another State if the private international law of the first State so provides.

#### *Written comments*

74. The *German Democratic Republic* supports the provision in article 9 that State succession shall in no way affect property owned by a third State.

75. *Czechoslovakia* considers that draft article 9 is superfluous,

because it is self-evident—and this follows, moreover, from the provisions of article 5—that the provisions of Part II will apply only to the property of the predecessor State and therefore under no circumstances to the property of third States. It should also be stressed that, just as the succession of States does not affect the property of third States, neither does it concern . . . ownerless property. Such property is not affected thereby, whether it is situated in the territory of the predecessor State or elsewhere. From this point of view, the present provisions of article 9 raise more problems than they resolve.<sup>13</sup>

#### OPINION OF THE SPECIAL RAPPORTEUR

76. Initially, the Special Rapporteur had not included in the draft articles a provision expressly protecting the property of third States. He considered that this went without saying. But the discussions in the Commission have shown that what goes without saying is the better for being said. Hence the express provision set forth in article 9, even if it rightly seems superfluous.

77. As for the proposals to improve the wording of the text, they do not appear to be easily acceptable. It may well seem unnecessary to refer to property, rights and interests "*situated in the territory of the predecessor State*" for the succession does not, *a fortiori*, affect property situated outside that territory. Moreover, deletion of the phrase would obviate the practical difficulty of determining the geographical location of a "right" or an "interest". But one can, to begin with, turn back the argument and say that, obviously, third State property situated outside the territory of the predecessor State must remain unaffected by a succession of States. If therefore all reference to the location of property outside the territory is deleted, retention of article 9 would be all the more superfluous. It may then be claimed that it is the location of the property in question in the territory of the predecessor State that makes article 9 of some value, because if a problem arose in relation to third State property in the context of a succession of States, it could only be in the territory of the predecessor State. Lastly, it should be noted that third State property can be determined in this connection only by reference to the internal law of the predecessor State, which makes it necessary for the property to be situated in the territory of the predecessor State.

78. It has been suggested that "internal law" should be followed by the words "including private international law". The Special Rapporteur takes the view that the rules of private international law form part of internal law inasmuch as they are "absorbed" and integrated by

internal law. Furthermore, to say "*including*" private international law is proof enough that it is so integrated. However, the Special Rapporteur is not totally hostile to the addition. He leaves it to the Commission to decide.

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

### ARTICLE 10. (Transfer of part of the territory of a State)

#### *Oral comments—1979*

79. One representative reserved his country's position on articles 10 to 14.

#### *Written comments*

80. The *German Democratic Republic*, referring to articles 10 to 14, welcomes the priority orientation towards agreement between the States concerned, the differentiation between movable and immovable State property and the differentiated passing of such property.

81. *Italy* has referred to the types of succession in the following terms:

While aware of the motives that may have induced the Commission to make a distinction between the case of *transfer* of part of the State's territory and that of *separation* of part of such territory followed by its union with another pre-existing State, the Italian Government is at pains to understand why the two cases—which are closely related, if not identical, conceptually—should be treated differently from one another (see art. 10 as compared to art. 13, para. 2; art. 19 as compared to art. 22, para. 1).<sup>14</sup>

#### OPINION OF THE SPECIAL RAPPORTEUR

82. Agreeing with the Special Rapporteur, the Commission, in the commentary to article 10, clearly emphasized the fact that, compared with other types of succession, "succession in respect of part of territory" is of a unique nature. While it is true that "succession in respect of part of territory" covers the case of a minor frontier adjustment—which, moreover, is effected through an agreement providing for a general settlement of all the problems involved, without the need to consult the population—it is nevertheless a fact that this type of succession also includes cases affecting territories and tracts of land that may be densely populated. It is this situation that accounts for the ambiguities, the uniqueness and, hence, the difficulty of the specific case of "succession in respect of part of territory" in the context of succession of States in respect of matters other than treaties.

83. It should be added that such cases of succession do not always involve agreements, particularly when a densely populated part of the territory of a State passes to another State, in other words, precisely when specific problems of State property, currency, Treasury, State funds and movable and immovable equipment actually arise. The Commission therefore considered it more

<sup>13</sup> *Yearbook . . . 1981*, vol. II (Part Two), annex I, sect. 4, para. 9.

<sup>14</sup> *Ibid.*, sect. 8, para. 6.

appropriate to distinguish and to deal separately in the present draft with three cases (which, in the 1974 draft on succession of States in respect of treaties, were covered in a single provision, article 14): (a) the case in which part of the territory of a State is transferred from one State to another, which is the subject of article 10, now under consideration; (b) the case where part of the territory of a State separates from that State and unites with another State, which is the subject of paragraph 2 of article 13 (Separation of part or parts of the territory of a State); and (c) the case in which a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, which forms the subject of article 11, paragraph 3 (Newly independent State).<sup>15</sup>

#### ARTICLE 11. (Newly independent State)

##### *Oral comments*

1979

84. It was considered that because the topic of succession of States in respect of matters other than treaties had important political implications, the draft articles had taken account of contemporary reality so far as decolonization and elimination of the consequences of oppression and domination were concerned. The changes in the United Nations over the past three decades were largely attributable to the process of decolonization; it was gratifying that the Commission had seen fit to give legal form to the basic principals underlying that process. The need for rules concerning succession of newly independent States was further justified by the fact that many of the problems involved had not been solved even after independence had been attained.

85. Several representatives expressed support for the Commission's reference, with regard to succession in the case of a newly independent State, to the statement in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations<sup>16</sup> that a dependent or Non-Self-Governing Territory possessed by virtue of the Charter a status separate and distinct from the territory of the State administering it, and the reference to the Declaration on the granting of independence to colonial countries and peoples<sup>17</sup> under which every people, even if it was not politically independent at a certain stage of its history, possessed the attributes of national sovereignty inherent in its existence as a people. In this connection, it was stated that, although a closer correlation between the various articles and a more detailed coverage of the situations brought about by decolonization would serve to clarify the rules and to facilitate

their implementation, it was gratifying to note that the Commission had established a link with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, as well as with the Charter of Economic Rights and Duties of States,<sup>18</sup> and that, when drafting article 11, it had borne in mind the requirements of the new international economic order and had based itself on article 16, paragraph 1, of that Charter.

86. Specific mention was also made with approval of the Commission's reference to the principle of the permanent sovereignty of every people over its wealth and natural resources.

87. Some representatives stressed that the principles on which the Commission had based itself and the rules of article 11 regarding newly independent States were of *jus cogens*, ultimately deriving from the right of all peoples to self-determination. It would be a positive factor if Member States conducted their international relations in a manner that reflected that fact.

88. In the opinion of one representative, the rules relating to the passing of State property in the case of newly independent States must be based on the principles of the viability of the territory and on equity. The introduction of the concept of the contribution of the dependent territory to the creation of certain movable property of the predecessor State was likely to reinforce the legal guarantees.

89. One representative pointed out that, with respect to succession to State property, British colonial practice appeared to have provided that on the attainment of independence, the property of the territorial Government that had been held by the corporation named "The Chief Secretary" would be transferred to and vested in the Crown in right of the newly independent State. For his country, its administration was assigned to the Minister of Finance. Thus the differentiations made in draft article 11 did not appear to have been made by the British colonial authorities in respect of property held by the Chief Secretary either prior to or on the granting of independence to their former dependent territories.

90. In the view of one representative, one recurring case not expressly covered by draft article 11 concerned the situation where the metropolitan or predecessor State held property of the dependent State that in due course became recognized as the property of the successor State: precious stones and historical artifacts had all too often been appropriated and kept in palaces or museums of the metropolitan State. He called for the elaboration of a basic rule of law declaring the past appropriation of highly valued property under such circumstances to be unlawful *ab initio*, and for the acceptance of a strong presumption to the effect that such property in principle belonged to the newly independent successor State.

91. One representative suggested, in regard to *paragraph 1*, that immovable property should be dealt

<sup>15</sup> See *Yearbook . . . 1979*, vol. II (Part Two), pp. 25–26, para. (5) of the commentary to article 10.

<sup>16</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>17</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>18</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

with before movable property, so as to bring the article into line with articles 10, 13 and 14.

92. With regard to *subparagraph 1(d)*, one representative considered that it was necessary to determine whether provision should also be made for the passing to the successor State of immovable property, irrespective of its location, if it had belonged to the territory to which the succession of States related and had become State property of the predecessor State during the period of dependence.

93. One representative drew attention to a discrepancy in the French text between *paragraph 3* of article 11, which used the term “*territoire dépendant*”, and *paragraph (24)* of the commentary to the article, which referred to “*un Etat dépendant*”.\*

94. One representative, supporting the formulation of *paragraph 4*, expressed agreement with *paragraph (29)* of the commentary to article 11. In the opinion of another representative in regard to *paragraph 4*, it would perhaps be appropriate to draw further on legal instruments that referred not only to natural wealth and resources but also to economic activities, such as the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order. In this connection, the view was also expressed that the principle of sovereign equality of States was largely an illusion if the economic dimensions of independence were ignored. It was therefore necessary to adapt the formulation of that principle to modern conditions so as to restore to the State the elementary bases of its national economic independence. Such must be the aim of the new economic co-operation, which, in accordance with the Declaration and the Programme of Action on the Establishment of a New International Economic Order,<sup>19</sup> must be based on equity, sovereign equality and independence, and must be reflected in practice by an inequality which favoured the least developed States. The Commission had therefore rightly considered that the validity of co-operation agreements should depend on their degree of respect for the principles of political self-determination and economic independence, in conformity with contemporary international law.

#### 1980

95. One representative considered that it was the duty of the predecessor State to disclose the nature of the property to be transferred, for the successor State might have no knowledge of it. The obligations on the part of the predecessor State under article 11 also included, in his view, the return, at the predecessor State's expense, of any property that had been removed from the territory, wherever such property might be.

96. With regard to article 11, *subparagraph 1(a)*, the words “having belonged to the territory” should, for the

sake of legal precision, be replaced, since property did not belong to a territory but to a person, natural or legal, such as a State.

97. In the opinion of the Chinese delegation, it was quite appropriate that *paragraph 4* should emphasize that agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of *paragraphs 1 to 3* of the article should not infringe the principle of permanent sovereignty of every people over its wealth and natural resources. However, in addition to enjoying permanent sovereignty over its natural resources, an independent State also had to have the right to adopt suitable means to exercise effective control over those resources and their exploitation. If the agreements between the predecessor State and the newly independent State merely acknowledged the right to permanent sovereignty and contained various restrictive provisions regarding the newly independent State's economic activities, then that State would still find it very difficult to shake off its economic subordination. It was completely correct that the Declaration on the Establishment of a New International Economic Order should stress that the new order should be founded on full respect for certain principles, including the principle of full permanent sovereignty of every State over its natural resources and all its economic activities. The Chinese delegation therefore proposed that the words “and all economic activities” should be added after the words “natural resources” in article 11, *paragraph 4*, in order to protect more effectively the interests of newly independent States.

#### Written comments

98. *Italy* finds that the wording and meaning of article 11, *subparagraph 1(a)*, are not at all clear and that the expression “movable property, having belonged to the territory to which the succession of States relates” is inexact, because property cannot be attributed to a territory, but rather to this or that *subject*, to a natural or legal person. It points out that the predecessor State may have temporarily ceded to the dependent territory property, such as works of art, which was legitimately purchased by the predecessor State, and therefore did not have to be “returned” by the predecessor State to the successor State.

99. *Italy* also states that the word “contribution” used in *subparagraph 1(c)* is not at all clear. In the English version, this expression seems to refer to the contribution that the territory in question has made to the creation of the property, but its counterpart in the French version is vaguer and open to a broader interpretation.

100. The *German Democratic Republic* welcomes the distinction drawn between movable and immovable State property and the solutions adopted for the passing of such property.

101. *Czechoslovakia* notes with satisfaction that the principle of sovereignty over wealth and natural resources is clearly enunciated in article 11, *paragraph 4*, as one of the principles to which any agreement between the

\* This comment relates only to the mimeographed text of the Commission's report (*Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 10 (A/34/10)*).

<sup>19</sup> General Assembly resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974.

predecessor State and the newly independent State relating to the passing of State property must be subordinated.

102. Czechoslovakia also points out that the Commission has employed two different criteria for determining the proportion in which certain movable property passes to the successor State, as can be seen from a comparison of the wording of article 11, subparagraph 1(c), and that of article 13, subparagraph 1(c). Czechoslovakia considers that it would be advisable to bring the wording of article 13, subparagraph 1(c), into line with that of article 11, subparagraph 1(c), which it finds preferable.

#### OPINION OF THE SPECIAL RAPPORTEUR

103. The Special Rapporteur cannot but welcome the idea of strengthening article 11, subparagraph 1(a), to enable precious stones, works of art and historical artifacts to be returned to the newly independent State, but the fact of the matter is that subparagraph 1(a) is already worded in such a way that it unquestionably allows for such restitution in cases of this kind. The Special Rapporteur is nevertheless open to any suggestions for drafting improvements. It is also necessary to correct the unsatisfactory wording of this subparagraph, which makes a territory the owner of property, as though it were a natural or legal person, a subject possessing rights. However, unless the expression "newly independent State" is used in anticipation, it is difficult to find an expression other than "territory". On the other hand, this might lead to further criticism, because a newly independent State may be regarded as having a separate and distinct personality from the entity which existed before it became dependent on the predecessor State. Hence it is not possible in juridical terms to say "movable property, having *belonged* to the newly independent State", because two different subjects of law are involved, except in a case of the re-establishment of a State.

104. The Special Rapporteur would like to comply with the request that, in article 11, immovable property should be dealt with before movable property, in line with the wording and the presentation adopted in articles 10, 13 and 14. The subparagraphs should therefore be rearranged.

105. One comment warrants special attention. Subparagraph 1(d) of article 11 reads as follows:

immovable State property of the predecessor State *situated in the territory*\* to which the succession of State relates shall pass to the successor State.

What is to become of State property which is situated outside that territory, but was either purchased by the territory with funds from its own budget while it was dependent or was the property of the entity which existed before it became dependent? It might, in other words, be necessary to supplement subparagraph (d) by a text equivalent to subparagraph (a) for the case of immovable property and worded along the following lines:

"immovable property situated outside the territory to which the succession of States relates and belonging to that territory shall pass to the newly independent State".

106. It is also necessary to correct the French text of paragraph (24) of the commentary to article 11, which

contains the unfortunate term "*Etat dépendant*", because the two expressions are plainly contradictory. This is an oversight, and the term "dependent territory" should be used.\*\*

107. The comment that property taken out of the territory should be returned at the predecessor State's expense reflects not only equity, but the practice followed. This should be made clear, at least in the commentary, if it cannot be embodied in a specific provision in article 11.

108. The Special Rapporteur does not agree that the French text of article 11, subparagraph 1(c), is open to too broad an interpretation. It refers not to the *general* "contribution" of the territory, but solely to the contribution which permitted the "creation" of the property in question.

In the opinion of the Special Rapporteur, the comment that the wording of article 13, subparagraph 1(c), should be brought into line with that of article 11, subparagraph 1(a), is not justified. Article 13 deals with a case that, although similar, yet is different. The idea of a "contribution" could not be used in article 13, subparagraph 1(c), because the part of the territory that separates had no separate identity making it possible to determine its specific "contribution".

109. The Special Rapporteur takes the view that paragraph 4 should be supplemented in keeping with all of the resolutions relating to the principle of sovereignty over natural resources. This principle should therefore be referred to in its entirety as the "principle of the sovereignty of every people over its wealth, natural resources and economic activities".

#### ARTICLE 12. (Uniting of States)

##### OPINION OF THE SPECIAL RAPPORTEUR

110. Comments on article 12 were made only by the *German Democratic Republic*, which finds it acceptable. The Special Rapporteur has no suggestions for improving it, and therefore recommends that the Commission should retain it in its present form.

#### ARTICLE 13. (Separation of part or parts of the territory of a State)

#### ARTICLE 14. (Dissolution of a State)

#### Oral comments—1979

111. One representative noted that article 14 did not make any reference to the possible existence of a priority in favour of one or the other part of the territory which might have "retain[ed] or perpetuate[d] the personality of the State which has ceased to exist", as provided in the draft code of international law by E. Pessoa quoted in paragraph (7) of the commentary to the article.<sup>20</sup>

\*\* See above, the footnote relating to para. 93.

<sup>20</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 38.

*Written comments*

112. *Italy* points out that, with regard to article 14, relating to dissolution of a State, the solution indicated in subparagraph 1(b) might raise problems in the case of property located outside the territory of the predecessor State. It could well be asked what criteria should, in such an instance, determine the attribution of property to one successor State rather than another.

113. The *German Democratic Republic* endorses articles 13 and 14.

## OPINION OF THE SPECIAL RAPPORTEUR

114. No comments were made on article 13.

As to article 14, the Commission has never been so naive as to think that the solutions it is proposing, particularly in subparagraph 1(b), would never give rise to problems. It is quite clear that the passing to one of the successor States of property situated abroad, with compensation to the other successor States, may give rise

to difficulties. But the Commission has no means of going further and elaborating on the solution it has proposed. In any event, if more than one successor State prefers to receive the property rather than compensation, the resulting problem can be settled only by agreement. There is no reliable criterion for designating one successor State rather than another as the recipient of the property in question, except to devise a whole set of different criteria that would be difficult to control and would relate to population, the way in which the property was acquired, the history of each part of the territory that had become a successor State, the length of time during which that part of the territory had belonged to the dissolved State, etc. That would undoubtedly be quite an undertaking . . .

115. If one of the successor States “retains or perpetuates the personality of the State which has ceased to exist”, to use the wording of the Pessoa code, reference is no longer being made to the dissolution of a State as such, because the fact that the personality of the State which has ceased to exist has been retained or perpetuated obviously means that that State has not ceased to exist.

## PART III: STATE DEBTS

## SECTION 1. GENERAL PROVISIONS

## ARTICLE 15. (Scope of the articles in the present Part)

*Oral comments—1979*

116. One representative was of the opinion that articles 15 to 18 improved the draft as a whole.

*Written comments*

117. There were no written comments from Governments on draft article 15.

## OPINION OF THE SPECIAL RAPPORTEUR

118. The Commission, wishing to maintain the closest possible parallelism between the provisions concerning succession to State debts in the present part and those relating to succession to State property in Part II, decided to include at the beginning of Part III a provision on the scope of the articles contained in this part. Article 15, therefore, provides that the articles in Part III apply to the effects of succession of States in respect of State debts. It corresponds to article 4 of the draft and reproduced its wording, except for the required replacement of the word “property” by the word “debts”. The article is intended to make it clear that Part III of the draft deals with only one category of public debts, namely, State debts, as defined in article 16.

119. Article 15 as proposed by the Commission is, therefore, fully justified. Moreover, there was no objection to the article on the part of any Government. The provision should therefore, be retained.

## ARTICLE 16. (State debt)

*Oral comments*

## 1979

120. One representative considered that Part III of the draft, concerning State debts, was, generally speaking, an improvement by comparison with the earlier versions submitted by the Commission.

121. Some representatives drew attention to the problems that the Commission had faced on the question of succession of States in respect of State debts. It was very difficult to define State debts, and the Commission had held lengthy discussions on the question whether State debts should be viewed strictly as international obligations governed only by public international law and covering only subjects of international law or whether the definition might also provide for a possible relationship under private international law between a debtor State and a private creditor. The scope of the proposed articles would depend on which approach was chosen. It was pointed out that two alternative criteria had been adopted in article 16: the *international personality of the creditor* and the fact that the *financial obligation was chargeable to a State*, regardless of the public or private, national or international character of the creditor.

122. One representative considered that although article 16 provided for two categories of obligation, it was not clear what purpose would be served by making such a distinction, particularly since the subsequent articles did not do so. It might therefore be simpler to adopt as the definition of “State debt” the phrase “any financial obligation chargeable to a State” or some similar wording.



*Subparagraph (a)*

123. Most of the representatives who spoke on the article supported subparagraph (a). In the view of one representative, however, the introduction of a reference to international organizations, in article 16 and elsewhere, seemed to be an unnecessary complication and it might therefore be advisable to confine the draft to the effects of succession "between", rather than "of" States, and to modify article 1 accordingly. For another representative, the meaning of the phrase "any other subject of international law" was a theoretical question on which a consensus was very difficult to achieve.

*Subparagraph (b)*

124. One representative pointed out that the Commission had decided to adopt article 16, subparagraph (b), although with reservations.<sup>21</sup> The reservations to its inclusion dated back to the twenty-ninth session, when the adjective "international" appearing before the words "financial obligations" in the former article 18 had been placed between square brackets.<sup>22</sup> Thus, the controversy remained, though the wording was different.

125. Many representatives supported subparagraph (b), according to which State debt was defined as covering any financial obligation chargeable to a State, without exception. It was stated that subparagraph (b) had been deliberately so drafted by the Commission in order to cover State debts whose creditors were not subjects of international law.

126. One representative indicated that, although some members of the Commission were of the opinion that article 16, subparagraph (b) should not be applied when the creditor was a national of the debtor predecessor State, that was not the view which had prevailed. Moreover, it was difficult to see how the provisions requiring that an equitable proportion of the State debt of the predecessor State should pass to the successor State (art. 19, para. 2; art. 22, para. 1; art. 23) could be applied. It would be equally difficult to apply those provisions requiring that an agreement between a predecessor State and a newly independent successor State should not "endanger the fundamental economic equilibria of the newly independent State" (art. 20, para. 2), if the State debts of which the creditors were nationals of the predecessor State were left out of account.

127. One representative, speaking in favour of subparagraph (b), stressed that international law had always dealt with the relationship between a State and nationals of other States. Although those nationals could not claim their rights directly at the international level and had to exhaust the resources provided by domestic law, it was recognized that the "receiving State" had an obligation to treat such persons in conformity with international law and that the State of which those persons were nationals had authority to act on their behalf with a view to ensuring that they were so treated. At the current stage in the

development of international law, when both theory and practice were moving towards recognition of the rights of individuals, it did not seem right to exclude the possibility that a successor State might be a debtor of subjects other than subjects of international law.

128. Another representative found the new wording of article 16, subparagraph (b), fully appropriate from both the legal and economic standpoints. From the legal standpoint, it was internationally accepted that any natural person was capable of constituting the basis of a relationship in international law, and since such persons could be only subjects in respect of a legal relationship, they must be considered as subjects of international law. In international relations, international rights existed side by side with internationally protected rights, particularly in the context of diplomatic protection. The maintenance of article 16 with its two subparagraphs was an important contribution to the progressive development of international law. From the economic standpoint, the Commission had sought to maintain the balance between States and private bodies by guaranteeing the rights of those bodies and facilitating the access of developing countries to the private capital market.

129. A number of representatives supported the definition of State debt contained in article 16, subparagraph (b), as corresponding to the economic reality of the world today, particularly because of the importance of the credit extended to States from foreign private sources. Deletion of that provision would not only restrict the sources of credit available to States and international organizations, but would also be detrimental to the interests of the international community as a whole, particularly the developing countries. In the opinion of one representative, although theoretically only the category of obligations mentioned in subparagraph (a) could constitute a State debt for the purpose of the draft articles, that category should also be mentioned, for practical reasons, in subparagraph (b).

130. Some representatives, while in favour of retaining subparagraph (b), nevertheless expressed some reservations. One representative doubted whether there actually was a causal link between the availability of credit, on the one hand, and the retention or deletion of subparagraph (b) on the other. It would surely, be reading too much into the text to see in it conclusive evidence of such a link. The availability of credit was indeed determined by the risk factor, but other factors, not the least important of which was the profit motive, also played their role; thus, if subparagraph (b) was deleted, the plight of developing countries would not be as dramatic as some would suggest. The solution would perhaps be to retain subparagraph (b), together with the reservations on it, until such time as a conference of plenipotentiaries dealt with the draft article. Another representative considered that the general effect of subparagraph (b) was to divest subparagraph (a) of its substance. In the circumstances, he felt that subparagraph (b) should be reformulated in the light of the points raised during the discussion.

131. On the other hand, many representatives criticized the provision of subparagraph (b) and proposed its

<sup>21</sup> *Yearbook* ... 1979, vol. II (Part Two), p. 47, para. (45) of the commentary to article 16.

<sup>22</sup> *Yearbook* ... 1977, vol. II (Part Two), p. 58.



deletion. It was said in this connection that the words “any other financial obligation chargeable to a State” seemed unduly broad and might give rise to improper interpretations. It was also said that, whereas subparagraph (a) clearly referred to the two parties to a financial obligation, the debtor and the creditor, subparagraph (b) referred only to the debtor, and that by the use of the word “chargeable”. There was nothing to indicate who the creditor was, nor did the commentary throw much light on the matter; yet it was obvious that creditors who were not subjects of international law were private institutions operating as legal or natural persons. The question, therefore, was whether such persons fell outside the framework of a set of draft articles concerned with international financial obligations. That question became even more pointed when set against the position in regard to debts contracted by public enterprises. The intent of the article in that respect was only partially clarified in the commentary, which stated quite properly that, irrespective of the State’s responsibility for such debts, under article 7 of the draft they were not subject to the rules on succession of States.

132. It was further stated that, insofar as subparagraph (b) of article 16 extended the application of the provisions of part III of the draft to State debts owed to creditors who were not subjects of international law, it gave rise to an obvious contradiction, since the draft articles embodied rules of international law and were therefore applicable only to subjects of international law. The draft articles should deal only with the international debts of States. The concept of State debt should include only the international financial obligations of States to other States, international organizations or another subject of international law. The transfer of debts that were not international could constitute interference in the internal jurisdiction of the successor State. Matters relating to the financial obligations of a State to private creditors or, in other words, to creditors who were not subjects of international law should be regulated by internal law and could not be the subject of international codification. Subparagraph (b) might even come to include debts contracted with the nationals of a State, which should obviously be governed by national laws. The draft articles should not apply to debts owed by the State to its own citizens or to foreign nationals or corporate bodies. Article 16, subparagraph (b), in its existing form, would have virtually the same effect as the deletion from article 18, as originally worded, of “international”, a deletion for which there was no justification. It was also said that the recourse of a State to diplomatic protection of its nationals in accordance with the rules of international law was also a matter which should be considered outside the scope of the current articles on State succession. In the opinion of certain representatives, the deletion of subparagraph (b) would not imply exemption of a State from its obligations to private parties; former article 18, paragraph 1, provided a sufficient safeguard for the interests of all creditors, including those who were not subjects of international law.

133. One representative, referring to the transfer of State debts, stressed the importance of his earlier suggestion to insert the adjective “international” in the phrase “any

other financial obligation chargeable to a State” in article 16, subparagraph (b), in keeping with the decision in the *Barcelona Traction* case.<sup>23</sup> It was regrettable that the suggestion had not been adopted. Before a final decision was reached as to whether article 16 should be retained as it stood or amended in accordance with his suggestion, it would be desirable for the Commission to look into that point more closely by studying the consequences and implications in that regard of both international case law and multilateral conventional rules, such as the convention signed at Washington on 18 March 1965<sup>24</sup> or the provisions of standard bilateral conventions on the protection and guarantee of foreign investment in third world countries. More precise drafting could serve as the basis for a compromise.

134. In the view of another representative, a solution to the remaining substantial problem, the definition of State debts, was not to be found in taking sides as to the inclusion or exclusion of the second subparagraph of article 16, but rather in making positive contributions which would provide new material for the Commission in its second reading. In that context, he emphasized the need for the draft to remain relevant to the situation of all States, and not of certain States only.

#### *The question of odious debts*

135. A number of representatives noted that, although the question of “odious debts” had been discussed by the Commission, no provisions relating to it had been included in the draft articles. It was pointed out that the Commission had decided against drafting general provisions on “odious debts” in the expectation that the rules being drafted would be sufficiently wide to cover that situation. “Odious debts” were considered to be those imposed upon a country without its consent and contrary to its true interests, and debts intended to finance the preparation for or the prosecution of war against the successor State. In that connection, some representatives deemed the Special Rapporteur’s earlier proposals to be quite interesting. Reference was made to the draft articles submitted by the Special Rapporteur in his ninth report,<sup>25</sup> under which odious debts contracted by the predecessor State—debts which were contrary to the major interests of the successor State or were not in conformity with the principles of international law—would be excluded from the provisions on succession to State debts. One representative disagreed with the Commission’s conclusion that there was no point in defining the concept of “odious debts” and stipulating that such debts could never be transferred. Another representative deemed it particularly important to clarify that point, since the intent behind the

<sup>23</sup> See *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, *I.C.J. Reports* 1970, p. 3.

<sup>24</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations, *Treaty Series*, vol. 575, p. 159).

<sup>25</sup> *Yearbook . . . 1977*, vol. II (Part One), pp. 67–70, document A/CN.4/301 and Add.1, chap. III.

draft articles was that succession to State debts should be a general obligation on all States other than newly independent States. He therefore considered that a provision should be included in the draft to cover that point.

136. Some representatives expressed the hope that, in view of the importance of the question, the Commission would review its decision regarding "odious debts" when it took up the articles on second reading.

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137. In the opinion of the New Zealand representative, the most important point in the draft articles was still the definition of "State debt". Almost the first rule of codification on a universal scale was a law of coexistence: a draft that manifestly suited the circumstances of a capitalist economy better than those of a socialist economy, or one that suited a socialist economy better than a capitalist economy, would not appeal to the world at large. It might serve a regional purpose, but not the cause of global codification. That, ultimately, was why the definition of debt was so important. The draft articles could do no more than deal with the moment of time in which one State replaced another in responsibility for the international relations of a particular piece of territory. After that, the normal rules of State responsibility towards other States had their natural play. The present rules could only determine by which international person debts were owed; and, from the standpoint of those rules, it was immaterial whether a debt was owed to another State or to a private individual.

138. Another delegation said that it seemed unjustified to make a distinction between debts according to the nature of the debts or the creditor, and that the relevant part of the draft should be re-examined. It would seem essential that, if adopted, the draft articles should apply both to debts arising from loans contracted on the basis of intergovernmental agreements and to debts arising from loans raised in a free market. It seemed unnecessary to maintain the present division of the article into two clauses, but it was essential to retain the whole of the article's existing scope.

139. One representative said that the provisions of article 16 were very unclear as to the question whether the term "State debts" included private debts. For example, what did "subject of international law" refer to? The problem was a controversial one. Did the words "any other financial obligation" include obligations which came about illegally? Judging from the language of article 16, the creditor might be a State, an international organization, a foreign natural or juridical person, or even a natural or juridical person of the debtor State. Actually, the purpose of the action of the draft articles in question was mainly to settle debts between States. The debts a State owed to private persons, especially the debts owed to its own people and enterprises, should be regulated under domestic law and were beyond the scope of the present topic.

140. One delegation was of the view that article 16 contained a definition, and that its substance should therefore

be reproduced in article 2, paragraph 1, concerning the "use of terms".

141. One delegation observed that the expression "any other subject of international law", used in article 16, subparagraph (a), might cause problems because it was held in some quarters that it could include private individuals. Terms liable to give rise to theoretical disputes should not be used in legal texts.

142. One representative drew attention to an apparent contradiction between article 2, subparagraph 1(a) and article 16, subparagraph (b): study of the former provision gave the impression that the only obligations to be taken into account were those established by international law within the context of an inter-State relationship, or, in other words, the obligations referred to in article 16, subparagraph (a); article 16, subparagraph (b), however, referred to "any other financial obligation chargeable to a State", and therefore covered more than the area defined in article 2, subparagraph 1(a).

#### Written comments

143. The *Byelorussian Soviet Socialist Republic* considered that further work was necessary on article 16(b). The fact that the subparagraph referred to "any other financial obligation chargeable to a State" was totally unacceptable, since such obligations were governed not by international law, but by the relevant provisions of municipal law. Subparagraph (b) should accordingly be deleted from article 16.

144. The *German Democratic Republic* felt compelled to reaffirm the reservations which had been voiced in the Sixth Committee by its representative concerning the definition of State debts in article 16.<sup>26</sup> Since succession to State debts was still a very controversial matter and the draft established, except for newly independent States, the obligation of succession, implying a progressive development of international law, the draft formula must be studied very thoroughly.

145. The German Democratic Republic welcomed the fact that article 16, subparagraph (a), confined itself to defining as State debts the financial obligations of States towards other subjects of international law. On the other hand, it found it highly objectionable that, despite the dissenting votes of several members, the majority of the Commission should have abandoned, in article 16, subparagraph (b) its otherwise consistent orientation with regard to that question, and that it should have deviated completely from the provisional draft submitted in 1977. Article 16, subparagraph (b) would result in an obligation for the successor State to continue without change its predecessor's relations under private law towards foreign natural and juridical persons. The same would apply, with all the consequences that entailed, to its own citizens. Factually, subparagraph (b) would bind a new State to the domestic jurisdiction of its predecessor. That would

<sup>26</sup> *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee, 43rd meeting, para. 27.*

constitute unacceptable interference in the successor State's sovereignty and was, therefore, incompatible with the principles of sovereign equality of States and non-interference in other States' internal affairs. A successor State must have the right to establish its own constitutional and legal order, including the right to the independent conduct of its relations under civil law with natural and juridical persons. When a State believed that, for instance, nationalizations or general expropriations affected the interests of its citizens with regard to their property in a way contrary to international law, it was able to exercise protective rights on behalf of its citizens through diplomatic channels. That was the internationally accepted way of protecting the interests of citizens in foreign countries. It could not be accepted, however, that an international convention should *a priori* bind a new State to the unqualified continuation of its predecessor's relations under private law. Consequently, the German Democratic Republic held that the matter to be regulated by the convention should, as a matter of principle, be confined to the debt relations of the predecessor State under international law, as was the case with regard to all other matters (treaties, State property, and State archives).

146. The German Democratic Republic also felt that it was necessary to include in the convention a provision on non-transferable debts and, consequently, clearly to define the term "odious debts". In that connection, it would be desirable if, on second reading, the Commission reconsidered the pertinent proposals which had been submitted by the Special Rapporteur in 1977.<sup>27</sup> Article C could provide a good platform for the definition of such debts, which were excluded from obligatory succession on the grounds that they were inconsistent with international law.

147. The *Ukrainian Soviet Socialist Republic* hoped that the Commission would delete subparagraph (b) of article 16, which it felt to be of dubious value, since, by its very nature, it went beyond the group of problems covered by the draft.

148. *Czechoslovakia* requested the Commission to review the definition of State debt which it proposed in article 16, for that definition created a "difficult problem" by exceeding the system of legal relationships regulated by public international law. According to *Czechoslovakia*, public international law did not regulate the succession of States to State debts subject to the internal law of the predecessor State, nor could it govern succession to State debts owed by the predecessor State to private or juridical persons, particularly when such persons were nationals of the predecessor State, for in no such case would the debt have arisen from an international obligation of the predecessor State. Succession to such debts was possible only if, on the date of the succession of States, there existed an international obligation of the predecessor State towards a third State concerning their payment. The case would then be one of

State responsibility and, as such, would be excluded from the scope of the present draft.

149. For *Italy*, the aim in article 16, subparagraph (b) seemed to have been to cover as wide a field as possible, whereas the succeeding provisions, particularly articles 19 and 23, were far more limited in scope, referring solely to inter-State relations. Contemporary State practice showed that debts owed by a predecessor State to foreign private persons had been the subject of State succession, and international laws had existed in that regard for some time, especially since the First World War.

150. *Italy* recognized, however, that the subject-matter of article 16, subparagraph (b) "is highly controversial and does not lend itself readily to the formulation of a solution acceptable to the entire international community". For that reason of political import, the Italian Government suggested that the draft articles should be limited to the lowest common denominator, or, in other words, that they should be restricted, in the hope of reaching a consensus, to the topic of debts between subjects of international law.

151. *Austria* expressed regret that, although the various categories of State debt, such as national debt, local debt and localized debt, had been mentioned in the lengthy commentary to the article, the Commission had not included definitions of those categories in article 16.

#### OPINION OF THE SPECIAL RAPPORTEUR

152. The Special Rapporteur has given a detailed account of all the written comments of Governments and all the oral remarks made during the past two sessions of the Sixth Committee in order to show the Commission that its long and arduous debate on the topic has been extensively echoed, both in the Sixth Committee and in national chancelleries. In the light of that situation, he recommends that, at the present stage of the second reading of the draft, the Commission should refrain from resuming a substantive discussion which would merely be a further sterile reflection of the sharp controversy by which it has itself been divided and which continues to trouble the international community.

153. In any event, now that its own term of office is drawing to an end and the second reading of the draft articles is under way, it would seem impossible for the Commission to find sufficient time to reopen its substantive debate on article 16, for, as the Government of *Italy* pointed out in its written comments, any fresh in-depth exploration of the subject might well be extremely long and complex and necessitate the revision of several clauses of the draft articles.

In such circumstances, to attempt to reply to each of the differing comments that have been made would serve no useful purpose, for it would merely add fresh fuel to the fire. Moreover, the legal arguments that have been put forward are of widely differing value; it is the political element that is of the essence in this affair, and goes beyond the scope of legal reasonings.

154. The Commission is, then, left with the choice between two possible attitudes. The first would consist in

<sup>27</sup> See *Yearbook ... 1977*, vol. II (Part One), p. 70, document A/CN.4/301 and Add.1, para. 140.

maintaining article 16, subparagraph (b) as it stands and leaving the solution of the question to a possible conference of plenipotentiaries. The Special Rapporteur is reluctant to propose such a course, if only because it tends to ignore the aim of consistency which he has pursued throughout the draft articles. In that respect, several Governments, including that of Italy, have justly drawn the Commission's attention to the concept of an inter-State relationship governed by international law that underlies the draft as a whole. The Commission has limited the scope of its articles to this kind of relationship. The inclusion in article 16 of subparagraph (b) is at variance with this otherwise harmonious approach and, as the Government of Italy has pointed out, the provision jars with the rest of the draft, particularly articles 19 and 23.

155. There is a second possibility. It is to accept *whatever* is capable of engendering consensus and *nothing* more, that is to say, merely to seek out and set down the minimum foundations for agreement within the international community. This means that the draft should limit itself to expressing the lowest denominator common to all States. Clearly, such an aim can be achieved only by retaining subparagraph (a) and deleting subparagraph (b). In that event, the commentary for the General Assembly and the possible conference of plenipotentiaries should draw attention to subparagraph (b) and to the reasons which led to its deletion *for the time being*. It would be for the conference of plenipotentiaries to launch a fresh debate and, if it so wished, to extend the scope of the draft articles to debts owed to foreign private individuals and to undertake the consequent in-depth recasting of certain other provisions of the draft.

But it would not be in the best of taste for the Commission to transmit to that possible conference of plenipotentiaries a draft which would, on a fundamental point, be hotly contested by part of the international community. That would be equivalent to offering the conference a time bomb.

156. Limiting the draft articles to an inter-State relationship governed by public international law would in no way mean that the fate of debts owed by the predecessor State to foreign private individuals should be ignored. It would simply be stated that it was not the purpose of the draft article to investigate this aspect of the problem, although the conference might wish to expand the field of study because of the importance of the question.

157. As to article 16, subparagraph (a), the written comments of Governments and the statements made by representatives to the Sixth Committee will undoubtedly be of help in improving its drafting. There is, however, no denying that the Commission laid itself open to problems when it defined State debt as a financial obligation of a State towards not only another State, but also an international organization, and in particular, "any other subject of international law". The Commission could hardly have avoided dealing with the kinds of financial relations that are so important in the modern world and that exist between a State and an international organization such as the World Bank or the IMF. But the

expression "any other subject of international law" has inevitably given rise to criticism because of the doctrinal and other differences that exist concerning the question of what constitutes a generally acceptable definition of a "subject of international law". Theories abound in support of the extension of that term not only to a State or an international organization—a notion that has gained universal acceptance—but also to national liberation movements, transnational corporations or multinational companies, and even to individuals—a notion that remains controversial.

158. Since some now consider that the rules of international law are ultimately directed to the individual, and since, in particular, there have been welcome advances in the human rights chapter of the theory of international law, to the point where the tendency is now to make the individual a "subject of international law", the differences of opinion encountered by the Commission would not end with the deletion of article 16, subparagraph (b). They would re-emerge through the interpretation that would be given to the expression "subject of international law" and by means of which article 16 could be held to refer to debts owed to individuals, whether nationals or foreigners.

The Special Rapporteur considers it even more unacceptable to recognize any degree of international personality whatsoever to multinational companies. It is common knowledge that this problem has long been under study by the Institute of International Law and that there is much doctrinal controversy concerning the nature of contracts, particularly investment contracts, concluded between a State (which may one day be involved in a succession of States) and a transnational corporation.

159. In order to avoid all these difficulties, which are likely to divide the Commission, and perhaps a conference of plenipotentiaries too, the best course would, once again, be to aim for the lowest common denominator, by deleting from subparagraph (a) of article 16 the expression "or any other subject of international law".

160. With regard to the question of "odious debts", the Special Rapporteur, who earlier advanced on this subject a number of arguments and articles to which there was some response in the Sixth Committee, is perfectly willing to resume the study of those provisions before the Commission, should that be considered expedient at the current stage of second reading and in the final year of the Commission's term of office.

#### ARTICLE 17. (Obligations of the successor State in respect of State debts passing to it)

##### *Oral comments—1979*

161. In the opinion of one representative, article 17 should be amended to provide that the successor State would take over State debts that passed to it subject to any lawful encumbrances.

##### *Written comments*

162. The German Democratic Republic held that article 17 would be unacceptable unless it was expressly stated

that it applied only to State debts contracted in accordance with international law, thereby excluding from the scope of the future convention debts contracted for a purpose not in conformity with such law.

#### OPINION OF THE SPECIAL RAPPORTEUR

163. There seems to have been almost universal tacit approval of draft article 17. The article contains a rule equivalent to that set out in article 6 concerning the rights of a successor State to such of the property as passes to it. The German Democratic Republic wishes it to be stated that article 17 applies only to State debts contracted in accordance with international law. In expressing that wish, it has in mind the problem of "odious" debts mentioned above. With regard to the comment by a representative to the Sixth Committee, the Special Rapporteur considers it correct to say that the successor State must take over the State debts that pass to it under article 17, subject to any lawful encumbrances.

#### DRAFT ARTICLE 17 *bis*. (Date of the passing of State debts)

164. The Special Rapporteur proposes to the Commission a draft article 17 *bis* which corresponds to article 7 concerning the date of the passing of State property. The article is its own justification and fills what had been a gap in the draft. It reads as follows:

##### *Article 17 bis. Date of the passing of State debts*

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

165. It should, however, be noted that the assumption by the successor State from the date of the succession of States of the servicing of the State debt that passes to it will probably not be feasible *in practice*. The predecessor State may continue to service the debt directly for some period of time, and that for practical reasons, since the debt, as a State debt, will have given rise to the issuance of acknowledgements signed by the predecessor State, which is bound to honour its signature. Before the successor State can honour directly the acknowledgements pertaining to a debt that passes to it, it must endorse them; until that operation, which constitutes novation in the legal relationship between the predecessor State and the creditor third State, has been completed, it is the predecessor State which remains accountable to the creditors for its own debt.

166. But there can be no question of such temporal or practical constraints altering the legal principle of the passing of the debt on the date of the succession of States. In reality, until such time as the successor State endorses or takes over the acknowledgements of the debts that pass to it, it will pay the predecessor State the servicing charges associated with those debts, and the predecessor State will provisionally continue to discharge the debts to the creditor third State.

167. The principal purpose of article 17 *bis* is to show that, however long the transitional period required for the

resolution of the organizational problems associated with the replacement of one debtor (the predecessor State) by another (the successor State), the legal principle is clear and must be observed: interest accrues on the State debt that passes to the successor State, and that debt is chargeable to that State, from the date of succession of States. Should a predecessor State which has been released from certain debts by virtue of the Commission's articles none the less provisionally continue, for material reasons, to service those debts to the creditors, it must receive due repayment from the successor State.

#### ARTICLE 18. (Effects of the passing of State debts with regard to creditors)

##### *Oral comments—1979*

##### *Paragraph 1*

168. In the opinion of one representative, paragraph 1 could be read to imply that the creditor maintained his claim against the predecessor State and did not automatically obtain a claim against the successor State. Moreover, paragraph (10) of the commentary to article 18 stated that the creditor did not, in consequence only of the succession of States, have a right to recourse or a right to take legal action against the State which succeeded to the debt. In cases where the predecessor State ceased to exist, however, the creditor would be seriously prejudiced if he did not automatically obtain rights, as a result of succession, against the successor State or States.

169. In the view of certain representatives, it would seem that the commentary had not been fully adapted to the paragraph's new wording. Thus, it was stated in paragraph (10) of the commentary that the word "creditors" in paragraph 1 of article 18 "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".<sup>28</sup> Besides the discrepancy between that interpretation and the wording of the text itself, why should a succession of States as such legally affect the rights and obligations of creditors which were natural or juridical persons under the jurisdiction of the predecessor or successor States? In another part of the commentary, the Commission had demonstrated that the creditor-debtor relationship as such should fall outside the scope of the rules of international law relating to State succession. Indeed, that relationship was normally regulated by municipal law or, where appropriate, by rules of conflict of laws indicating the municipal law to be applied. If the creditor and debtor were States, their relationships might be governed by a treaty, but then the present draft articles would not apply, the effects of State succession on treaties being the subject-matter of the 1978 Vienna Convention. Quite a different matter was the relationship between, on the one

<sup>28</sup> *Yearbook . . . 1979*, vol. II (Part Two), pp. 49–50.

hand, the predecessor and successor States and, on the other hand, a third State asserting a claim under international law on behalf of itself or its nationals, when the predecessor or successor State or both failed to meet its or their financial obligations under municipal law. Whether or not such a claim was admissible under the rules of international law and, if so, under what conditions and to what extent it was admissible, were questions outside the scope of the draft articles. They fell within the scope of other rules of international law, namely those relating to diplomatic protection and State responsibility. But to the extent that those other rules allowed a State—or another subject of international law—to assert a claim, a preliminary question might arise in connection with a situation of State succession, namely whether an agreement between the predecessor and the successor State, being an instrument governed by international law, concerning the passage of State debts from the one to the other, could be invoked against a third State. That question was dealt with in the present wording of article 18, paragraph 2. Now it was clear that in the situation contemplated in that paragraph, the creditor, while being a national of the third, claimant State, might fall under the jurisdiction of the predecessor or successor State. That, indeed, was why the third State could not normally assert the claim unless the creditor himself had exhausted the effective local remedies available to him. There was therefore no reason whatsoever to exclude creditors under the jurisdiction of the predecessor or successor State from the scope of article 18.

#### *Paragraph 2*

170. Some representatives expressed reservations concerning paragraph 2. In the opinion of one representative, the paragraph and, in particular, the expression “the consequences of that agreement”, which appeared in subparagraph (a), required clarification. He agreed, however, with the statement in paragraph (10) of the commentary to the effect that the provision was equally valid in cases where the creditors were not States, which was an added reason for deleting the references to international organizations. Another representative did not understand why paragraph 2 was confined to creditor States and creditor international organizations, whereas paragraph 1 dealt with creditors in general.

171. Certain representatives also expressed doubts about the condition laid down in subparagraph 2(a), namely, that the consequences of the agreement must be in accordance with the other applicable rules of the articles in part III. For one representative, the only exception to the general rule that the predecessor and successor States could conclude such agreements as they saw fit was to be found in article 20, paragraph 2, but he was not clear whether that was the restriction that had to be observed under article 18, subparagraph 2(a). Another, and possibly more reasonable, interpretation was that the agreement could be invoked only if it complied with the general principles of succession which, under articles 19, 20 and 22, had to be applied in the absence of any agreement between the predecessor and successor States. Another representative, likewise, did not understand to

which draft articles the words “the other applicable rules” referred.

172. Some representatives referred to the condition laid down in subparagraph (b) and to the conclusion that, in their view, could logically be drawn from it, namely, that the predecessor State or the successor State could invoke an agreement concluded between those two States against a third State or international organization which was not a party to that agreement. For one representative, however, there was nothing in article 18 to suggest that the third State or international organization enjoyed a similar right as against the predecessor and successor States, something that did not seem reasonable to him. Another representative, referring to the logical conclusion to be drawn from paragraph 1 and subparagraph 2(a), namely that the agreement could be invoked if its consequences were in accordance with certain applicable rules of the draft articles, deemed it to be clearly in conflict with article 34 of the 1969 Vienna Convention. In his view, if the words “a third State or an international organization” used in paragraph 2 meant exclusively a State or an organization party to the draft articles, then the predecessor State or successor State or States were not invoking against the third State the agreement in question, but rather the applicable rules of the draft articles. It was said that the question remained to be analysed in more detail on second reading, in the light of the 1969 Vienna Convention.

#### *Written comments*

173. *Italy*, recognizing the international relevance of succession in the case of debts between States and foreign private persons, considered article 18, paragraph 1, all the more important as it had proposed the deletion of subparagraph (b) of article 16. With that in mind, it called for the rewording of article 18, paragraph 1, as a general safeguard clause.

174. In the opinion of *Czechoslovakia*, not all the rules in the draft articles were established norms of general international law. Consequently, the question arose whether the agreements mentioned in article 18, paragraph 2, could be enforced against third States or international organizations if those entities were not bound by a future convention containing the draft articles. That question would remain valid even if, as required by article 18, subparagraph 2(a), the consequences of the agreements concluded between the predecessor State and the successor State (or between successor States, in the event of the disappearance of the predecessor State) were in accordance with the other applicable rules of the draft.

175. The Government of *Czechoslovakia* also observed that the definition of a third State contained in article 2, subparagraph 1(f), was inadequate because the case referred to in article 18, paragraph 2, might involve two categories of third States: States which would be third States with respect to the agreements between the predecessor State and the successor State (or between successor States), but which would be bound by a future convention containing the draft articles; and States which would be third States with respect both to such a future

convention and to the agreements between the predecessor State and the successor State (or between successor States). In view of the provisions of article 34 of the 1969 Vienna Convention, draft article 18, subparagraph 2(a), could only apply to the first category of third States. The Czechoslovak Government therefore invited the Commission to review the proposed text.

#### OPINION OF THE SPECIAL RAPPORTEUR

176. In view of the criticisms made of article 18, paragraph 1, the Special Rapporteur suggests that this provision, which creates more problems than it solves, should be deleted. The Commission devised the paragraph with the aim of protecting creditors, but the serious reservations to which it gave rise in the Sixth Committee show that it deserves them.

177. First, it is incorrect to state that, legally, succession to State debts does not affect the *rights* of creditors. Naturally, the creditor third State retains title to its debt as a patrimonial right. With respect to the rest of its *rights*, however, the effect of a succession of States is exactly the opposite of what is stated in article 18, paragraph 1: the succession entails *novation* in the legal relationship that previously existed between the predecessor State and the creditor third State with regard to the State debts that pass to the successor State. While the legal effect of a succession of States is to substitute for the *right* of the creditor third State over the predecessor State an equivalent right for the same beneficiary over the successor State, it cannot be said that succession has no effect at all on the right of the third State, however similar that State's rights over two successive debtors may be. Although the creditor's patrimonial right will remain intact, it is clear that, from a strictly technical viewpoint, the novation—by the replacement of the first debtor by a second—in the legal relationship between debtor and creditor alters the creditor's *rights*, particularly in the procedural sphere. In fact, article 18, paragraph 1, can even be said to contradict article 17, which provides that a succession of States "entails the extinction of the obligations of the predecessor State" or, in other words, the extinction of the rights of the creditor third State over the predecessor State. Article 17 further provides that a succession of States "entails . . . the arising" of the obligations of the successor State, that is to say the arising for the creditor third State over the new debtor of rights which, while they are equivalent, are fresh. That is no more than the logical outcome of the novation.

178. Hence, unless paragraph 1 of article 18 can be redrafted, it would be better, in order to avoid ambiguity, to delete it, particularly as its underlying idea is also contained in paragraph 2 of the article.

179. Paragraph 2 of article 18 has been the subject of still more outspoken criticism. In this respect, the Special Rapporteur can find no fault with the reasoning of the Government of Czechoslovakia. The 1969 Vienna Convention provides no grounds for asserting that an agreement between a predecessor State and a successor State (or between two or more successor States) may automatically be invoked against a creditor third State even when

the latter has neither accepted that agreement nor acceded to a convention containing the present draft articles. This opinion holds true even if the consequences of the agreement between the predecessor State and the successor State (or between two or more successor States) are entirely in keeping with the rules set out by the Commission in the draft articles on State debts.

180. The Commission might, then, wish to delete subparagraph 2(a) to leave only subparagraph 2(b). That would not be a good choice, for the text would be weakened without covering the case in which the creditor third State is itself a party to the future convention containing the draft articles.

181. Another possibility would be to redraft subparagraph 2(a) so as to cover in it the case in which the creditor third State is itself a party to the future convention containing the draft articles. Here, however, the difficulty is twofold. First, article 18 refers to the invocation of the novatory agreement not only against a creditor third State, but also against an international organization, thereby raising the question how far it is possible for an international organization to be a party to the future convention, which will govern only succession of States "between States". The difficulty derives from the fact that reference has been made in the definition of State debt contained in article 16, subparagraph (a), to the international organizations that provide loans and that can, therefore, be creditors of States.

Second, the inclusion in article 18, paragraph 2, of a provision covering the case in which a creditor third State is itself a party to the future convention might have a political disadvantage, inasmuch as the presence of such a provision would do anything but encourage States to become parties to the instrument.

182. The problem that must be solved is the following: while the creditor third State is entitled to consider that the agreement on the fate of its claim cannot be invoked against it so long as it refuses to accept that agreement or to become a party to the future convention, it is, on the other hand, utterly without power to oppose the conclusion, or even the execution, of an agreement between the predecessor State and the successor State concerning the future of its claim which releases the predecessor State from that obligation by its replacement as debtor by the successor State. The difficulty lies in reconciling these two facts and incorporating them in an appropriate provision in article 18, paragraph 2.

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

### ARTICLE 19. (Transfer of part of the territory of a State)

#### *Oral comments*

1979

183. One representative observed that the phrase "taking into account, *inter alia*, the property, rights and



interests which pass to the successor State in relation to that State debt" used in paragraph 2 did not conform to the phrase "taking into account all relevant circumstances" used in articles 22 and 23.

1980

184. In the opinion of one representative, the terms "property, rights and interests" appearing in *paragraph 2* should be replaced by the term "State property".

185. One representative welcomed the adoption of articles 19, 20, 22 and 23, which basically provided for the passing to the successor State of an equitable proportion of the State debt contracted by the predecessor State.

#### Written comments

186. The *German Democratic Republic* takes the view that the provision concerning the passing, in the light of all relevant circumstances, of an equitable proportion of State debts, as set out in articles 19, 22 and 23, seems broad enough to cover all possible situations. In the final analysis, to be equitable, any passing of State debts will always have to take account of the historical and national circumstances of each particular succession. Equitable apportionment will have to pay regard both to the capabilities of the successor State and to the real gain which would result for the successor State from assuming the debts contracted by its predecessor.

#### OPINION OF THE SPECIAL RAPPORTEUR

187. Draft article 19 has not given rise to any objections and has indeed commanded clear support. At most, an attempt has properly been made to improve the wording. The latter would not necessarily be more satisfactory if, in the text of paragraph 2, the expression "property, rights and interests" were replaced by the term "State property", as had been proposed.

188. A question has been raised concerning the difference in wording between article 19, in which the phrase used is "taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt", and articles 22 and 23, where it is more a question of "taking into account all relevant circumstances".

In this connection, the Special Rapporteur wishes to point out once again that there is a difference between the circumstances covered by article 19 and those envisaged in articles 22 and 23. Article 19 relates to a case in which the predecessor State transfers, freely and normally by agreement, part of its territory, usually small in area, to another State. The most frequent instance is treaty adjustment of frontiers between two States, for modern international law prohibits any annexation of territory. In a case of this kind, all the problems are settled by agreement, which is why paragraph 1 of article 19 favours that form of settlement.

In the absence of an agreement, equity requires in such a case of State succession that the debt passing to the successor State should be proportional, taking into account, *inter alia*, the property which passes to the successor State in that territory. The problem is not so

complex as in the circumstances covered by articles 22 and 23. Moreover, the "equitable proportion" of debts which pass to the successor State is calculated by taking into account "*inter alia*" (and not "exclusively") the property, rights and interests which pass to that State.

189. The cases covered by article 22 involve situations that are normally more complex and sometimes even violent. For example, part of the territory of a State separates from that State after the population of the part in question has, by more or less peaceful methods, claimed its right to self-determination. Such secession of part of the territory of a State is more serious for the predecessor State; normally it affects a larger area of territory than is envisaged in article 19, where it is usually a question of a straightforward frontier adjustment. In contrast to the case covered by article 19, it finally leads to the creation of a new State and thereafter perhaps some difficulties because of geographical proximity.

For this reason, the Commission thought it more prudent to recommend that account be taken of "all relevant circumstances", as the only way to achieve a truly equitable apportionment of State debts.

190. The same concerns prompted the Commission to use the wording "all relevant circumstances" in the case of dissolution of a State, covered by article 23. The break-up of one State into several others creates delicate and complex situations in which account must be taken of all the parameters of the problems involved, so as to ensure an equitable apportionment. These parameters obviously include the one covered by article 19, namely the proportion between the State debts and State property that pass. However, in that case other parameters must also be taken into consideration.

#### ARTICLE 20. (Newly independent State)

#### Oral comments

1979

191. A number of representatives supported the provision set forth in article 20. It was said that the article had rightly been based on the "clean slate" principle and that it did not exclude the possibility of an agreement freely arrived at between the predecessor and the successor States. Appreciation was expressed for the Commission's efforts in drafting this positive article. Nevertheless, in the view of some representatives the article should have provided in more direct terms that no debt of the predecessor State would pass to the newly independent State, so as to ensure that the rule would not be open to possible interpretations.

192. One representative expressed his satisfaction that, on the basis of the principle of the permanent sovereignty of every people over its wealth and natural resources, which was a basic element of the right to self-determination, the Commission had decided to adopt as a basic rule the rule laid down in paragraph 1. However, the provision had been greatly weakened by the concluding part of the paragraph, which provided for an exception to



the rule in the case of an agreement between the two States. In view of the special circumstances in which the succession normally took place between a dominant State and a State that had been dominated, he could not see how such an agreement could be freely concluded on both sides. Even after independence, the effect of domination was still felt, and the consent of the successor State in such circumstances could not be regarded as freely given. He hoped that the Commission could study that aspect of the question further in the light of the dominant position of the predecessor State, the different levels of development of the two States, the natural incapacity of the successor State to assume financial burdens resulting from the action of the predecessor State alone without the former's participation, the need to avoid, in the interests both of creditors and of the community as a whole, any adverse effect on the already unfavourable economic situation of a weak country, and the requirements of the new international economic order. Although paragraph 2 of article 20 already provided some protection against excessive claims by the predecessor State, the best protection remained the rule that no State debts should be passed.

193. Other representatives recognized that succession of newly independent States was a distinct type of State succession. In this connection, it was said that the political considerations put forward in support of the rule laid down in article 20 were justified and that the inter-relationship between the economic, political and legal factors had been duly reflected; the references to General Assembly resolution 31/158, on the debt problem of developing countries, were likewise relevant. It was also stated that problems of succession in the matter of State debt might be prolonged for decades if the automatic passing of such debt to the newly independent State prevented the latter from achieving real independence. Furthermore, the assumption of State debts by a newly independent State would be incompatible with that State's right to receive compensation for the exploitation of its resources by the colonial Power. That right had been affirmed in the Declaration on the Establishment of a New International Economic Order and in the Charter of Economic Rights and Duties of States<sup>29</sup> and had been proclaimed for the first time at the First Conference of Heads of State or Governments of Non-Aligned Countries, held at Belgrade in September 1961. The assumption of State debts by newly independent States was also incompatible with the legal obligation of the industrialized States to provide assistance to newly independent States. The opinion was also expressed that, considering the scope of the draft articles as a whole, they would be applied most widely mainly in the relations between strong countries and the weak countries that had formerly been colonies or protectorates. In view of the special nature of those relations, it might have been more to the point in that context to deal with the question not in terms of succession of States, but in terms of a mere restoration of

rights which did not involve any passing of debts. It was unreasonable that the predecessor State, having profited for decades from the natural and human resources of the successor State, should be allowed to pass on its debts to that State at the very time when, weakened by the colonial experience and the cost of fighting for its independence, it most needed aid and support.

194. Also with reference to article 20, one representative, for whom the position of newly independent States was a particularly interesting aspect of succession, considered that the practice of States that had been analysed appeared to deal extensively with French colonial practice, and to a lesser extent with Belgian, Netherlands and Spanish colonial practice, but much less with British colonial practice, except for a few countries in Asia which had gained their independence in the 1940s and 1950s. There was some difference between those administrative practices; for example, British colonial territories were considered separate administrative units and were largely fiscally autonomous. Consequently, all borrowings by British colonies were made by the colonial authorities and constituted charges on colonial revenues alone. When British colonial territories had needed capital it was raised by the colony itself, under the *Colonial Loans Act* or the *Colonial Development and Welfare Act*, from the World Bank or from the London or local stock markets. Accordingly, in those instances, there was no question of succession to State debts as defined in the draft articles, since the debts were debts not of the predecessor State but of the colonial territory itself. When his country had acceded to independence in 1962, its public debt had consisted of financial obligations under the 1877 *Colonial Stock Act* to the World Bank and to local natural or juridical persons. Those financial obligations had been honoured after independence, and legislation had been enacted just prior to independence to secure that aim, especially in the case of inscribed stock under the *Colonial Stock Act*. It therefore appeared that British colonial practice differed from that of other colonialist countries and, consequently, draft article 20 would have little direct consequence for countries such as his. In its report, the Commission itself acknowledged that, in the light of British colonial practice, such local debts might fall outside the scope of the draft articles concerned with the debts of the predecessor State.<sup>30</sup>

#### Paragraph 2

195. One representative emphasized that paragraph 2 incorporated two modern concepts favoured by developing countries: the permanent sovereignty of every people over its wealth and natural resources, and the fundamental economic equilibria of newly independent States. In this connection, reference was made with approval to paragraphs (39) and (60) of the commentary to article 20. In the opinion of another representative, however, it would be appropriate to broaden the scope of paragraph 2, as it was difficult to establish the meaning of the words

<sup>29</sup> General Assembly resolution 3201 (S-VI) of 1 May 1974, and General Assembly resolution 3281 (XXIX) of 12 December 1974, respectively.

<sup>30</sup> See *Yearbook . . . 1979*, vol. II (Part Two), p. 63, para. (38) of the commentary to article 20.

“endanger the fundamental economic equilibria of the newly independent State”.

1980

196. In the opinion of one representative, the article did not seem well balanced.

197. Another representative considered that *paragraph 1* was far from clear and lent itself to various interpretations; the text should therefore be recast.

198. In the view of another delegation, *paragraph 2* raised unnecessary questions which might limit the freedom of action of newly independent States, something that appeared to conflict with the intention of the rest of the draft.

199. Another representative considered that the question of the debts of a newly independent State was a very complicated one and, in dealing with it, that State's right to development must be taken into account and linked with the establishment of the new international economic order. The developing countries' external debt burden should be reduced by the utmost; he therefore proposed that the words “to ensure that the normal development of the newly independent State will not be affected by excessive indebtedness” should be added after the words “the fundamental economic equilibria of the newly independent State” in paragraph 2.

#### Written comments

200. *Czechoslovakia* fully supports both paragraphs of article 20. In particular, it welcomes the protective provisions contained in paragraph 2.

201. *Austria*, on the other hand, takes the view that article 20 goes beyond reasonable protection of the interests of the newly independent State by failing to draw any distinction between different categories of State debts and by proposing a rule which, in its opinion, has not been confirmed by the practice of States over the past twenty years. The Government of Austria considers that to adduce arguments based on the “weak financial capacity” of the newly independent State or relief or total cancellation of debts is out of place in the context of succession of States. Such considerations pertain to the realm of economic aid or the establishment of a new international economic order. Accordingly, local “or” localized debts should, in principle, pass to the newly independent State.

#### OPINION OF THE SPECIAL RAPPORTEUR

202. The Special Rapporteur regards the Commission's draft article 20 as sufficiently well balanced. The misgivings expressed by some representatives who fear that the predecessor State might profit from its dominant position and impose on the newly independent State a one-sided agreement under the terms of paragraph 1 of article 20 are all the more justified in that they have been considerably reinforced by the disappointing practice followed in the past twenty years of decolonization. It is a

fact that, in general, the newly independent States have inherited a burdensome if not disastrous financial situation and have ruined themselves in their attempts to discharge a variety of debts which have been assigned to them and which they have not been able to reject. However, the Special Rapporteur does not advocate a further strengthening of the text of paragraph 1, which is the result of a painstaking compromise. He would point out that, in any case, the text of paragraph 2 makes it possible to protect the newly independent State quite adequately against excessively one-sided agreements.

203. On the other hand, in the view of the Special Rapporteur the comments of the Government of Austria appear to be inadmissible. First of all, it should be emphasized that draft article 20 relates to the State debt of *the predecessor State*, that is to say, a debt contracted by the Government of the colonial Power within the context of its *imperium* and its former *dominium* on the territory of the colony and of its political, economic, social or military strategy in that territory. Clearly, such debts cannot pass to the newly independent State, unless an agreement provides otherwise.

However, when the organs of the colony enjoy a significant degree of autonomy and when the purpose, utilization and benefit of the loans indicate that the debts corresponding to those loans have been contracted in the interest of the colony and by the “organs proper to the territory”, it is less a question of State debts of the predecessor State than of “local debts”, or rather of “debts proper to the territory” to which the succession of States relates. In such a case, it is only natural that those debts should pass to the successor State. Accordingly, it is the agreement between the predecessor State and the newly independent State that identifies and determines this category of debts and assigns them to the successor State. There is nothing in draft article 20 to prevent such an eventuality, which should satisfy the justifiable part of the concerns of the Government of Austria.

204. However, the Government of Austria maintains that the solutions put forward in article 20 relate not so much to the requirements of State succession as to the concerns regarding a new international economic order and a request for aid to the developing countries. That opinion betrays an erroneous conception of the international economic order. The latter is an indivisible whole, one that admittedly has its economic dimensions, but also its political, cultural, legal and other aspects. As the saying goes in French civil law, “You cannot give with one hand and take away with the other”. It is not possible to pinpoint norms of international law to bring in a new international economic order and, at the same time, establish in matters of State succession more restrictive rules that contradict such norms. As for so-called “economic aid” to the third world, it has to be remembered that the latter has simply one perfectly legitimate claim, which is to obtain its due, in other words, fair remuneration for its raw materials, commodities and energy. Once this has been achieved, it is a safe bet that the third world will have no need whatsoever of economic “aid”. Once the Group of 77 has recovered at the proper

price due to it all or part of the revenue taken away from it for so many years in the form of resources tapped by the industrialized countries, it will be able to build up the conditions for its own development and its own prosperity, without having to resort to this incorrectly named "aid", for on the one hand such aid merely gives back the unfair revenue of the industrialized countries, and on the other, gives back only a very small proportion of it.

205. One representative referred to the British colonial practice whereby colonial territories under the authority of the British Crown were regarded as separate administrative units and were "largely fiscally autonomous". The Special Rapporteur is grateful to that representative for enriching our knowledge of State practice and refers the reader to his comments in paragraph 194 above. Insofar as debts have been contracted by the "organs of the colony" and have benefited the territory, they should be assigned to the newly independent State, which is the solution suggested by the practice reported by that representative, for, in the opinion of the Special Rapporteur they are local debts proper to the territory. Account has to be taken, however, of the second requirement, which is the benefit actually derived by the territory, and does not seem to have concerned that representative, who thus echoes a practice which is far too favourable to the predecessor State. The "organs of the colony" which have contracted the loan in the name of the territory only belong to that colony by a legal fiction: they are, in reality, the representatives of the colonial Power in the territory. The financial commitments that they might have contracted during the discharge of their functions in the territory may have been dictated by considerations (for example, strategic or military considerations such as the construction of a military base in the colony) completely unrelated to that of the economic or social development of the territory to which the succession of States relates.

At all events, on this point, as on others, only an agreement between the predecessor State and the successor State can identify the debts that are proper to the territory to which the State succession relates and the debts which, although contracted by the predecessor State, have directly or indirectly benefited the territory.

206. One representative criticized the phrase "endanger the fundamental economic equilibria of the newly independent State" in paragraph 2 of article 20, the scope of which he would like to see widened. The Special Rapporteur is of the opinion that everything depends on the circumstances and that the phrase in question is indeed broad enough, where necessary, to allow the scope of article 20 to be widened and so satisfy all the considerations of equity and ensure that the economy of the newly independent State is not harmed by an intolerable volume of debts that bears no relation to the capacities of the various economic sectors of that State.

207. One representative expressed a wish for a more precise definition of the meaning of this expression in paragraph 2 by inserting the words "to ensure that the normal development of the newly independent State will not be affected by excessive indebtedness". For his part, the Special Rapporteur believes that such an insertion cannot fail to be beneficial, if the Commission agrees to it.

#### ARTICLE 21. (Uniting of States)

##### *Oral comments—1979*

208. In the opinion of one representative, article 21, paragraph 2, was likely to complicate the payment of debts to a third State, for the State, as a juridical person, could not be shown to be physically divisible for the purpose of attributing debt after the uniting of two or more States into one State.

##### *Written comments*

209. No written comments have been made on article 21, except by *Italy*, which takes the view that paragraph 2 is of very doubtful value in that it seems to relate to a matter of purely internal law.

#### OPINION OF THE SPECIAL RAPPORTEUR

210. As the Commission itself pointed out in paragraph (13) of its commentary to article 21,<sup>31</sup> it was perfectly aware that paragraph 2 may be regarded as unnecessary, since the paragraph relates to the purely domestic allocation of debt-servicing, the international aspect of the passing of debts being defined in paragraph 1. The Commission retained paragraph 2, however, because very often a component part of a successor State continues to be responsible for servicing the debt incurred by it as a State before it united with another State or States. If the possibility of an internal arrangement were not expressly indicated, as it is in paragraph 2, the creditors might experience difficulties in finding out who the debtor is.

211. This is the sole advantage of paragraph 2, which admittedly places us outside the actual succession of States, at a time when the succession has already taken place and the successor State may later have adopted internal legislation that is *not in conformity with the provisions of paragraph 1 of article 21*.

How does such a situation work out? Under the terms of paragraph 1, and if paragraph 2 did not exist, the successor State, and it alone, would be internationally responsible for payment of the debt of the predecessor States that formed the successor State. No special arrangement, based on subsequent internal legislation of the successor State, could have been invoked against the creditor third State. The latter could continue to regard the successor State as its debtor. The provision in paragraph 2, apart from the fact that it adjusts to actual circumstances and enables the creditor to identify his debtor, means that effects of international law are conferred on a provision of internal law adopted later by the successor State. It gives to internal law the sanction of international law simply because it is inserted in the draft.

212. Article 21 thus comprises two distinct and contradictory rules: the first designates the successor State as the State exclusively responsible for the debts of the predecessor States, on the basis of paragraph 1, and the second designates one or more predecessor States as

<sup>31</sup> *Ibid.*, p. 71.

responsible for all or part of those debts, on the basis of paragraph 2. It is true that the latter provision, which enunciates a straightforward and acknowledged right of the successor State, is lower down the scale than is the solution contained in paragraph 1. Legally, however, a *twofold passing* of debts is involved here. The debts are not *maintained* at the level of each of the predecessor States that was previously the debtor. First, they pass to the successor State under the terms of paragraph 1. Once that operation has been carried out, *and only after it has been carried out*, the debts can be passed back to the predecessor States, on the basis of paragraph 2. Indeed, the twofold passing is such that the successor State has the right to transfer *all* or *part* of the debt to any of its predecessor States. Theoretically, paragraph 2 allows it to assign all or part of the debt to one of its component parts, even if the component part was not the original debtor.

213. In the end, this leads to so many legal complications that the initial objective behind the wording of paragraph 2, namely to help the creditor third State identify its debtor and continue to hold the predecessor State responsible, may not be attainable. It may be inferred from paragraph 2 that the debtor of the creditor third State will be neither the successor State, nor even necessarily the predecessor State that was its original debtor, but possibly some other predecessor State that had dissolved in the union—simply because of the terms of the internal law of the successor State once the present draft articles open the door for such an eventuality. Having weighed the advantages and disadvantages of paragraph 2, the Special Rapporteur is finally of the opinion that the Commission might perhaps delete it.

However, if such were to be its decision, the Commission would have to revert to paragraph 2 of article 12, which is, in the case of State property, the counterpart of paragraph 2 of article 21, and the Commission would have to decide whether paragraph 2 of article 12 ought to be retained.

**ARTICLE 22. (Separation of part or parts of the territory of a State)  
and**

**ARTICLE 23. (Dissolution of a State)**

*Oral comments—1979*

214. Some representatives expressed the opinion that article 22, paragraph 1, as drafted, could be interpreted to mean that the predecessor State could enter into agreements with the successor State which did not stipulate that an equitable proportion of the State debt of the former must pass to the latter. For one representative, that difficulty could be overcome by deleting the phrase “and unless the predecessor State and successor State otherwise agree”. For another representative, the provision in article 22 also appeared to contradict the provision in article 18, paragraph 2, which allowed creditors to deny the effect of such an agreement. He suggested that the Commission should re-examine article 18, paragraph 2, in its relationship with article 22, paragraph 1, during its second reading of the draft articles.

*Written comments*

215. *Czechoslovakia* expresses the view that in articles 22 and 23 the Commission has proposed, in the cases of separation and dissolution, an automatic division of the debt and the passing of an equitable proportion thereof to the successor. The Government of Czechoslovakia fears that the question of the amount of the equitable share could, in the absence of agreement, lead to litigation between the parties. In such a situation, the position of the creditor would be made more difficult even in relation to the original debtor, because his claim against the latter would become a matter of litigation, at least in respect of the amount. Czechoslovakia also points out that the wording of article 22, paragraph 1, and that of article 23 are open to the interpretation that the predecessor State and the successor State can conclude an agreement which need not necessarily correspond to an equitable division of the debt. The question then arises as to whether such an agreement should apply in respect of a creditor.

**OPINION OF THE SPECIAL RAPPORTEUR**

216. In the opinion of the Special Rapporteur, the criticism expressed by representatives in the Sixth Committee in 1979 and in writing by the Government of Czechoslovakia with regard to the wording of articles 22 and 23, which could be understood as signifying that the predecessor State and the successor State can by agreement decide not to undertake an equitable apportionment of the State debt of the predecessor State, seems justified. Indeed, this interpretation can be reached by reasoning *a contrario*, but it was not the intention of the Commission when it adopted these two articles. Admittedly, by their own independent will two States could freely agree on any mutually acceptable solution, provided it paid due regard to the rights of the creditors. However, it is difficult to see how two States could conclude an agreement for an *inequitable* division of the debt, since one of the two States would inevitably be opposed to it. For this reason, it does not seem conceivable that the two contracting States would, by agreement, deliberately turn aside from an equitable apportionment or division of the debt. The procedure of “taking into account all relevant circumstances” would certainly not justify such a course of action. There is, consequently, good reason to remedy the defective wording of article 22, paragraph 1, and of article 23 in order to avoid this misinterpretation.

217. It is perfectly clear that, in the case of separation and dissolution, agreement between the predecessor State and the successor State, or among the successor States, depending on the circumstances, is necessary and even indispensable. It goes without saying that the conclusion of an agreement is still the normal procedure in such cases. Is it imperative that such an instrument should observe the rules laid down in articles 22 and 23? Certainly not, since (except in the special case of succession involving newly independent States) the Commission has been careful at all times to respect the independent will of States and to offer them rules of a residual nature. However, for the reasons stated in paragraph 214 above, this does not mean that, conversely,

the agreement can disregard the provisions of articles 22 and 23; because it would inevitably be rejected by one of the contracting parties, the agreement would never be concluded, if it failed to pay due regard to an equitable division of debts necessitated by the relevant circumstances surrounding the separation or dissolution.

Consequently, the agreement is not only indispensable

but must also pay regard to the need to take into account equitably all the relevant circumstances. Hence, there seems to be absolutely no need to include the usual expression "unless (they) otherwise agree" in the two articles. Deletion of this phrase makes it possible to avoid the absurd solution that might be feared from an interpretation reached by reasoning *a contrario*.

## PART [...]: STATE ARCHIVES

218. The Commission has already adopted articles A to F, dealing with succession of States in respect of State archives. These articles constitute a set, covering the definition of State archives (art. A) and each of the various categories of State succession (arts. B to F). The Special Rapporteur considers it advisable to supplement these rules by general provisions, as was done in the cases of State property and State debts. The new articles will provisionally be identified by capital letters G to K.

219. The Special Rapporteur also considers that State archives are fundamentally State property, but State property of a special nature. Logically, the rules drawn up for State property should be applicable to State archives. Indeed, the Special Rapporteur had initially envisaged examining succession to State archives as an example of succession to State property viewed *in concreto*. Justification for such a study could be found, in particular, in the existence of frequent, protracted and complex disputes between States concerning archives. But it is clear that, although they fall within the general category of State property, State archives have their own intrinsic characteristics which, in turn, impart a specific nature to the disputes they occasion and call for special rules. In order to provide better assistance in resolving such disputes between States, an attempt at drafting appropriate rules more closely adapted to specific cases is required.

220. In these circumstances, the Special Rapporteur is of the opinion that it is, first and foremost, the special rules which should apply to any succession of States in respect of State archives. He is not certain, however, that this precludes entirely the application of the general rules designed to resolve cases of succession of States in respect of State property viewed *in abstracto*. It ought always to be possible to turn to one of the rules relating to succession of States in respect of State property should it transpire, in a particular case, that the special rules are incapable of resolving a dispute concerning archives. In other words, the general rules on succession in respect of State property and the special rules on succession to State archives cannot and must not be contradictory. They can and must be complementary.

221. The Special Rapporteur proposes that, when the Commission decides on the final arrangement of the draft articles as a whole, the part relating to State archives should be moved. He does not wish to propose that it should be merged with the part relating to State property, since that would probably give rise to a number of problems concerning the general structure of the draft. He does, however, think it desirable that the part relating to

State archives should come immediately after the part devoted to State property. That is why he has not given a number to the title of the part concerning archives.

222. If that is to be the general structure of the draft, it will be necessary to include in the part on State archives a few introductory articles by way of the general provisions, in keeping with the procedure already followed by the Commission in the part relating to State property and State debts. The Special Rapporteur therefore proposes the articles set out below. He is fully aware that the effect of this proposal is to accentuate the specificity of the subject of State archives by comparison with that of State property, for the general provisions concerning the latter (articles 4 to 9) could have applied automatically to the case of State archives. For this reason, he believes that, in order to avoid creating too great a difference between the two sets of rules, the provisions concerning archives should be very similar to those concerning property already adopted in articles 4 to 9.

### SECTION 1. GENERAL PROVISIONS

#### DRAFT ARTICLE G. (Scope of the articles in the present Part)

223. Article G, which is purely and simply the counterpart of article 4, concerning State property, reads as follows:

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

**The articles in the present Part apply to the effects of a succession of States in respect of State archives.**

Like article 4, and article 15 defining the scope of the articles in the part concerning State debts, article G is very necessary. It may, however, be thought that the wording does not meet the concerns set out in paragraphs 217 to 219 above. It could, indeed, give the impression of establishing an impenetrable barrier between the articles on State property and those on State archives, so that the combined effect of articles 4 and G is to preclude recourse, where necessary, to the provisions on State property to solve a particular problem in matters of State archives. The Commission might consider it less restrictive to add a complementary provision reading, perhaps, as follows:

"The application of the articles in the present Part to the effects of a succession of States in respect of State archives shall be without prejudice to, and shall not preclude, the application to such matters, when necessary, of the articles in the Part relating to State property."

## ARTICLE A. (State archives)

*Oral comments*

1979

224. A number of representatives supported the definition of State archives in article A. It was said in that connection that the definition was a well balanced one. Introducing the formula of *renvoi* to internal law and adding a new element contained in the words "and had been preserved by it as State archives" seemed a very appropriate way of completing the definition. Some representatives also agreed that the widest possible meaning should be given to the word "documents". That word, understood in its widest sense, would make any specific enumeration unnecessary. It was also said that the words "documents of all kinds" were sufficiently clear. Inevitably, there would be cases where the categorization would become difficult, but an enumerative approach in the article would also be difficult and should be avoided. The commentary should perhaps refer in greater detail to cases which it was intended should be excluded from the meaning of the article. It was further stated that the definition was acceptable, since equity was preserved by the supplementary rules concerning reproduction and fair compensation.

225. Certain representatives agreed with the Commission's opinion that it was not an easy matter to define State archives. It was said in that connection that due care should be taken to ensure the preservation of archives and their transmission to the successor State, which had over them a fundamental right inherent in national sovereignty.

226. Some representatives expressed reservations on article A. It was said that the article required further study. Also, in the opinion of one representative, the Commission should consider revising the definition, which had been the subject of reservations by some of its members. There should be an international definition of archives; once it was established, independently of the internal law of States, what archives were, there could be reference to internal law in determining which of the existing collections in a given country belonged to the State and therefore became subject to the rule of succession. He considered that the Commission also took that view, according to paragraph (1) of its commentary to article A.<sup>32</sup> That view likewise seemed to be reflected in the first part of article A, but not in the last part: "and had been preserved by it as State archives". Thus, if the article had been intended to embody the view he had outlined, it did not appear to do so, for the text seemed to provide in a contrary sense, since the documents preserved by a State as State archives were surely those regarded as such in its internal law. Moreover, if the current text was accepted, it might not cover collections which might be held in State museums or libraries but which, not being preserved as State archives—a concept that was not defined—might not be covered by article A. He therefore wondered whether the last part of article A fulfilled its purpose. He

was confident that the second reading of the draft articles would result in a text in line with the aim of establishing an international standard for archives that would make it possible to extract from the varied domestic legislations the substance of what was covered by the legal rule. In the view of another representative, it would be preferable to delete the reference to the internal law of the predecessor State from the definition in article A, since certain valuable historical and cultural documents might otherwise be held to fall outside its terms. Another representative considered that the definition still required much more elaboration before it could be considered fully satisfactory. On the one hand, as stated in the Commission's commentary itself, account should be taken of the fact that the concept of archives varied considerably, and that the content of State archives varied, in consequence, from one country to another. On the other hand, if the definition was not sufficiently accurate, the risk arose of confusing documents on facts, situations and persons concerning the territory which was the object of succession with works which had become part of the historical and cultural heritage of a country.

227. One representative noted that the definition had been given a very restrictive interpretation in the commentary. Although paragraph (3) of the commentary stated that the expression "documents of all kinds" was to be understood in its widest sense, and also that documents could be in written or unwritten form and made of a variety of materials, in paragraph (6) it was said that the expression excluded *objets d'art*, which might also have cultural value.<sup>33</sup> He saw no justification for making such an exception. If the expression "documents of all kinds" was to be interpreted in the widest sense, then applying the *sui generis* rule, all documents relating to the cultural heritage of a people, whether written or unwritten, should be regarded as falling within it. Moreover, a definition which excluded works of art and culture presupposed that all civilizations used only writing as their means of expression. Yet, in Africa, the cradle of civilization, documents had also been expressed through the medium of objects of art. He therefore trusted that the definition in its final form would include objects of art and culture, wherever they were housed. Had there been an international convention in force at the time it attained independence, his own country would have been able to recover most of its valuable works of art and culture; he wished to spare other countries the same sad experience as his own when they attained independence. It was also said that the definition should include inscriptions on wood and stone. For the sake of clarity, it would perhaps have been better to define clearly all the various types of document envisaged, instead of using the words "of all types", and then to have made a clearer elaboration in the commentary of what was meant.

228. One representative thought that the definition could cause confusion in its reference to "documents of all kinds". In paragraph (3) of the commentary on the article, the Commission pointed out that the words "documents of

<sup>32</sup> See *Yearbook* . . . 1979, vol. II (Part Two), pp. 79–80.

<sup>33</sup> *Ibid.*, p. 80.

all kinds" should be understood in the widest sense, and it was added that an archival document was anything that contained "authentic data which may serve scientific, official and practical purposes", whether or not in written form. In addition, tapes, drawings and plans, containing no writing, could also be archival items if a more general term than documents was introduced. There could be still more room for confusion if it was remembered that in paragraph (6) of the commentary it was specifically pointed out that the term "documents of all kinds" excluded objects of art, which might also have cultural and historical value. Other observations in the commentary and, more specifically, the reproduction in paragraph (8) of article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, tended to suggest that what was had in mind as archives were indeed "documents" in a broad sense.<sup>34</sup>

229. In the opinion of another representative, who reserved his position on the article, it was very clear that article A should specify that it referred to State property within the meaning of article 5 of the draft. Again, as the question of determining whether documents were State archives depended, not on what they contained or represented, but on the manner in which they were kept, it might be better to define such State property as documents of any kind which, on the date of the succession of States, were owned by the predecessor State in accordance with its internal law and constituted State archives by virtue of what they contained or represented or the manner in which they were kept.

230. One representative stressed that, in dealing with State archives, it was important to distinguish between two main categories of documents, each of which called for separate treatment: documents of practical importance for the administration of the successor State, which should be handed over to that State, and documents that could be of historical interest to both the successor and the predecessor State, and which might therefore give rise to dispute. Documents in the second category should be treated in the same way as other cultural property, and it would therefore be desirable to study the question in the light of the work being carried out on the cultural property of newly independent States. Modern methods of reproduction made it easier to reach compromise solutions on the transfer of State documents. In the view of another representative, the scope of the draft articles devoted to archives should be limited, in so far as possible, so that they included, for example, only those documents indispensable for administrative purposes. As for other types of archives, such as historical archives, they could very well be covered by the provisions relating to State property.

231. Another representative doubted that the definition could be adopted as final because of its vagueness and ambiguity; he would prefer a definition consisting of as complete a list as possible of the various fields of activity, to be included in article 2. A similar definition could also be considered for State property, if that term did not have

the same meaning in the various legal systems in the world.

### 1980

232. Several representatives expressed misgivings about the definition of State archives contained in article A and hoped that it would be redrafted on second reading. In the view of one representative, the definition could have been clearer and more precise. It would have been better to omit the reference to the predecessor and successor States and to define State archives as "the collection of documents, irrespective of their kind or date, belonging to a given State". Such a definition would be more in conformity with the concept of State archives as referred to in articles B, C, D, E and F. Another representative considered that more particulars should be given of the nature of the documents referred to, such as maps and so forth.

233. One representative said that at the previous session his delegation had expressed approval of article A because it had considered the definition of the term "archives" satisfactory for the purposes of newly independent States. However, his delegation had also expressed doubts about the usefulness of including further provisions on State archives relating to other types of State succession. He added that it was hard to accept the proposed definition for the other cases considered in articles C, D, E and F, since the real meaning of the second requirement of the definition, embodied in the words "and had been preserved by it as State archives", was difficult to perceive because of the very complex legal issues to which that requirement gave rise. That part of the definition seemed to be based on a circular argument, and was therefore not satisfactory.

234. One delegation reaffirmed the reservation it had made in 1979 with regard to the definition of State archives. It continued to believe that the Commission should examine the concept further, in order to avoid a situation in which the same treatment was accorded to documents dealing with facts, situations and persons linked to the territory which was the subject of the succession as to documents which served only indirectly to facilitate normal administration of the territory but which deserved to be classified in the category of works of art forming part of the historical and cultural heritage of the country in whose territory they were situated.

In the opinion of another representative, to define "State archives" as "the collection of documents of all kinds" would be to leave out historical *objets d'art* which were not documents but were highly cherished by a newly independent State because they represented the civilization and characteristics of its people. Perhaps consideration could be given to broadening the definition of State archives to include not only "the collection of documents of all kinds", but also "other records and cultural *objets d'art* which reflect historical development". If it was difficult to include historical and cultural *objets d'art* in the part on State archives, then the part on State property should contain the necessary provisions on their disposal. Another important question was that of the

<sup>34</sup> *Ibid.*, p. 81 and footnote 438.



restitution of *objets d'art* to their original owners. In drafting the articles on succession to State archives, the Commission should give full attention to that point.

#### Written comments

235. *Czechoslovakia* was of the opinion that the expression "documents of all kinds" employed in article A was too vague and required more precise definition and that a clearer distinction must be drawn between State archives and other categories of State property.

It also felt that it would be necessary during the second reading to draw a clearer distinction between two categories of documents which, together, constituted State archives in the broadest meaning of the term: namely, between documents of an administrative character—which were essential for the administration of the territory involved in the succession of States—and documents which were predominantly of cultural or historical value. In the case of the former category, it was possible to benefit substantially from modern reproduction techniques, which might influence the thrust of the pertinent rules, but no such possibility existed for the second category.

236. *Italy* said that the Commission should be very careful to distinguish the problems of archives in the traditional sense of the term (namely, collections of documents) from those of works of art. That distinction, while clear enough in itself, might in certain practical cases become difficult in relation to the kind of documentation that the history of a given civilization had produced.

237. *Austria* was of the opinion that the residual nature of the Commission's rules became more apparent than ever in the case of State archives, where no provision, with one exception, would eliminate deviation by agreement between the States concerned. Austria therefore inclined to the view that, with the possible exception of the provision relating to newly independent States, the articles on State archives added little to the draft as a whole and should simply be deleted.

238. If, however, the Commission deemed it absolutely essential to retain the provisions on State archives, the contents and wording must be carefully reviewed. The definition of the term "State archives" contained in article A, while in principle acceptable in the case of article B, seemed inappropriate for the other articles proposed. It should therefore be thoroughly reviewed so as to establish beyond doubt the scope of the provisions that followed.

239. *The German Democratic Republic* felt that, in view of the distinct nature of State archives, which, on the one hand, formed part of State property in general and, on the other, might also be national culture property, it would be appropriate to place the provisions on State archives after article 14, as Part III. That Part III should then be followed by the rules concerning State debts, which would comprise Part IV.

With regard to the definition of the term "State archives" contained in article A, the German Democratic Republic hoped that the Commission would pay greater heed on second reading to the fact that such archives included both historical archives and administrative

archives. The insertion in article A of a distinction between the two would ensure greater conceptual clarity in article B, paragraph 1; article C, paragraph 2; article E, paragraph 1; and article F, paragraph 1, with regard to archives passing to the successor State.

#### OPINION OF THE SPECIAL RAPporteur

240. The first point to be made is that the Commission was not trying to provide a hard and fast definition of State archives; it adopted the definition very tentatively and drew the attention of Governments to that fact in the hope that they would help to improve the provision.<sup>35</sup> If it had been able to devise an international definition of State archives without referring to internal law, the Commission would have been as pleased as the representatives who called on it to do so. However, international law contains no independent criterion for the identification of State archives. Consequently, defining State archives, like defining State property, inevitably seems to require a reference to the internal law of the State. It is moreover, desirable to have a definition of State archives that is as close as possible to that of State property. In this respect, the fact that the property or archives belong to the predecessor State according to its internal law is an element that makes for similarity between the two definitions.

241. The second condition in article A is not the fact that they belong to the archives of the predecessor State, but that they are preserved by that State as State archives. The two conditions are therefore cumulative. Paragraph (1) of the commentary to article A gives the following description of the reasons why the Commission decided to include the second condition in the present text:

The second condition . . . is not qualified by the words "according to its internal law". By detaching this second element from the internal law of a State, the Commission attempted to avoid an undesirable situation where certain predecessor States could exclude the bulk of public papers of recent origin—the "living archives"—from the application of the present articles simply because they are not designated under their domestic law as State archives. It should be pointed out that in a number of countries such "living archives" are not classified as "State archives" until a certain time, for example 20 or 30 years, has elapsed.

242. After the remarks by representatives on the Sixth Committee and the written comments of Governments, the Special Rapporteur is no longer altogether certain that the Commission has actually succeeded through the present wording of article A in achieving its very laudable objective. It is true that succession may have no effect on contemporary political or administrative archives—those which are also known as "living archives"—unless care is taken to draft article A appropriately. In this respect, the second condition imposed by the article (that of having been "preserved by it as State archives") may produce the opposite of what is intended. Under the internal law of some countries, contemporary political or administrative documents are not legally classed and preserved as "State archives" until 15, 20 or even 30 years have elapsed. Hence, a whole range of papers of the utmost importance

<sup>35</sup> *Ibid.*, p. 81, para. (11) of the commentary to article A.



may be excluded from succession on the basis of a particular interpretation of the second condition.

243. There is a further reason why the Special Rapporteur has doubts about the advisability of maintaining the second condition. The predecessor State may have entrusted cultural or historical archives of great value to another State or foreign institution, on protracted deposit or for the purposes of a lengthy travelling exhibition. If a succession of States occurs during that period, can it be said that the archives in question “*are preserved*” by the predecessor State when they are no longer within its territory? Admittedly, in archival terminology the notion of “conservation” is not tied in with any idea of “situation”, but is it certain that article A will be interpreted in that sense?

244. For the above reasons, the Special Rapporteur urges the Commission to consider the possibility of doing away with the second condition, something which would have the added advantage of making article A, defining State archives, an exact replica of article 5, defining State property.

245. Mention was also made of a need to give as broad a definition as possible of State archives, so as to encompass all documents. It was suggested in this respect that the types of archives should be enumerated in article A. In the view of the Special Rapporteur this would be unwise, for lists are never exhaustive and anything that might be overlooked or omitted could well be considered as unaffected by State succession. As for the criticism that the current definition is not broad enough, the Special Rapporteur believes that, on the contrary, the wording of article A does in fact meet the concern to include all types of document, of whatever nature. Furthermore, the commentary explains clearly what is meant by the term “documents of all kinds”: documents, whether written or not, of whatever material—paper, parchment, fabric, stone, wood, glass, ivory, film, etc.; of whatever subject matter—scientific, literary, journalistic, political, diplomatic, legislative, judicial, administrative, military, civil, ecclesiastical, historical, geographical, financial, fiscal, cadastral, etc.; of whatever nature—manuscripts, printed works, drawings, photographs, originals or copies, sound recordings, etc.

246. The most the Special Rapporteur feels he can do is to suggest that the Commission should study the possibility of deleting the words “the collection of” from the phrase “means the collection of documents of all kinds”. It is possible that the word “collection” (“*ensemble*”) may not adequately convey the intention of encompassing all State documents, in so far as it calls to mind the image of a “collection” in the physical sense, and may therefore exclude from succession individual or specific documents which are not interconnected and do not of themselves constitute a complete set of archives. To the Special Rapporteur, this is not a question of fundamental importance.

247. Many countries stressed the need to distinguish between administrative archives and cultural or historical archives. The Special Rapporteur is not sure that it would be helpful to make distinctions of this kind in article A, for

a definition should be general in scope. The distinctions in question might find a better place in the latter articles, as is in fact the case.

248. As far as works of art are concerned, it seems to the Special Rapporteur that the Commission cannot make any express mention of such matters in article A. The problem is linked to the internal law of each State. Depending on the country, the “State archives” may or may not include works of art, such as curios, valuable ancient manuscripts, illuminations, medal collections, etc. The commentary to article A is very explicit on this point. Such works of art are to be treated in the same way as actual documents when they have been defined by the internal law of the predecessor State as State “archives”.

Naturally, the absence of such a definition in no way implies that works of art such as paintings, statuettes, sculptures, icons, the contents of collections, etc., are excluded from succession. As “State property”, works of art of these kinds will be affected by a succession of States as specified in the articles governing State property. It is in any case clear that, all questions of the internal law of States aside, paintings by the great masters have nothing in common with the papers or documents that make up “State archives”. They can only be governed by that part of the draft that deals with succession in respect of State property.

**DRAFT ARTICLE H. (Rights of the successor State to State archives passing to it)**

249. The Special Rapporteur submits for the consideration of the Commission a draft article H, which is modelled on article 6, concerning the rights of the successor State to State property passing to it. On the whole, the article is in no way unusual. It reads as follows:

***Article H. Rights of the successor State to State archives 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 archives as pass to the successor State in accordance with the provisions of the articles in the present Part.**

250. The Special Rapporteur would, however, like to draw attention to a problem which has no equivalent with respect to State property, the latter being, by definition, irreproducible. It is open to question whether article H is altogether correct in cases in which one of the States involved in the succession is granted the right to copies of State archives. A State which holds copies has rights over them. Should it wish, for example, to offer them against valuable consideration for use or display in the making of a film or for artistic purposes, can it be said to possess a copyright or anything of that nature, in the same way as the State holding the original of the document? The Special Rapporteur is not sure that this is simply an academic question. He wonders, therefore, whether the Commission might not consider it useful to insert in article

H a clause of the following kind: "subject to the rights held by the State which obtains a copy of such State archives".

**DRAFT ARTICLE I. (Date of the passing of State archives)**

251. This article, which is the counterpart of article 7, concerning the date of the passing of State property, reads as follows:

**Article I. Date of the passing of State archives**

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

To provide that State archives shall pass on the date of the succession of States may, at first sight, appear ill-advised. It may even be thought unreasonable, unrealistic and illusive, inasmuch as archives generally need sorting in order to determine what shall pass to the successor State, and that sometimes requires a good deal of time.

252. In reality, however, archives are usually well identified as such and quite meticulously classified and indexed. They can be transferred immediately. Indeed, State practice has shown that this is possible. The "immediate" transfer of the State archives due to the successor State has been specified in numerous treaties. Such archives should be transferred "*without delay*" according to: (a) article 93 (concerning Austria) of the Treaty of St-Germain-en-Laye of 10 September 1919,<sup>36</sup> (b) article 77 (concerning Hungary) of the Treaty of Trianon of 4 June 1920,<sup>37</sup> and (c) articles 38 and 52 (concerning Belgium and France) of the Treaty of Versailles of 28 June 1919.<sup>38</sup> Provision was also made for the "immediate" transfer of archives in article 1, subparagraph (2)(a), of General Assembly resolution 388 (V) of 15 December 1950, concerning the position of Libya as a successor State.

253. It is, furthermore, necessary to make the date for the passing of State archives the date of the succession of States, even if delays are granted *in practice* for copying, microfilming, sorting or inventory purposes. It is essential to know that the date of the succession is the date on which the successor State becomes the owner of the archives that pass to it, even if practical considerations delay the actual transfer of those archives. It must be made clear that, should a further succession of States affecting the predecessor State occur in the meanwhile, the State archives that were to pass to the successor State in connection with the first succession of States are not affected by the second such event, even if there has not been enough time to effect their physical transfer.

254. Lastly, it should be pointed out that the rule

concerning the passing of the archives on the date of the succession of States is tempered in article I by the possibility open to States at all times to agree on some other solution and by the allowance made for whatever may be "decided"—for example, by an international court—contrary to the basic rule. As a matter of fact, quite a number of treaties have set aside the rule of the immediate passing of State archives to the successor State. Sometimes the agreement has been for a period of *three months* (as in article 158 of the Treaty of Versailles)<sup>39</sup> and sometimes *eighteen months* (as in article 37 of the Treaty of Peace with Italy of 10 February 1947,<sup>40</sup> which required Italy to return within that period the archives and cultural artistic objects "belonging to Ethiopia or its nationals").

It has also been stipulated that the question of the handing over of archives should be settled by agreement "*so far as is possible, within a period of six months following the entry into force of [the] Treaty*" (art. 8 of the Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany concerning various frontier areas).<sup>41</sup>

One of the most precise provisions concerning time limits is article 11 of the Treaty of Peace with Hungary, of 10 February 1947,<sup>42</sup> it sets out a veritable calendar for action within a period of *eighteen months*.

In some instances, the setting of a time limit has been left to a joint commission entrusted with identifying and locating the archives which should pass to the successor State and with arranging their transfer.

**DRAFT ARTICLE J. (Passing of State archives without compensation)**

255. Article J, which is the counterpart of article 8, concerning the passing of State property *without compensation*, is worded as follows:

**Article J. Passing of State archives without compensation**

**Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives to the successor State shall take place without compensation.**

It would, in fact, be more precise to speak in each case of "*gratuitousness*", in the sense of "without payment". Article 8, like article J, refers only to "compensation", or reparation in cash or in kind (provision of property or of a collection of archives in exchange for the property or archives that pass to the successor State), but the notion of "gratuitousness" is broader, in the sense that it not only precludes all compensation but also exonerates the successor State from the payment of taxes or dues of whatever nature. In this case, the passing of the State property or archives is truly considered as occurring "*by right*", entirely free and without compensation.

<sup>36</sup> *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 361.

<sup>37</sup> *Ibid.*, 1920 (1923), vol. CXIII, p. 518.

<sup>38</sup> *Ibid.*, 1919, vol. CXII, pp. 29–30 and 52.

<sup>39</sup> *Ibid.*, p. 81.

<sup>40</sup> United Nations, *Treaty Series*, vol. 49, p. 142.

<sup>41</sup> *Ibid.*, vol. 508, p. 154.

<sup>42</sup> *Ibid.*, vol. 41, p. 178.

Article J is justified by the fact that it reflects clearly established State practice. Furthermore, the principle of non-compensation or of gratuitousness is implicitly confirmed in the later articles, which provide that the cost of making *copies* of archives shall be borne by the requesting State.

**DRAFT ARTICLE K. (Absence of effect of a succession of States on third party State archives)**

256. Article K, which is the counterpart of article 9, concerning the absence of effect of a succession of States on the third party State property, reads as follows:

***Article K. Absence of effect of a succession of States on third party State archives***

**A succession of States shall not as such affect State archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.**

Two eventualities are conceivable. The first is that in which the archives of a third State are housed for some reason within a predecessor State. For example, the third State might be at war with another State and have deposited valuable archives for safekeeping within the territory of the State where a succession of States occurs. Again, it might simply have entrusted part of its archives for some time, for example for restoration or for a cultural exhibition, to a State where a succession of States supervenes.

The second eventuality is that in which a successor State to which certain State archives should pass fails, for extraneous reasons, to have them handed over immediately or within the agreed time limit. If a second succession of States affecting the same predecessor State occurs in the interim, the successor State from the first succession will be considered as a third State in relation to that second succession. Those of its archives situated within the territory of the predecessor State which it has not by then recovered must remain unaffected by the second succession.

257. Clearly, article K will be of value only if the article on which it is so closely modelled, article 9, is retained. Everything depends on the Commission's decision concerning article 9 during the second reading of the draft.

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

**ARTICLE B. (Newly independent State)**

*Oral comments*

1979

258. A number of representatives expressed support for article B. It was said that article B dealt satisfactorily with

cases in which State archives might be essential both to the predecessor State and to the successor State and, by their very nature, could not be divided. Modern technology made it possible to provide for their reproduction, which was very important to newly independent States. Often archives constituted a common heritage, not only for the predecessor State and the successor State, but in some instances for several successor States, as had been the case with the Latin American countries when they had achieved their independence from Spain. The large volume of historical archives kept in Spain at Seville represented a common heritage of Spain and Latin America and could not be divided among all the countries concerned. Those archives had, of course, always been accessible to researchers from the Latin American countries and, thanks to modern technology, could be reproduced. It was also said that article B was clear and that its various clauses expressed a proper balance of interests not only between the predecessor and successor States, but also with regard to the preservation of the cultural heritage of peoples.

259. Another representative, however, expressed some doubts about the equitable character of the solutions provided in article B and reserved his position, in the light of resolutions adopted by the General Assembly, the UNESCO General Conference and the Conferences of Heads of State or Government of Non-Aligned Countries on the restitutions to newly independent States of archives of a cultural and historical character.

260. One representative indicated that, since British dependent territories constituted separate administrative units, archives, at least those required for the normal administration of the territory, were already to be found in the territory at independence.

*Paragraphs 1 and 2*

261. One representative had difficulties with respect to the words "having belonged to the territory" in subparagraph 1(a) when read in conjunction with what was said in paragraph (5) of the commentary.<sup>43</sup> It did not seem appropriate to him to include the archives of such institutions as local missionary bodies or banks in that category. He therefore believed that there was a need for further consideration to be given to the precise nature of the relationship between the territory and the archives in question, which should form the precondition for the operation of the relevant part of draft article B. In the opinion of another representative, the words "having belonged to the territory", and "should be in that territory", in subparagraphs 1(a) and 1(b), and "of interest to the territory", in paragraph 2, were much too ambiguous to be included in a legal text. It was therefore necessary to formulate more explicit wording in order to minimize possible disputes over those criteria. If the scope of the draft articles was limited to official documents connected with administration, drafting difficulties would be reduced to some extent.

<sup>43</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 82.

262. One representative expressed the view that the particularly delicate problem of documents relating to the *imperium* or *dominium* of the administering Power but of interest to the newly independent State had been tackled by reference to the concept of equity, a concept which was present throughout the draft and which came to the forefront in paragraph 2. That was a good way to deal with the problem, and therefore the wording of the provision would be accepted. Another representative did not share the opinion expressed in paragraph (17) of the commentary to article B<sup>44</sup> and believed that documents of primary interest to the newly independent State—documents in the economic, political and strategic fields and documents whose content might pose a threat to the sovereignty, independence or security of the newly independent State—should be transferred to it immediately. Furthermore, provision might be made for obliging the predecessor State not to utilize duplicates of those archives to promote acts of aggression and sabotage against the newly independent State.

#### Paragraph 6

263. Several representatives stressed the importance of paragraph 6. In that connection, some of them emphasized the just claim of former colonies to the return of objects belonging to their cultural heritage. It was also emphasized that the paragraph limited the freedom of negotiation of States in the interest of cultural development.

264. One representative, while agreeing entirely with the reference to the right of peoples to information about their history and to their cultural heritage, said he would go still further, since, in his view, all peoples had a right to the restoration of objects of their cultural heritage of which they had been despoiled. That right had already been recognized, under the Treaty of Versailles of 28 June 1919,<sup>45</sup> in connection with a part of Egypt's cultural heritage which had been found in Germany. Scattered throughout the world were many documents of great value to his country's cultural heritage. In some cases, those documents were well maintained and there was full access to them; in others, they were not treated with the degree of care they required. Very often the documents were of no use in the places where they were situated, since the languages in which they were written were not known in those places. There were no scholars to study them and ensure their scientific dissemination, nor a general public anxious to behold part of its national cultural heritage.

265. In the opinion of one representative, paragraph 6, as drafted, appeared to lay down a peremptory norm of international law. Although he accepted the principle that the people of a decolonized territory had a right to information about their history and their cultural heritage, he considered that the peremptory norm in article B, paragraph 6, was inappropriate, given the provisions of paragraph 2 of the same article. Another representative

expressed the view that the words "the right of the peoples of those States to development, to information about their history and to their cultural heritage" were ambiguous. An attempt must be made to render the intended meaning in clear legal terms.

1980

266. In the opinion of one representative, subparagraph 1(b) of article B would be a little weak without a precise definition of State archives, since it provided for the passing to the newly independent State of archives required for normal administration of the territory. It would be more appropriate to refer to the passing of archives belonging to the territory of the successor State.

267. In the view of one representative, paragraph 2 assumed that archives belonging to the territory of the successor State might not be adequate for its proper administration and consequently allowed for appropriate reproduction of other parts of the archives of the predecessor State and, in particular, of archives of interest to the newly independent territory. Such archives were not necessarily of importance to the territory, and it would be sufficient for them to include any information of benefit to the territory. A distinction had been drawn between "benefit" and "interest" in paragraph 2. Another representative considered that the disposition of archives by mutual agreement was likely to give rise to greater difficulties in the case of the newly independent State than in the event of the dissolution of a State as provided for in article F.

268. One representative was of the view that the provisions of article B and, in particular, of paragraph 3, were consistent with the principle of equity and would facilitate the application of the rule *uti possidetis juris*, concerning the immutability of the frontiers inherited from the colonial era, which was of such importance to the OAU. Another representative thought that the predecessor State should be prepared to provide the newly independent State with the best available evidence of all documents from the State archives of the predecessor State, and he proposed that paragraph 3 should be amended accordingly.

#### Written comments

269. There were no objections to article B.

#### OPINION OF THE SPECIAL RAPPORTEUR

270. The Special Rapporteur believes that the wording of draft article B is satisfactory. There is only one comment which he wishes to discuss, namely that of the representative who sought to contrast paragraph 6 with paragraph 2 of the same article (see para. 265 above). The Special Rapporteur considers that paragraph 6 does indeed lay down a peremptory rule of international law. But that is in no way incompatible with the provisions of paragraph 2, which leaves the parties completely free to reach agreement amongst themselves, provided that the agreement permits each of them to "benefit as widely and as equitably as possible" from the archives. The Special Rapporteur can see no contradiction between the right of

<sup>44</sup> *Ibid.*, p. 83.

<sup>45</sup> Art. 153 (*British and Foreign State Papers, 1919 (op. cit.)*).

peoples to development, to information about their history and to their cultural heritage, as affirmed in paragraph 6, and the opportunity for those peoples to benefit as widely and as equitably as possible from the relevant archives, as prescribed in paragraph 2.

# ARTICLE C. (Transfer of part of the territory of a State)

## Oral comments—1980

271. In the elaboration of article C, the Commission had based itself on the provisions of various peace treaties but, being aware of the victor/vanquished relationship inherent in such instruments, had also sought, instead of relying exclusively on State practice, to find more equitable solutions. The delegation of Trinidad and Tobago supported that approach. The underlying principle in article C was that the part of the territory concerned must be transferred so as to leave the successor State as viable a territory as possible in order to avoid any disruption of management and to facilitate proper administration.

While agreeing with the substance of article C and considering its succinctness appropriate, the same delegation felt that certain ideas reflected in the commentary could be incorporated with beneficial effects in the article. For example, whereas article C stated simply that the predecessor and successor States should resolve the problem of succession to State archives by agreement, it was explained in paragraph (23), subparagraph (d), of the commentary that such agreement should be based on principles of equity and take into account all the special circumstances. It was stated explicitly also, in paragraph (22), that local administrative, historical or cultural archives owned in its own right by that part of the territory which was transferred were not affected by the draft articles, which were concerned with State archives, and that the predecessor State had no right to remove them on the eve of its withdrawal from the territory or to claim them later from the successor State.<sup>46</sup> The Commission might wish to consider whether those ideas should be incorporated not only in article C, but also in the provision relating to succession to State archives where the successor State was a newly independent State.

272. One representative referred to paragraph (13) of the commentary to article C, which contained a careful analysis of the problem that arose when the archives were situated in the territory of neither interested party.<sup>47</sup> In such a case, the responsibility of the predecessor State would stem from an obligation of result, in respect of which it would be sufficient to prove that the archives had not passed to the successor State.

273. Several representatives expressed approval of paragraph 1, noting with satisfaction that the Commission had, in article C, given precedence to settlement by agreement between the predecessor and successor States.

In the light of that approach, one representative expressed his preference for the point of view expressed in paragraph (23), subparagraph (d), of the commentary to article C.

In addition, one delegation remarked that, in paragraph (6) of the commentary, the Commission had pointed out that almost all treaties concerning the transfer of part of a territory contained a clause relating to the transfer of archives.<sup>48</sup> Thus, the rule of international law was embodied mainly in the regulation of the matter by agreement between the predecessor and successor States. That delegation was, therefore, in favour of article C, paragraph 1. It felt that to go any further would be to risk not only conflict with a widespread practice, but failure to take account of the immense range of complex situations that existed in practice. It was often the case, for example, that succession to archives involved a number of successor States.

274. One representative pointed out that, in article C, the Commission had laid down the rules which would apply in the absence of agreement. Those rules were based on the administrative requirements of the predecessor and successor States and took into account both the successor State's responsibility for the administration of the part of the territory transferred and the predecessor State's duty to protect the interests of the successor State. In view of the importance of determining the specific principles underlying those rules, paragraph 1 should stipulate that the agreement must be based on the principles of equity and good faith—especially since the separation of a part of territory was not normally a voluntary act but usually a result of a war or of a peace treaty concluded following a war.

275. One representative emphasized that, in paragraph 2, the Commission had stated two fundamental principles: continuity in the administration of the transferred territory and interdependence between the archives and the territory.

276. Some representatives considered that the drafting of subparagraph 2(b) was satisfactory, since, in addition to administrative archives, the successor State would receive that part of the predecessor State's archives which concerned either exclusively or principally the territory to which the succession of States related. It was said in that connection that the "archives-territory" link should be more broadly interpreted and that account should be taken of the principles of "territorial or functional relevance".

277. A number of representatives indicated that they would prefer that subparagraph 2(b) make it obligatory for the predecessor State not only to hand over the archives in its possession but also to strive to obtain the transfer of such of the administrative, historical or other archives as were outside the territory. It was also said that all archives, whether situated outside or inside the territory in question, should pass to the successor State.

278. With regard to subparagraph 4(b), which provided that the successor State should make available to the

<sup>46</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 19 and 18 respectively.

<sup>47</sup> *Ibid.*, p. 16.

<sup>48</sup> *Ibid.*, p. 12.

predecessor State, at the latter's request and expense, reproductions of documents from archives which had passed to it, the delegation of Egypt was of the opinion that account must be taken, on the one hand, of the need for the predecessor State to show valid reasons for requesting the documents, and, on the other hand, of the principle that the security and sovereignty of the successor State must not be imperilled. Since that involved an element of judgement on the part of the successor State, the principle of good faith also must apply in that case. Given the importance of State archives for the administration of the region affected, the draft article should also establish an obligation on the part of the predecessor State to permit those archives to be transferred at the same time as the territory.

#### *Written comments*

279. *The German Democratic Republic* was of the opinion that the principle contained in article C whereby the passing of archives should be settled by agreement between the predecessor and successor States was acceptable, since it represented an approach that was in keeping with the basic principles of international law, particularly the principle of the sovereign equality of States.

#### OPINION OF THE SPECIAL RAPporteur

280. Unquestionably, the only possible basis for the settlement of disputes relating to archives on the occasion of the transfer of part of the territory of one State to another State is an agreement between those two States. There is a clear consensus on this point.

None the less, the wish was expressed that the Commission should include in article C, paragraph 1, the idea that such an agreement must be based on the principles of equity and take into account all the special circumstances of the case. While the Special Rapporteur has no objection to an addition, he wishes to point out that the situation covered by article C generally involves the transfer of a very small part of the territory of one State to another, the best example being that of a minor adjustment of the border between two States. In such a situation, the transfer of territory, which entails delimitation and demarcation, is generally impossible without an agreement in which the two States grant each other benefits and compensation. The very idea of an agreement between two neighbouring States on a minor border adjustment implies that the agreement will inevitably be based on equity and take into account all the special circumstances of the case.

281. One delegation took this situation so literally that it suggested that the Commission should limit article C to a single paragraph, paragraph 1, for it thought that to go any further would be to lose sight of the infinite variety of situations that might arise. The Special Rapporteur does not share this opinion: little would be gained by saying no more than that the solution lies in agreement between the parties. The result would be an article which lacked substance and which, since it would not lay down a rule in the proper sense of the term, it would be better to delete. The Commission would then have failed to give an

adequate account of the situation in the event of transfer of part of the territory of a State. It would be impossible to tell what should, as a general rule, be done in the absence of an agreement.

282. The Commission was reproached with failing to give balanced consideration to the two principles of "territorial origin" and "territorial or functional relevance". The Special Rapporteur considers this criticism unjustified.

#### ARTICLE D. (Uniting of States)

#### *Oral comments—1980*

283. A number of representatives said that they had no objection to the text of article D, concerning the uniting of States, for it took due account of the voluntary nature of such uniting, which should suffice to ensure that the transfer of archives took place without any dispute. Paragraph 2 provided that any problems arising in the matter would be settled according to the constitution and the internal law of the successor State.

284. Other delegations said that the case of the uniting of States did not give rise to any major problems, for, as the Commission had pointed out in paragraph (6) of the commentary to article D,<sup>49</sup> when States agreed to constitute a union among themselves, it was to be presumed that they intended to provide it with the means necessary for its functioning and administration, and one of those means could be State archives.

285. One representative considered that the reason why the article did not give rise to any major problems was that the archives would in any case be in the hands of the successor State. It might be asked whether the problem did not relate solely to the internal law of the successor State; if so, it might be sufficient to retain only paragraph 1, since paragraph 2 might be regarded as an interference in the internal affairs of the successor State.

286. Some representatives doubted the usefulness of the article. In the opinion of one representative, article 12 should apply to archives, although even article 12 did not appear to be wholly necessary, since it merely stated in so many words what happened in any case. Under international law, at the moment when two States united their property passed to the successor State, but after that moment there was only one State where there had been two. Hence, international law could not apply, and the only law that could was internal law. However, the representative in question was not opposed to the inclusion of the article, for it did not damage the structure of the proposed instrument and might perhaps rule out any claims by third States.

287. Another representative considered that paragraph 2, in particular, merely referred to internal law a question that obviously could only be governed by that law. One

<sup>49</sup> *Ibid.*, p. 20.

representative hoped that the Commission would take a fresh look at article D, as there appeared to be a discrepancy between the text and the meaning given to it in the commentary. Paragraph (1) of the commentary indicated that whether the State archives of the predecessor States passed to the successor State would depend on the terms of the agreement of union or, if the agreement was silent on that point, on the internal law of the successor State,<sup>50</sup> whereas article D, paragraph 1, appeared to set out a general rule whereby, upon a uniting of States, the State archives should pass to the successor State.

#### *Written comments*

288. Sweden observed that paragraph 1 of article D provided that the State archives of the predecessor State would pass to the successor State, whereas it appeared from paragraph 2 that the internal law of the successor State would determine whether the archives should belong to the successor State or to its component parts. It noted that article 12 of the draft articles was worded in a similar manner.

While the Swedish Government agreed that the commentary to those articles gave some guidance as to their interpretation, it felt that the text of the articles made it difficult to understand the relationship between paragraph 1 and paragraph 2, which might even appear to be contradictory. It therefore suggested that the Commission should give further consideration to the best way of drafting article D and article 12.

#### OPINION OF THE SPECIAL RAPPORTEUR

289. Essentially, only two comments were made concerning article D: (a) there is a contradiction between paragraph 1 and paragraph 2 of the article; (b) there is a contradiction between the wording of the article and the corresponding commentary.

290. The first comment echoes what was said earlier concerning article 12, relating to succession to State property in the event of a uniting of States. Articles D and 12 have the same structure, and whatever solution is ultimately chosen for article 12 should also apply in the case of article D.

291. With regard to the second point, the contradiction between article D and the commentary to the article is only one of outward appearance. The commentary seeks to emphasize above all that the uniting States have sovereign power to decide on the fate of their archives either in the treaty establishing their union or in the internal law of that union. But, whatever the arrangements made *inter se* by the uniting States, or by the union in the "internal" context, the situation from the standpoint of international law remains that described in paragraph 1 of the article. Unless what is created is a confederation, the State archives pass, in the eyes of the international community and of international law, to the

successor State, which is the only subject of international law left after the disappearance of the various predecessor States. But over and above this juridical situation which international law imposes on all States, account must be taken of objective reality. Paragraph 2 does this by referring to the possibility that the component parts of the union or the union itself may actually have taken other measures. However, it is perfectly clear that, from the standpoint of international law, it is the successor State—the only subject of international law—that incurs responsibility or must discharge obligations towards third parties with respect to the archives, even if the archives have not actually been surrendered to it by one or other of its component parts.

#### ARTICLE E. (Separation of part or parts of the territory of a State) and

#### ARTICLE F. (Dissolution of a State)

#### *Oral comments—1980*

##### *Article E*

292. One representative noted that, under subparagraph 1(b), not only the administrative archives but also that part of the archives which related directly to the territory to which the succession of States related would pass to the successor State. In his view, that concept was broader than the concept, mentioned in article C, of the archives concerning exclusively or principally the territory to which the succession of States related.

293. Another representative welcomed the fact that the passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, would, under paragraph 2, be determined exclusively by agreement between the predecessor State and the successor State, because it was impossible to formulate objective criteria in such a case. The principles on which such an agreement should be based were set out in paragraph 4 of the article.

294. One delegation endorsed the opinion expressed in paragraph (20) of the relevant commentary to the effect that, on second reading, the Commission might revise, the drafting of paragraph 5 to bring it into line with the text of paragraph 4 of article C.<sup>51</sup>

##### *Article F*

295. In the opinion of one representative, it would be necessary to amend *paragraphs 1, 3, 4 and 5* to bring them into line with the corresponding provisions of article E.

296. Another representative deemed it advisable to clarify the provision in *paragraph 6* of article F, since there was no reference in paragraphs 1 to 5 of the article to the question of the unity of the State archives of the successor States in their reciprocal interest.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, p. 25.

*Written comments**Articles E and F*

297. *Sweden* observed that the draft articles drew a distinction between the two cases of State succession dealt with in articles E and F and the case of a newly independent State, which was dealt with in article B. Nevertheless, articles E and F seemed to be based on much the same principles as article B. In particular, paragraphs 2 and 4 of article E and paragraphs 2 and 4 of article F extended to the cases of State succession in question the provisions of paragraphs 2 and 6 of article B. Those provisions restricted the freedom of the successor State or of two successor States to conclude agreements with regard to archives of the predecessor State. According to paragraph 2 of articles B, E and F, an agreement between States regarding the passing (in articles B and E, also the reproduction) of archives which were of interest to the territory in question but did not pass to the successor State under paragraph 1 of the said articles should regulate the matter "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives". Furthermore, paragraph 6 of article B and paragraph 4 of article E and article F provided that agreements between the States concerned "shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage".

That meant that the validity of an agreement concluded between the predecessor State and the successor State, in the case dealt with in article E, or between the successor States concerned, in the case dealt with in article F, in regard to State archives of the predecessor State, would depend on whether it conformed to certain principles, which were all of a very general nature. To let such general principles take precedence over agreements concluded between independent States could hardly be justified and might lead to unnecessary disputes regarding the validity of the agreements concluded. In the case of a State succession that was not the result of decolonization, the contracting parties must be presumed to be independent States whose agreements about State archives should be given full legal effect. Sweden therefore suggested that the words "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives" in paragraph 2 of article E and article F, as well as the whole of paragraph 4 of each of those articles, should be deleted.

298. The *German Democratic Republic* considered as acceptable the principle contained in articles E and F that

the passing of archives should be settled by means of an agreement between the predecessor and the successor States or between the successor States, as the case might be. In its view, that approach was in keeping with the basic principles of international law, particularly the principle of the sovereign equality of States.

299. *Austria* was of the view that the wording used in articles C, E and F to cover virtually identical situations varied for no obvious reason and should be harmonized.

## OPINION OF THE SPECIAL RAPPORTEUR

300. The comments mainly followed two courses. On the one hand, calls were made for maximum harmonization of the provisions of articles C, E and F. On the other hand, it was said that States should not be restricted in their freedom to include whatever they wished in any agreements they concluded on archives.

301. With regard to the second comment, the Special Rapporteur appreciates the objective of the Swedish Government, which is so rightly concerned about the contractual freedom of States. He is, however, uncertain of the wisdom of complying with that Government's request to delete paragraph 4 of articles E and F as well as the phrase reading "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives" in paragraph 2 in both those articles. The agreements should conform to principles which are formulated here in the most general terms. The principles in question are the principle of equity (para. 2) and the principle of the right to development, to information and to the cultural heritage (para. 4). Being general, the principles provide States with general guidelines for concluding their agreements. There is no difficulty in complying with those guidelines, precisely because they are general, equitable, balanced and commonly acceptable and accepted. Hence they cannot be burdensome constraints for States acting in good faith and for the common good. Should some States find such equitable guidelines onerous and depart from them, the agreements they conclude are likely to be unsatisfactory. Such solutions are not to be encouraged within the international community.

302. The question of harmonizing articles E and F, or article C on the one hand and articles E and F on the other, deserves consideration. The Commission will without doubt devote all due care to that task, bearing in mind the differing situations involved in the three types of succession in question.



# QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

DOCUMENT A/CN.4/341 and Add.1\*

## Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

[Original: French]  
[3 and 6 April 1981]

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## Introduction

1. At its thirty-first session, the International Law Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit to Governments the draft articles on treaties between States and international organizations or between international organizations provisionally adopted at that date, i.e. draft articles 1 to 60. Similarly, in accordance with paragraph 5 of General Assembly resolution 2501 (XXIV) of 12 November 1969, in which the Assembly recommended that the Commission should study the topic "in consultation with the principal international organizations", the Commission requested those organizations to submit comments and observations through the Secretary-General.<sup>1</sup> At its thirty-second session, the Commission renewed that invitation, requesting that comments and observations be submitted to the Secretary-General of the United Nations by 1 February 1981; furthermore, the Commission decided to transmit to Governments and the international organizations concerned draft articles 61 to 80 and the annex adopted on first reading at that session,<sup>2</sup> with a view to receiving their comments and observations through the Secretary-General by 1 February 1982.<sup>3</sup>

2. At the time when this report was prepared, comments had been submitted by the Governments of the Byelorussian SSR, Canada, the Federal Republic of Germany, Madagascar, Mauritius, the Ukrainian SSR and the Soviet Union, and by the following international organizations: the Council for Mutual Economic Assistance (CMEA), the European Economic Community (EEC), FAO, ILO, UNESCO, and WMO.<sup>4</sup> Moreover, many Governments

have made substantive comments in the Sixth Committee of the General Assembly, during the discussion of the Commission's report not only on the work of its thirty-second session,<sup>5</sup> but also on that of its previous sessions.<sup>6</sup> The Commission thus has at its disposal a substantial body of comments and observations in the light of which to undertake the second reading of the draft articles.

3. The purpose of the present report is to submit these comments and observations to the Commission, defining the available options and making new proposals where appropriate. Although some comments and observations particularly those made in the Sixth Committee, relate to articles other than articles 1 to 60, this report will deal only with the latter articles, in view of the time-limit established for the submission of comments and observations on articles 61 to 80. However, since some comments concern the draft articles as a whole, we shall begin with a number of general observations.

written comments of Governments and international organizations are to the relevant sections of that annex.

<sup>5</sup> See *Official Records of the General Assembly, Thirty-fifth Session, Annexes*, agenda item 106, document A/35/731; *ibid.*, *Thirty-fifth Session, Sixth Committee*, 25th and 43rd to 60 meetings, and *ibid.*, *Sessional fascicle*, corrigendum; and "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the Thirty-fifth session of the General Assembly" (A/CN.4/L.326).

<sup>6</sup> See "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the Thirty-fourth session of the General Assembly" (A/CN.4/L.311); as well as reports of the Sixth Committee at earlier sessions of the General Assembly: 1974—*Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897; 1975—*ibid.*, *Thirtieth Session, Annexes*, agenda item 108, document A/10393; 1976—*ibid.*, *Thirty-first Session, Annexes*, agenda item 106, document A/31/370; 1977—*ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433; 1978—*ibid.*, *Thirty-third Session, Annexes*, agenda item 114, document A/33/419; 1979—*ibid.*, *Thirty-fourth Session, Annexes*, agenda item 108, document A/34/785.

<sup>1</sup> See *Yearbook ... 1979*, vol. II (Part Two), pp. 138, para. 84.

<sup>2</sup> For the text of all the articles adopted on first reading by the Commission, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*, para. 58.

<sup>3</sup> *Ibid.*, pp. 64–65, paras. 54–56.

<sup>4</sup> A/CN.4/339. The comments submitted previous to the preparation of the present report appeared under the symbols A/CN.4/399/Add.1–8. Document A/CN.4/339 and its addenda are reproduced in *Yearbook ... 1981*, vol. II (Part Two) as annex II. References to the

## General observations

4. The most important general observations made, particularly in the Sixth Committee, can be grouped under three headings: (a) the general orientation of the proposed rules; (b) the methodological approach and the final form of the draft; (c) drafting matters. These questions, particularly the first and the second, involve the relationship between the draft articles and the Vienna Convention on the Law of Treaties<sup>7</sup> in different ways.

### (a) General orientation of the proposed rules

5. At the beginning of its work on this topic, the

Commission adopted a basic line of conduct: it would follow *as closely as possible*, for the treaties which form the subject of the draft articles, the solutions adopted in the Vienna Convention for treaties between States.<sup>8</sup> The Commission interpreted in a particularly rigorous way the

<sup>7</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereinafter referred to as the "Vienna Convention".

<sup>8</sup> For the work of the sub-committee which studied the matter before a Special Rapporteur was appointed, see *Yearbook ... 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 10, and *Yearbook ... 1974*, vol. II (Part One), p. 290, document A/9610/Rev.1, para. 124. For the work of the Special Rapporteur, see *Yearbook ... 1972*, vol. II, p. 194, document A/CN.4/258, para. 76; *Yearbook ... 1973*, vol. II, p. 77, document A/CN.4/271, paras. 9 *et seq.*; *Yearbook ... 1974*, vol. II (Part One), p. 137, document A/CN.4/279, paras. 3–5. See also the report of the Commission on the work of its twenty-sixth session: *ibid.*, p. 292, document A/9610/Rev.1, paras. 137 *et seq.*

idea of respect for the Vienna Convention which it had thus accepted, since it refrained from refining, amending or adding to the solutions adopted in that Convention when transposing the rules applicable to treaties between States to treaties to which international organizations are parties. No criticism was levelled at the Commission with regard to the principle thus defined or the rigorous way in which it was applied. However, this principle of extending the Vienna Convention rules is not absolute, since it is applied only *as far as possible* and must be reconciled with the differences which clearly exist between States and international organizations. In the course of this necessary process of reconciliation, divergent opinions are frequently expressed, and two contradictory trends of opinion became apparent.<sup>9</sup> According to one, international organizations should be treated like States as far as treaties are concerned unless there is an obvious need to do otherwise, while in the other view, the differences are fundamental and should be emphasized at every opportunity, even from a purely formal point of view. Both approaches found supporters among the members of the Commission when the draft articles were being prepared, and many draft articles represent an attempt to reach a compromise solution. The general principle of consensualism which constitutes the basis of any treaty commitment necessarily entails the legal equality of the parties, and this principle plays an important role in the draft articles. On the other hand, account has been taken of the essential differences between States and international organizations, not only in certain substantive rules but even in matters of vocabulary.<sup>10</sup>

6. Any compromise is debatable, and it is quite natural that its necessity and merits should be discussed. It will be for the Commission to discuss them once again, taking into account some of the observations submitted. The Special Rapporteur will devote particular attention to the provisions which were the subject of lengthy and numerous observations and those in connection with which he can provide information not given in his earlier reports.

#### **(b) Methodological approach and final form of the draft articles**

7. At the beginning of its work on the topic, the Commission decided to prepare a set of *draft articles*,<sup>11</sup>

<sup>9</sup> These approaches became apparent from the outset in the discussions in the Sixth Committee, for example, in 1975: see *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 167 *et seq.*

<sup>10</sup> Thus, for legal acts having the same nature, the same effect and the same purpose, the Commission used a different vocabulary according to whether those acts were performed by States or international organizations, for example "full powers" and "powers" (art. 7) or "ratification" and "formal confirmation" (art. 14). In its written comments, the Federal Republic of Germany found these distinctions pointless (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

<sup>11</sup> In his second report, the final objective which the Special Rapporteur set himself was "the preparation of a set of draft articles, since it seems that this method, which is now followed by all special rapporteurs, is the only one which in itself incorporates the exactitude and the precision which should characterize all the Commission's work;

that is, a text which, by reason of its presentation and style, could subsequently constitute the basis for a convention. It had no intention of prejudging the solution to a problem which, in the final analysis, depends solely on Governments and the General Assembly;<sup>12</sup> it was fully aware of the difficulties inherent in the conclusion of a convention on the subject and the possibility of envisaging such final solutions as machinery comparable to that used in connection with the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,<sup>13</sup> or the endorsement of the draft articles in a General Assembly resolution.<sup>14</sup> The form of a set of draft articles was absolutely neutral vis-à-vis the final outcome of its work, neither imposing any solution nor excluding any. Thus the Commission was able to state, in its report on the work of its twenty-sixth session:

Even at this stage ... a set of draft articles, because of the strict requirements it imposes upon the preparation and drafting of the text, appears the most suitable form in which to deal with questions concerning treaties concluded between States and international organizations or between international organizations.<sup>15</sup>

8. This decision was in keeping with a practice in the Commission which has by now become standard, and has not so far evoked the slightest criticism or reservation. However, as soon as the Commission resolved to prepare a text which could become a convention it was confronted with a choice: it could prepare a draft which *in form* was entirely *independent* of the Vienna Convention, or a draft which was more or less closely linked to that Convention *from the standpoint of form*. The Commission opted for the former course, that is, a draft that is formally independent of the Vienna Convention, and this choice must be re-examined in the light of certain comments that have been made.

9. The draft articles as they appear today are *in form* entirely *independent* of the Vienna Convention, meaning that they are independent in two respects, which must be carefully distinguished.

10. First, the draft articles are independent of the Vienna Convention in the sense that the text as a whole represents a complete entity that can be given a form which would enable it to produce legal effects irrespective of the legal

it is indeed essential, unless one rules out the possibility that the work of the Special Rapporteur is ultimately to be reflected in the form of a formal convention." (*Yearbook ... 1973*, vol. II, p. 77, document A/CN.4/271, para. 8).

<sup>12</sup> The Special Rapporteur will not go into greater detail in this report concerning the various possible alternatives; if the Commission decides to do so, it will doubtless devote a good deal of its attention to the comments on the subject submitted by the ILO in connection with draft article 4 (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.2, paras. 4-6).

<sup>13</sup> United Nations, *Treaty Series*, vol. 33, p. 261.

<sup>14</sup> As the Special Rapporteur noted in his second report: "... the participation of international organizations in a general multilateral convention gives rise to certain objections. Possible solutions other than a general convention are a declaration by the General Assembly, or resort to machinery similar to that evolved for the 1947 Convention on the Privileges and Immunities of the Specialized Agencies." (*Yearbook ... 1973*, vol. II, p. 77, document A/CN.4/271, para. 8.).

<sup>15</sup> *Yearbook ... 1974*, vol. II (Part One), p. 292, document A/9610/Rev.1, para. 136.

effects of the Vienna Convention. If the set of draft articles becomes a convention, the latter will bind parties other than those to the Vienna Convention and will have legal effects whatever befalls the Vienna Convention. The draft articles have been so formulated that, as worded at present, they are fated to remain completely independent of the Vienna Convention. If they became a convention, there would be States which would be parties to both conventions at once. That being so, there may be some problems to be solved, as the Commission indicated briefly in its report on its twenty-sixth session:

The draft articles must be so worded and assembled as to form an entity independent of the Vienna Convention: if the text later becomes a convention in its turn, it may enter into force for parties which are not parties to the Vienna Convention possibly including, it must be remembered, all international organizations. Even so, the terminology and wording of the draft articles could conceivably have been brought into line with the Vienna Convention in advance, so as to form a homogeneous whole with that Convention. The Commission has not rejected that approach outright and has not ruled out the possibility of the draft articles as a whole being revised later with a view to providing for States which are parties both to the Vienna Convention and to such convention as may emerge from the draft articles, a body of law as homogeneous as possible, particularly in terminology.<sup>16</sup>

11. Second, the draft articles are independent in the sense that they state the rules they put forward in full, *without referring back to the articles of the Vienna Convention*, even when the rules are formulated in terms identical with those of the Vienna Convention. To take an example, one could conceivably have a draft article reading as follows:

"The rules regarding treaties between States set forth in articles 26, 28, 31, 32, 33, 41, 52, 53, 55, 56, 58, 59, 61, 64, 68, 71, 72, 75 and 80 of the Vienna Convention shall apply to treaties concluded between States and international organizations or between two or more international organizations."

Technically, such an article would be unimpeachable, since the draft articles appearing under the same numbers in the current set have exactly the same wording as the corresponding provisions of the Vienna Convention. Having thus accepted the principle of a *renvoi* to the Vienna Convention, it would be possible to apply it to a considerable number of draft articles that differ from the Vienna Convention only in their references to the international organizations which are parties to the

treaties covered by the draft articles.<sup>17</sup> Although such an approach would simplify the drafting process, the Commission did not follow it during the first reading—for several reasons, apparently. To begin with, the preparation of a complete text with no "*renvoi*" to the Vienna Convention would undoubtedly be advantageous from the standpoint of clarity, and would make it possible to measure the extent of the parallelism with that Convention. Furthermore, it seems to be a tradition in the Commission to avoid all formulas involving *renvois*; one need only compare the 1961 Vienna Convention on Diplomatic Relations,<sup>18</sup> the 1963 Vienna Convention on Consular Relations,<sup>19</sup> the 1969 Convention on Special Missions<sup>20</sup> and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character<sup>21</sup> to realize that, although there was ample opportunity to refer from one text to another, there is not a single example of a *renvoi* to be found. Moreover, such a *renvoi* is likely to cause certain legal difficulties: since every convention may have a different circle of States parties, would States not parties to the convention to which the *renvoi* referred be bound by the interpretation given by States which were parties to the convention in question? Should a *renvoi* to a convention be understood to apply to the text as it stands at the time of the *renvoi*, or to the text as it might conceivably be amended as well?

12. All these considerations are reason enough for the Commission's choice, at least in first reading, but the period preceding a second reading is certainly an appropriate time for a re-examination of the position adopted. Some time ago it was suggested in the Sixth Committee that it would be a good idea to streamline as much as possible a set of draft articles which appeared to be a belated annex to the Vienna Convention and whose main point was to establish the very simple idea that the principles embodied in the Convention are equally valid for treaties to which international organizations are parties. During the Sixth Committee's discussions in 1980, one speaker made the ingenious suggestion that "the methodological approach hitherto adopted"<sup>22</sup> should be reviewed and the draft articles combined with the relevant

<sup>17</sup> During the Sixth Committee's debates in 1980, it was suggested, as an example, that article 65 of the draft articles might be phrased:

"Article 65 of the Vienna Convention on the Law of Treaties shall apply to treaties to which the present articles apply, it being understood that any notification or objection made by an international organization shall be governed by the relevant rules of that organization." (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 45th meeting, para. 22.)

<sup>18</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>19</sup> *Ibid.*, vol. 596, p. 261.

<sup>20</sup> General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

<sup>21</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. The Convention is hereinafter called "1975 Vienna Convention".

<sup>22</sup> *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 45th meeting, para. 22.

<sup>16</sup> *Ibid.*, para. 141. Regarding the Commission's reference to the desirability of bringing the terminology into line, it can be stated that the terminology used in the draft articles is, with but a single exception identical with that of the Vienna Convention and that the problem of bringing terminology into line does not arise. The one word which is used in different senses in the two texts is "treaty", which in the Vienna Convention means a treaty between States. If the definitions of the term used in the Convention and the draft articles were to be made the same, the text of the draft articles would be encumbered to no purpose. The rule given in article 3, para (c) of the Vienna Convention might also give rise to certain problems; many of the draft articles follow the principle set forth therein, but some do not and should not be required to. Thus article 3, para (c) could not lead to the application of article 47 of the Vienna Convention regarding relations between States in the circumstances described in paragraph 1 of the draft article 47; both the States and the organizations themselves must be notified in order to produce consequences in the relations among States.

provisions of the Vienna Convention so as to simplify the proposed text, one method being to increase the number of *renvois* to the articles of the Vienna Convention. Additionally, it was said, such a manner of proceeding would make it more likely that the provisions of the Vienna Convention would be adhered to, by removing the temptation to depart from them; simplifying the text of the articles proposed would ease the task of a plenipotentiary conference, thereby saving time and money. This new approach would not necessarily affect the substance of the rules proposed in the draft articles, only their over-all presentation. The Commission cannot ignore this suggestion and must consider it from every angle. Without taking a definitive stand as to the course to be pursued—only the Commission can do that—the Special Rapporteur believes it is his duty to present the Commission with a few ideas that may help it to delve a little more deeply into the question.

13. If we take the approach of strengthening the formal links between the draft articles and the Vienna Convention, then thought must be given, at least in theory, to an extreme position which no one has so far suggested (or at least no one seems to have examined very closely the implications of such a position), but which helps to define the terms of the problem. This position entails considering the draft articles as constituting, from the technical standpoint, a proposal to amend the Vienna Convention. Such a position cannot be accepted by the Commission for many reasons. The simplest is that, since the Vienna Convention does not contain any specific provisions governing its amendment, the rules of article 40 of the Convention would apply and amendments would be decided upon both as to principle and substance by the contracting States alone. Of course, any contracting State can take the initiative to have the treaty amended on any ground it deems appropriate, but the Commission is completely foreign to such a procedure and cannot direct its work to that end. Moreover, returning to the initial point, it must be borne in mind that the draft articles should be structured in such a way as to accord with whatever solution the General Assembly may ultimately adopt. The Commission cannot at the present stage and on its own authority adopt an approach which would foreclose all but one very specific option, namely, amendment of the Vienna Convention. It should be added, moreover, that incorporating the draft articles into the Vienna Convention by means of an amendment would create difficulties with regard to the role of international organizations in the preparation of the text and the procedure in accordance with which they would agree to be bound by the provisions relating to them. In addition, incorporating the substance of the draft articles into the Vienna Convention would entail a number of drafting problems on which there is no need to dwell here.<sup>23</sup>

14. The problem therefore seems to be delimited in the following manner. The commission must prepare a comprehensive set of draft articles that will remain legally separate from the Vienna Convention. The draft articles

will be given legal force by incorporation in a convention or another instrument (a declaration of the General Assembly, for example),<sup>24</sup> depending upon the decision of the General Assembly. It remains to be decided whether the presentation of the articles will be changed and rendered less cumbersome by including in them references to the Vienna Convention along the lines of the examples given above. It is equally conceivable that the draft articles will become a convention or be incorporated into a General Assembly resolution. The choice depends on judgements concerning the style of legal instruments, in particular. The Special Rapporteur, for his part, is inclined to favour the present approach in order to preserve the force and authority of the text, apart from the considerations set forth above (para. 11). However, numerous references to the Vienna Convention could be incorporated into the draft articles fairly quickly should the Commission so wish. The streamlining of the text of the draft articles is certainly desirable, but can be achieved, at least to some extent, by means other than the inclusion of references to the Vienna Convention.

### (c) Purely drafting questions

15. As the Commission's work has progressed, views have been expressed to the effect that the wording of the draft articles is too cumbersome and too complex.<sup>25</sup> Almost all the criticisms levelled against the draft articles stem not from any fault on the part of the drafters but rather from the dual position of principle that is responsible for the nature of some articles: on the one hand, it is held that there is a sufficient difference between a State and an international organization to rule out in many cases the application of a single rule to both; on the other hand, it is held that a distinction must be made between treaties between States and international organizations and treaties between two or more international organizations, and that different provisions should govern each.

16. There is no doubt that these two principles are responsible for the drafting complexities which are so apparent in the draft articles. The first principle relates to a substantive issue which has already been dealt with at some length (paras. 5 and 6 above). The second principle also involves a substantive issue in some cases. Some comments made during the discussion in the Sixth Committee seem almost to imply denial that treaties between two or more organizations have any real legal interest and agreement that they should be excluded from the draft articles. That position may reflect an underestimation of the importance of such agreements, some of which deal, for example, with financial matters and are concluded in exactly the same way as agreements between

<sup>24</sup> See in this connection the written comments of the ILO (*Yearbook* . . . 1981, vol. II (Part II), annex II, sect. B.2, para. 6).

<sup>25</sup> See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 162; *ibid.*, *Thirty-third Session, Annexes*, agenda item 114, document A/33/419, para. 224; "Topical summary . . ." (A/CN.4/L.311), para. 170; "Topical summary . . ." (A/CN.4/L.326), paras. 169 *et seq.* See also the written comments (sect. I, para. 5) of the Federal Republic of Germany (*Yearbook* . . . 1981, vol. II (Part Two), annex II, sect. A.7).

<sup>23</sup> See footnote 16 above.

international organizations and States.<sup>26</sup> In any event, the Commission's mandate also covers treaties between international organizations, and it remains to be determined whether, for reasons of substance, the draft articles should have dual wording so as to cover the two categories of treaties. The reason of substance would remain the same: the difference in nature between States and international organizations. In treaties between international organizations, all the parties are on an equal footing; in treaties between States and international organizations there is, it is argued, an inequality rooted in principle. The rules applicable to the two categories of treaties would therefore not always be the same and it would even be easier to extend the rules applicable to treaties between States to treaties between international organizations than to treaties between States and international organizations. This apparently paradoxical consequence is responsible for certain provisions of the draft articles, particularly those relating to reservations. Such

<sup>26</sup> A case frequently thought of in this connection, as evidenced by the interesting observations of the ILO (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.2, paras. 2-3), is that of agreements referred to as "interagency" about whose legal nature there is sometimes doubt (in this connection, see the comments below concerning art. 2 subpara. 1(a)). What seems certain is that some important agreements concluded between international organizations are not subject either to the national law of any State or to the rules of one of the organizations that is a party to the agreement, and hence fall within the purview of public international law. A case in point is that of the United Nations Joint Staff Pension Fund, which was established as a subsidiary body of the United Nations by General Assembly resolution 248 (III) (subsequently amended on several occasions). The principle organ of the Fund is the Joint Staff Pension Board (art. 5 of the Regulations (JSPB/G.4/Rev.10)). Article 13 of the Regulations provides that:

"The Board may, subject to the concurrence of the General

analyses have been discussed and can be discussed further, but they do not relate to purely drafting matters.

17. Nevertheless, there are some cases<sup>27</sup> in which, solely in the interest of precision, a distinction has been made between treaties concluded between international organizations and treaties concluded between States and international organizations. The Commission should therefore carefully consider whether more ingenious wording would make it possible to streamline the text, or even whether in some cases it might be possible to make a slight sacrifice in precision in the interest of simplicity.

18. It can be concluded, in general, that the Commission should continue to pay close attention to the quality of the wording and should seek to simplify it as far as possible without introducing any ambiguities or altering any substantive position which the Commission may intend to confirm.

Assembly, approve agreements with member Governments of a member organization and with intergovernmental organizations with a view to securing continuity of pension rights between such Governments or organizations and the Fund".

Agreements have been concluded in pursuance of that article with four States (Canada, the Byelorussian SSR, the Ukrainian SSR and the USSR) and seven intergovernmental organizations (EEC, the European Space Agency, EFTA, IBRD, IMF, OECD and the European Centre for Medium Range Weather Forecasts). For the text of these agreements, see *Official Records of the General Assembly, Thirty-second Session, Supplement No. 9* (A/32/9/Add.1); *Thirty-third Session* (A/33/9/Add.1); *Thirty-fourth Session* (A/34/9/Add.1); *Thirty-fifth Session* (A/35/9/Add.1). An agreement has legal effect only when the General Assembly "concurs" (for an example, see resolution 32/215 A, sect. IV, of 17 December 1980).

<sup>27</sup> In particular, "Topical summary ..." (A/CN.4/L.326), para. 168. See also the written observations of Canada (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.3, para. 8).

## Consideration of draft articles

### PART I. INTRODUCTION

19. Of the four articles which make up the introduction to the draft articles, article 2 (Use of terms) should be divided into its component parts so that they can be reviewed at the appropriate time. This method has already been followed during the first reading: the Commission took up the various subparagraphs of article 2 individually in conjunction with the articles in which the term in question was used for the first time. The same method will be used once again, in a flexible manner and without necessarily following the same procedures as before. The Commission will immediately take up some provisions which will not necessarily be the same as those it considered in 1974 with the first articles drawn up by the Commission.<sup>28</sup>

<sup>28</sup> See *Yearbook ... 1974*, vol. II (Part One), pp. 294 *et seq.*, document A/9610/Rev.1, chap. IV, sect. B, art. 2 and commentary).

**Article 1 (Scope of the present articles) and**

**Article 2 (Use of terms), subpara. 1(a) (the term "treaty")**

20. Defining the scope of the draft articles and the meaning of the term "treaty" entails making a distinction between treaties concluded between one or more States and one or more international organizations, on the one hand, and treaties concluded between international organizations, on the other. Such a distinction is necessary in terms of principle; it also suits the purposes of the draft articles. The definition of the term "treaty" adds a fundamental element by specifying that what is involved is an agreement "governed by international law". It has been suggested that a further distinction should be introduced into the article according to whether or not a State linked by an agreement to an international organization is a member of that organization.<sup>29</sup> The idea is interesting in so

<sup>29</sup> See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 53rd meeting, para. 18.

far as it would make it possible to investigate whether some agreements are of an "internal" nature as far as an international organization is concerned, that is, whether they are governed by rules peculiar to the organization in question. The Special Rapporteur addressed inquiries on this point to various international organizations without receiving any conclusive replies.<sup>30</sup> However, the draft articles, in referring to agreements "governed by international law", have established a simple and clear criterion. It is not the purpose of the draft articles to state whether agreements concluded between organizations, between States and international organizations, or even between organs of the same international organization may be governed by some system other than international law, whether the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law. Granting that, within certain limits, such a possibility exists in some cases, the draft articles do not purport to provide criteria for determining whether an agreement between international organizations or between States and international organizations is not governed by international law. Indeed, that is a question which, within the limits of the competence of each State and each organization, depends essentially on the will of the parties and must be decided on a case-by-case basis.

21. What is certain—and this is underscored by the written observations of the ILO<sup>31</sup>—is that the number of agreements dealing with administrative and financial questions has increased substantially in relations between States and organizations or between organizations, that such agreements are often concluded in accordance with streamlined procedures, and that the practice is sometimes uncertain as to which legal system governs such agreements. If an agreement is concluded by organizations with recognized capacity to enter into agreements under international law and if it is not by virtue of its purpose and terms of implementation placed under a specific legal system (that of a given State or organization), it may be assumed that the parties to the agreement intended it to be governed by international law.<sup>32</sup> Such cases should be settled in the light of practice; the draft articles are not intended to prescribe the solution.

22. In conclusion, the Special Rapporteur does not

propose any changes in article 1 or article 2, subparagraph 1(a).

#### ARTICLE 2, subpara. 1(f) (the term "international organization")

23. The draft articles adopt unchanged the definition of "international organization" contained in the Vienna Convention. The Commission had wondered, as did the Canadian Government in its written comments,<sup>33</sup> whether the concept of an international organization should not be defined by something other than the "intergovernmental" nature of the organization.<sup>34</sup> Should it not be made clear that the draft articles related only to international organizations with the capacity to conclude treaties (which would thus provide a link between the definition of the term "international organization" and article 6, to which we shall return later)? It is a fact that international law has no accepted definition of the term "international organization" that is valid in all cases. The meaning of the term does or can vary according to the text in which it is used. In the present case, the term can apply only to an intergovernmental international organization with the capacity to conclude at least *one* treaty; otherwise, the "international organization" has no concern with the draft articles. This in no way rules out the possibility of using the term in a broader sense in connection with another text. It is therefore true that the meaning of the term in the draft articles is slightly more precise than is implied by the mere reference to the intergovernmental nature of the organization. Is it necessary, however, to spell this out? The Special Rapporteur does not think so, but that can be done easily, and apparently without detriment.

24. Another point is not made clear in this "definition": how is the identity of an international organization defined in relation to a broader system of which it forms part? For example, does UNICEF, a subsidiary organ of the United Nations, conclude treaties which, being specifically UNICEF treaties, are not United Nations treaties? After fruitless efforts to obtain information on this general matter,<sup>35</sup> the Special Rapporteur concluded that there was no single answer to such a question and that the answer depended on the organization. The question does not have to be reviewed for the purposes of the draft articles. The fact is:

that the main purpose of the present draft is to regulate, not the status of international organizations, but the regime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.<sup>36</sup>

<sup>30</sup> See *Yearbook* ... 1973, vol. II, pp. 88–89, A/CN.4/271, paras. 83–87. Apart from the relatively few cases in which a true legal system that can govern legal acts exists within an organization, the question may arise as to whether some agreements between the organization and a member State are not completely subordinated to a unilateral act of the organization and represent a purely executive measure adopted by the latter. As early as 1973, the Special Rapporteur indicated in his report that this problem arose in connection with article 27: of the report of the Commission on the work of its twenty-ninth session: *Yearbook* ... 1977, vol. II (Part Two), p. 118. In its written comments (sect. I, para. 7) the Federal Republic of Germany has emphasized the problems arising in the special relations between an organization and its members (*Yearbook* ... 1981, vol. II (Part Two), annex II, sect. A.7).

<sup>31</sup> *Yearbook* ... 1981, vol. II (Part Two), annex II, sect. B.2, paras. 1–3.

<sup>32</sup> In this sense, the agreements referred to in footnote 26 can be regarded as agreements "governed by international law".

<sup>33</sup> *Yearbook* ... 1981, vol. II (Part Two), annex II, sect. A.3, paras. 3–4.

<sup>34</sup> For a similar approach, see "Topical summary ..." (A/CN.4/L.311), para 171.

<sup>35</sup> See *Yearbook* ... 1973, vol. II, pp. 85–86, document A/CN.4/271, paras. 65–68.

<sup>36</sup> *Yearbook* ... 1974, vol. II (Part One), p. 296, document A/9610/Rev.1, chap. IV, sect. B, para. (9) of the commentary to article 2.



25. In short, the Special Rapporteur would propose no amendment to article 2, subparagraph 1(i).

**ARTICLE 2, subpara. 1(j) and para. 2 (the term "rules of the organization")**

26. Article 2, paragraph 2, which prompted no observations, uses for the first time the term "rules of an international organization", the meaning of which is given in subparagraph 1(j) ("rules of the organization"). It should be noted that the term was defined not in 1974 during consideration of the initial draft articles, but in 1977, in connection with draft article 27. The text which became article 2, subparagraph 1(j), was borrowed from article 1, paragraph 1 (34), of the 1975 Vienna Convention.<sup>37</sup> In its report, the Commission pointed out:

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 later 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>38</sup>

27. Turning to the other draft articles, we find a different term: "relevant rules of that organization" (art. 6; art. 36, para. 3). The term "rules of the organization" appears in art. 27, para. 2; [art. 36 *bis*, subpara. (a)]; art. 37, [para. 5]; art. 37, para. 7; art. 39, para. 2; art. 45, para. 3); while article 46, para. 3, refers to "rules of the organization regarding competence to conclude treaties". One conclusion immediately emerges from this comparison. The use of the adjective "relevant" with the word "rules" has a precise purpose: the text refers not to all the rules of the organization, but only to those relating to the subject-matter of the respective articles (in article 46 that subject-matter is designated precisely and directly with the reference to "rules of the organization regarding competence to conclude treaties"). On the other hand, article 2, paragraph 2, does indeed refer to *all* the rules of the organization.

28. This very simple finding raises several questions: does the definition in article 2, subpara. 1(j), adequately cover all the rules of an organization? Does such a definition have to be retained in the draft articles? Is the reference to "relevant rules" in the other draft articles adequate? These three questions have to be answered one by one.

29. Does the definition in article 2, subpara. 1(j), adequately cover all the rules of an organization? The wording borrowed from the 1975, Vienna Convention was perfectly suited to the subject-matter of that Convention and to the nature of the organizations to which it was

initially intended to apply, i.e., organizations of a universal character. However, two criticisms suggest themselves. In the first place, the definition does not cover *all* the rules of such organizations, since it focuses on the "relevant decisions and resolutions". This restriction is perfectly justifiable in view of the *limited scope* of this Convention, but becomes out of place in a definition referring to all the rules of the organization. Secondly, the choice of the words "decisions and resolutions" is not necessarily felicitous, considering that the definition should be valid for all international organizations; however, this criticism may be countered with the argument that the words "in particular" make it possible to include all legislative instruments, and the incomplete and descriptive listing in this definition is more appropriate than a theoretical expression such as "legislative instruments" or any other expression along the same lines. In short, the Special Rapporteur would be in favour of retaining the present wording, with the deletion of the word "relevant", provided that the answer to the next question is in the affirmative.

30. Does such a general definition have to be retained in the draft articles? The definition could, at first sight, prompt this question because, whenever the other articles refer to rules of the organization, they mean specific rules relating to a specific question, and it could therefore be astonishing that there is a definition for a term that will have such a general meaning only once. To reason thus, however, would be to look at only one side of the question. Article 2, subpara. 1(j)—it must be repeated—in no way seeks to lay down a rule relating to the status in international law of international organizations; it merely describes the very general components of the "distinctive law", the "internal law" of the organization, including constituent instruments, resolutions, decisions and many other instruments ("in particular"), as well as *well-established practice*. The purpose of the draft articles is not and cannot be to establish that the sources of the law of a specific organization are bound to derive from the elements listed in the draft; that is a question determined in a different way for each organization, the manner of such determination depending on what will be described as its constitutional status, which is outside the scope of the draft articles. However, the general description given in article 2, subpara. 1(j), is still very useful, despite its enunciative nature; it reflects the fact that the source of the statute of an organization may be, *inter alia*, well-established practice; the extent to which this is a factor will vary according to the organization and depend on its particular nature. This is a very important point. During the proceedings of the United Nations Conference on the Law of Treaties and in the course of the work on the draft articles that became the 1975 Vienna Convention, international organizations attached fundamental importance to the reference to practice.<sup>39</sup> As to the present draft articles, the written comments of the Canadian Govern-

<sup>37</sup> See footnote 21 above.

<sup>38</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 118, para. (3) of the commentary to article 2. See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 168.

<sup>39</sup> See *Yearbook ... 1972*, vol. II, pp. 186–187, document A/CN.4/258, para. 51.

ment and of the EEC<sup>40</sup> show that the retention of article 2, subpara. 1(j), is one of the basic elements of the compromise reached in connection with draft article 6. For this and other reasons, this definition should be retained in its most general wording.<sup>41</sup>

31. Is the reference to "relevant rules" in the other draft articles adequate? As already noted, article 46, para. 3, instead of using the term "relevant rules", uses the more explicit expression "rules of the organization regarding competence to conclude treaties". If, therefore, it is felt that a more precise wording should be found for the other articles that use the term "relevant rules", the most appropriate expression would have to be sought on an article-by-article basis. In point of fact, it does seem that the question will seriously arise only in connection with article 27, which, as we have said, is chronologically at the source of these difficulties.

32. The Special Rapporteur therefore proposes that the two provisions under consideration, namely, article 2, subpara. 1(j), and article 2, para. 2, should be retained; he merely wishes to add that it would be better to delete from article 2, subpara. 1(j), the adjective "relevant" qualifying the words "decisions and resolutions".

**ARTICLE 3 (International agreements not within the scope of the present articles),**

**ARTICLE 4 (Non-retroactivity of the present articles), and**

**ARTICLE 2, subpara. 1 (g) (the term "party")**

33. Articles 3 and 4 did not prompt any substantive comments. Before the square brackets around the word

<sup>40</sup> *Yearbook . . . 1981*, vol. II (Part Two), annex II, sect. A.3, para. 6; and sect. C.2, para. 3, respectively.

<sup>41</sup> There is no doubt that because of the evolutionary nature of practice, some organizations are sometimes dubious about the capacity of international organizations; this is why the States members of an organization become parties to the same treaty as the organization. See "Topical summary . . ." (A/CN.4/L.311), para. 172; and *Bulletin of the European Communities* (Luxembourg), vol. 13, No. 12 (1980), p. 87, point 2.3.2.

"parties" in article 3 can be deleted, article 2, subpara. 1(g), which provoked no comment, would have to be adopted. It is unfortunately impossible to delete the square brackets around the words "entry into force" in article 4; the expression is inherently unsatisfactory because it refers only to a hypothetical transformation of the draft articles into a convention.<sup>42</sup> It might be more appropriate to use the more general term "application".

34. Article 3 is one of those articles of which the wording was found to be particularly cumbersome.<sup>43</sup> In order to remedy this, the structure and wording of the corresponding provision of the Vienna Convention could be followed more closely: subparagraphs (i) and (ii) would be merged in a single subparagraph; subparagraph (iii) would remain unchanged and become subparagraph (ii). Subparagraph (i), in its new wording, would read as follows:

**(i) to international agreements concluded between, on the one hand, one or more States and one or more international organizations or several international organizations, and, on the other hand, one or more entities other than States or international organizations.**

35. To sum up, the Special Rapporteur proposes:

(a) that article 2, subpara. 1(g), should be adopted unchanged;

(b) that the square brackets around the word "parties" in article 3 should be deleted;

(c) that article 3, subparas. (i), (ii) and (iii), should be amended as indicated at the end of the preceding paragraph;

(d) that the words between square brackets in article 4 "entry into force" should be replaced by the word "application".

<sup>42</sup> On the question of the ultimate destiny of the draft articles, see paras. 7 *et seq.* of the introduction above. See also the written observations of the ILO (*Yearbook . . . 1981*), vol. II (Part Two), annex II, sect. B.2, para. 6).

<sup>43</sup> See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897, para. 150.

## PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

### SECTION 1. CONCLUSION OF TREATIES

**ARTICLE 6 (Capacity of international organizations to conclude treaties)**

36. In the Sixth Committee in 1974 and 1975,<sup>44</sup> representatives expressed somewhat divergent views regarding the capacity of organizations to conclude treaties. These views reflected and sometimes accentuated the differences that had emerged in the Commission. Such being the case, the Commission would apparently have absolutely nothing to gain by reopening the debate and

departing from the compromise text adopted on first reading. The written observations of Canada and of the ILO<sup>45</sup> lead to the same conclusion and emphasize the link, to which we referred in connection with article 2, between article 2, subpara. 1(j), and article 6.<sup>46</sup> At this juncture, it

<sup>44</sup> *Yearbook . . . 1981*, vol. II (Part Two), annex II, sect. A.3, para. 5; and sect. B.2, paras. 7–9, respectively.

<sup>45</sup> According to the ILO, "where the rules of the organization so permit, the term 'relevant rules' is intended to embrace practice and . . . there is no intention of fixing those rules as they stand at the time the draft articles become effective." (*ibid.*, sect. B.2, para. 8). This has been the Special Rapporteur's position from the outset (cf. footnote 39 above).

<sup>46</sup> *Ibid.*, paras. 151–157, and *ibid.*, *Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 175.

should be noted that the term "relevant rules" of the organization is perfectly clear here and that there would be nothing, save a tautological effect, to be gained by replacing that term with the wording of article 46, "rules of the organization regarding competence to conclude treaties".

**ARTICLE 7 (Full powers and powers) and**

**ARTICLE 2, subparas. 1(c) and (c bis) (the terms "full powers" and "powers")**

37. Some substantive observations have been submitted; other observations relate to questions of form. The two types will be examined in turn. The substantive observations concern the representation of international organizations. The Canadian Government suggested that the general wording of paragraphs 3 and 4 could perhaps be made more precise with a provision, by analogy with the text adopted with regard to the State, according to which the "executive head" of an organization would be considered as representing that organization for the purpose of performing all acts relating to the conclusion of a treaty.<sup>47</sup> The fact is that powers have to be issued by a person, and that person cannot issue powers to himself; there must therefore be someone in an international organization competent to represent it without having to produce powers. However, since organizations do not all have the same structure, it is very difficult to designate by any one expression the office held by such a person. Not all organizations have an official fitting the designation "Executive Head", "Secretary-General", "Chief Administrative Officer" or "Director". In practice, a notification that a person such as the chairman of an intergovernmental body will be authorized to represent the organization is sometimes an alternative to the presentation of powers. It is for this reason that the Commission contented itself with laying considerable stress on the question of practice in article 7, subparas. 3(b) and 4(b). The written comments of the ILO<sup>48</sup> show how flexible and acceptable practice is, and the draft article gives the fullest weight to this question. It is precisely because of the relative frequency with which a secretary-general or administrative director notifies the other parties of the decision constituting the consent of an organization to be bound by a treaty, even when the decision has been taken by an intergovernmental corporate body, that the word "communicating" was used instead of "expressing" in article 7, paragraph 4. The discussion in the Sixth Committee in 1975 brought these very points into sharp focus;<sup>49</sup> accordingly, it does not seem necessary to make any substantive amendments to article 7.

<sup>47</sup> *Ibid.*, sect. A.3, para. 7.

<sup>48</sup> *Ibid.*, sect. B.2, paras. 10–11.

<sup>49</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 178. In its written comments (sect. II, para. 4), the Federal Republic of Germany proposed that the word "communicating" be replaced by "declaring", since the role of the representative may go beyond the communication of consent (*Yearbook . . . 1981*, vol. II (Part Two), annex II, sect. A.7).

38. As far as the wording is concerned, various suggestions have been or can be made. In the first place, the words "between one or more States and one or more international organizations" could be deleted from paragraph 1, since a treaty between international organizations obviously cannot be in question here. If the Commission is amenable to that suggestion, it could then simplify other articles along the same lines. (Incidentally, an example may be given here of the results of a method which, as we have seen, the Special Rapporteur does not recommend: if the Commission decided to proceed on the basis of references to the Vienna Convention, paragraphs 1 and 2 would be replaced by a text worded along the following lines:

"The representation of a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty is governed by the rules set forth in article 7 of the Vienna Convention on the Law of Treaties.")

39. It has also been suggested that paragraphs 3 and 4 should be merged in a single paragraph and thus made less unwieldy.<sup>50</sup> This is an excellent suggestion, which does not affect the substance of the text. The amended text could read as follows:

**A person is considered as representing an international organization for the purpose of adopting or authenticating a treaty or 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 one or more such purposes.**

40. Although it has also been suggested that one term, "full powers", should be used to designate the documents whether they emanate from States or organizations,<sup>51</sup> the Special Rapporteur, in view of the fact that this proposed drafting change would involve a question of substance for some members of the Commission, thinks it would be better to retain the present wording and the definitions given in article 2, subparas. 1(c) and 1(c bis).

41. To sum up, the Special Rapporteur proposes that paragraphs 3 and 4 of article 7 should be merged in a single paragraph (see para. 39 above) and that the first part of paragraph 1 should be streamlined in the way indicated above in paragraph 38.

**ARTICLE 8 (Subsequent confirmation of an act performed without authorization),**

**ARTICLE 9 (Adoption of the text),**

**ARTICLE 10 (Authentication of the text),**

**ARTICLE 11 (Means of establishing consent to be bound by a treaty), and**

<sup>50</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 178.

<sup>51</sup> *Ibid.*, para. 176. See also the written comments (sect. II, para. 3), of the Federal Republic of Germany (*Yearbook . . . 1981*, vol. II (Part Two), annex II, sect. A.7).

ARTICLE 2, subparas. 1(b), (b bis) and (b ter) (the terms "ratification", "act of formal confirmation", and "acceptance", "approval" and "accession")

42. The fact is that these texts did not as a whole prompt any really substantive comments; they do call, however, for a few observations relating more or less to form or to the language proper. Article 9 gave rise to some comments,<sup>52</sup> which have to do not with the wording, but with side issues referred to in the commentary. In accordance with the wish expressed by one representative in the Sixth Committee in 1975, article 10 could be greatly simplified if paragraphs 1 and 2 were merged in a single paragraph.<sup>53</sup> To that end, one would simply have to use the expression "participants in the drawing-up", which was accepted without comment in the text of article 9. Article 10 would thus become:

#### *Article 10*

**The text of a treaty is established as authentic and definitive:**

**(a) by such procedure as may be provided for in the text or agreed upon by the participants in the drawing-up of the treaty; or**

**(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those participants of the text of the treaty or of the final act of a conference incorporating the text.**

43. The question which then arises with regard to article 10 (and article 9) is whether the expression "participants in the drawing-up" should be defined. As early as 1975, the Commission had raised that question, and had deferred an answer until the time of the second reading.<sup>54</sup> The reason was that some organizations sometimes participate in the drawing-up of the text of a convention (and occasionally even sign it) although they have merely a consultancy role and are not expected to accede to the convention. It is quite clear that both in article 9 and in article 10, participation in the drawing-up of a text is envisaged only in the context of a disposition on the part of the participants to become parties. Is there any need to include another definition in article 2, paragraph 1, for the sake of clarification? In order to avoid making the text unwieldy, the Special Rapporteur would be inclined to give a negative answer.

44. Article 11 calls for no substantive comments other than the criticisms voiced in the Sixth Committee regarding the introduction of the term "act of formal confirmation" and regarding the parallelism created between this act of formal confirmation and ratifi-

cation.<sup>55</sup> Since there is no doubt that international organizations have a procedure allowing them to express their consent to be bound by a treaty in two phases, with only the second expression of consent being actually binding, and since organizations use the widest variety of terms to describe the second phase,<sup>56</sup> the Special Rapporteur proposes that the present wording should be retained together with the definitions given for the terms in question.

45. The only drafting change which should be made in article 11, if the course suggested above (para. 38) is acceptable, would be to delete for paragraph 1 the words "between one or more States and one or more international organizations", which are totally unnecessary.

ARTICLE 12 (Signature as a means of establishing consent to be bound by a treaty),

ARTICLE 13 (An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty),

ARTICLE 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty),

ARTICLE 15 (Accession as a means of establishing consent to be bound by a treaty),

ARTICLE 16 (Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession),

ARTICLE 17 (Consent to be bound by part of a treaty and choice of differing provisions),

ARTICLE 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), and

ARTICLE 2, subparas. 1(e) and (f) (the terms "negotiating State" and "negotiating organization" and "contracting State" and "contracting organization")

46. No comments were made on any of these provisions, but all, with the exception of the definitions, could be made less unwieldy or simpler. Like article 11, paragraph 1, and for the same reasons, article 12 could be slightly simplified: the words "between one or more States and one or more international organizations" could be deleted from paragraph 1 without detriment. For the rest, the term "the participants in the negotiation" makes its first appearance in article 12, subpara. 1(b); it will reappear in article 14, subpara. 1(b), and article 15, subpara. 2(b). The terms "negotiating State" and "negotiating organization" were defined in article 2, subpara. 1(e). It would be useful to provide a definition of the term "the participants in the negotiation", which could read as follows:

**"the participants in the negotiation" means, in each case:**

**(i) one or more States and one or more international organizations,**

**(ii) several organizations**

**which took part in the drawing-up and adoption of the text of the treaty.**

<sup>52</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 179. See also the written comments (sect. II) of the Federal Republic of Germany (*Yearbook* . . . 1981, vol. II (Part Two), annex II, sect. A.7); and of the EEC (*ibid.*, sect. C.2, para. 3).

<sup>53</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 180.

<sup>54</sup> See *Yearbook* . . . 1975, vol. II, p. 177, document A/10010/Rev.1, chap. V, sect. B.2, para. (3) of the commentary to art. 9.

<sup>55</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 181–182. See also the written comments (sect. II) of the Federal Republic of Germany (*Yearbook* . . . 1981, vol. II (Part Two), sect. A.7).

<sup>56</sup> The example referred to in footnote 26 above states that the General Assembly "concurs", while in fact it "confirms".

It should be noted too that the terms "negotiating States" and "negotiating organizations" are used only once in the draft articles (in article 76), and that they could easily be replaced there by the term "the participants in the negotiation". The Special Rapporteur therefore proposes that the definition of the two terms now contained in article 2, subpara. 1(e), should be replaced by the definition of the term "the participants in the negotiation".

47. Article 13 did not elicit any substantive comments. The wording could be simplified with advantage if the article were condensed into a single paragraph and worded impersonally:

### **Article 13**

**Consent to be bound by a treaty constituted by instruments exchanged is established by that exchange when:**

- (a) the instruments provide that their exchange shall have that effect; or**
- (b) it was otherwise agreed that the exchange of instruments should have that effect.**

48. Article 14 did not give rise to any substantive comments. It could be simplified through the deletion of the words "between one or more States and one or more international organizations" in paragraphs 1 and 3.

49. Article 15 did not evoke any substantive comments. The wording could easily be simplified by condensing the article into a single paragraph as follows:

### **Article 15**

**The consent of a State or organization to be bound by a treaty is expressed by accession when:**

- (a) the treaty provides that such consent may be expressed by means of accession;**
- (b) the participants in the negotiation were agreed that such consent might be expressed by means of accession; or**
- (c) all the parties have subsequently agreed that such consent may be expressed by means of accession.**

50. Article 16 did not occasion any substantive comments. Its wording could be simplified by reducing it to a single paragraph. To this end, a new term should be added to the definitions contained in article 2, paragraph 1, i.e. the term "the contracting entities". This new term would immediately simplify articles 16 and 17, and also a number of other articles in the draft—particularly, as the Special Rapporteur has noted, articles 77 and 79.<sup>57</sup> The term could thus be modelled on the definition of the term "the participants in the negotiation":

**(f bis) "the contracting entities" means respectively:**

- (i) one or more States and one or more international organizations,**

### **(ii) several organizations**

**which have consented to be bound by the treaty, whether or not the treaty has entered into force.**

The question whether the given definitions of the terms "contracting State" and "contracting organization" are to be retained will depend on whether they can be used in other articles in the draft. The problem will arise in the case of reservations, and the Special Rapporteur considers that they should be retained, at least provisionally, until the Commission indicates its views on the articles concerned. Article 16 would thus read as follows:

### **Article 16**

**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 upon:**

- (a) their exchange between the contracting entities;**
- (b) their deposit with the depositary; or**
- (c) their notification to the contracting entities or to the depositary, if so agreed.**

51. No comments have been made with regard to article 17, which, after the square brackets enclosing the figures "19 to 23" have been deleted, can be reduced to two paragraphs by using the term "the contracting entities", and the Special Rapporteur suggests that the article should read as follows:

### **Article 17**

**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 is effective only if the treaty so permits or if the other contracting entities so agree.**

**2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.**

52. Only one comment was made with regard to article 18.<sup>58</sup> Its wording could be improved by reducing it to one paragraph, which would read as follows:

### **Article 18**

**A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty 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**

<sup>57</sup> See *Yearbook ... 1980*, vol. II (Part One), pp. 146 and 148, document A/CN.4/327, para. (2) of the commentary to art. 77, and commentary to art. 79. The Special Rapporteur envisaged that in future the terms "contracting parties" and "signatory parties" would be used; he is now proposing that, still more simply, the terms "the contracting entities" and "the signatories" should be used.

<sup>58</sup> According to the written comments (sect. I, para. 7) of the Federal Republic of Germany, this article could create a special problem in the case where both an organization and one or more States members of that organization are parties to a treaty (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

into force of the treaty and provided that such entry into force is not unduly delayed.

## SECTION 2: RESERVATIONS

### *General observations*

#### *Background*

53. Even in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties.<sup>59</sup> Difficulties attended the Commission's discussions with regard to treaties to which international organizations are parties;<sup>60</sup> the compromise text finally adopted did not receive unanimous support within the Commission.<sup>61</sup> The question was discussed extensively in the Sixth Committee, and widely diverging points of view emerged in 1977.<sup>62</sup> The question was also touched upon in 1978 and 1979.<sup>63</sup> It is brought up in the written comments submitted by Canada, the Federal Republic of Germany, the USSR, CMEA, EEC, and, particularly, the ILO.<sup>64</sup>

54. The fundamental difficulty is to be found in the right to formulate reservations, since the question of objections to reservations or acceptance of reservations is largely (though not completely) dependent on that right. As has already been noted (see above, paras 5 *et seq.*), there are two trends of opinion, one tending towards the view that international organizations should simply be accorded the same status as States, while the other would completely reject such a viewpoint. The compromise solution in the draft articles consisted in equating the status of inter-

national organizations with that of States in two cases: the case of treaties concluded between international organizations and the case of treaties in which the participation of the organization is not essential to the object and purpose of the treaty. In other cases the organization can formulate a reservation only if that reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized. A lack of clarity has been noted in the provision stating that participation of an international organization is essential to the object and purpose of the treaty; it must be acknowledged that the written comments of the Canadian Government and of the ILO are convincing in this respect, despite the fact that the Commission was principally concerned with a relatively simple case: one in which an international organization is called upon, in a treaty between States, to perform a supervisory function with regard to the obligations undertaken by those States and is for that reason accepted as a party to the treaty. In the draft articles the question of objections is dealt with in the same way as that of reservations, the only difference being the extension of an organization's right to object when such an extension necessarily follows from the duties assigned to the organization by the treaty; here, too, what has been borne in mind is the status of an organization which is a party to a treaty between States and which has a duty to supervise the implementation by those States of their obligations under that treaty.

#### *Current international practice*

55. Before examining the options open to the Commission on second reading, it should be considered whether it would not in fact be possible to find some information concerning practice, despite the prevailing view that practice is lacking in this regard. In fact, this view is not entirely justified; there are a certain number of cases in which such questions have arisen. Admittedly the value of these cases is open to question: do the examples to be adduced involve genuine reservations, genuine objections or even genuine international organizations?<sup>65</sup> It would seem difficult to claim that the problem of reservations has never arisen in practice, although the issue is a debatable one.<sup>66</sup>

56. An interesting legal opinion has been given in the form of an aide-mémoire addressed to the Permanent Representative of a Member State from the Secretary-General of the United Nations concerning the "juridical standing of the specialized agencies with regard to reservations to the [1947] Convention on the Privileges and Immunities of the Specialized Agencies".<sup>67</sup> In becom-

<sup>59</sup> See P. H. Imbert, *Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (Paris, Pedone, 1979); see also the same author's "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire français de droit international*, 1978 (Paris), vol. XXIV, p. 29.

<sup>60</sup> See *Yearbook ... 1975*, vol. I, pp. 237-249, 1348th to 1350th meetings; *Yearbook ... 1977*, vol. I, pp. 70-103, 1429th to 1435th meetings.

<sup>61</sup> One member of the Commission did not associate himself with the compromise solution adopted and proposed another text (A/CN.4/L.253) (see *Yearbook ... 1977*, vol. II (Part Two), pp. 109-110, footnote 464, and p. 113, footnote 478).

<sup>62</sup> See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 169-177. While some representatives supported the compromise submitted by the Commission (*ibid.*, para. 170), some sought a stricter system on the lines envisaged in the preceding footnote (*ibid.*, para. 171), while others asked for a more liberal system (*ibid.*, para. 172).

<sup>63</sup> *Ibid.*, *Thirty-third Session, Annexes*, agenda item 114, document A/33/419, para. 228; and "Topical summary ..." (A/CN.4/L.311), paras. 175-176.

<sup>64</sup> See *Yearbook ... 1981*, vol. II (Part Two), annex II—comments of Canada: sect. A.3, para. 8; of the Federal Republic of Germany: sect. A.7, II, paras. 8-9; of the USSR: sect. A.13, para. 2; of the EEC: sect. C.2, III, paras. 9-10; CMEA: sect. C.1, para. 2; ILO: sect. B.2, paras. 12-14.

<sup>65</sup> A number of precedents relate to the EEC, and it has sometimes been maintained that the Community does not constitute an international organization; on the other hand, it has been argued that the Community considers itself entitled to at least the same treatment as that accorded to international organizations. See "Topical summary ..." (A/CN.4/L.326), para. 157.

<sup>66</sup> The Special Rapporteur wishes to thank Professor P. H. Imbert, a member of the Directorate of Legal Affairs of the Council of Europe, who has pointed out a number of precedents he had overlooked.

<sup>67</sup> United Nations, *Juridical Yearbook, 1964* (Sales No. 66.V.4), pp. 266 *et seq.*

ing parties to this Convention, States have sometimes entered reservations, and several specialized agencies have objected to the reservation; after various representations, four States which had formulated reservations withdrew them. It is at the level of objections to reservations that such precedents can be invoked. According to the Secretary-General's legal opinion,

Practice ... has established ... the right ... to require that a reservation conflicting with the purposes of the Convention and which can result in unilaterally modifying that agency's own privileges and immunities, be not made effective unless and until it consents thereto.<sup>68</sup>

As an example of an objection by an international organization to a reservation formulated by a State, this case is open to dispute in that the specialized agencies are not usually considered as "parties" to the 1947 Convention.<sup>69</sup> However, even if they are denied this status, there is obviously a link under the terms of the Convention between each specialized agency and each State party to the Convention, and it is on the basis of this link that the objection is made.<sup>70</sup>

57. A second case which arose a little later involved reservations not only to the 1947 Convention but also to the 1946 Convention on the Privileges and Immunities of the United Nations.<sup>71</sup> In a letter addressed to the Permanent Representative of a Member State,<sup>72</sup> the Secretary-General of the United Nations referred still more specifically to the position of a State which has indicated its intention of acceding to the Convention with certain reservations. Without using the term "objection", the Secretary-General indicated that certain reservations were incompatible with the Charter of the United Nations, and strongly urged that the reservation should be withdrawn, emphasizing that he would be obliged to bring the matter to the attention of the General Assembly if, despite his objection, the reservation were retained, and that a supplementary agreement might have to be drawn up "adjusting" the provisions of the Convention in conformity with section 36 of the Convention. This precedent is of additional interest in that the Convention contains no provision concerning reservations and objections to reservations, and also in that the States parties have made a considerable number of reservations.<sup>73</sup>

<sup>68</sup> *Ibid.*, p. 267, para. 6.

<sup>69</sup> The legal opinion wisely states that:

"each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether or not each agency may be described as a 'party' to the Convention in the strict legal sense". (*ibid.*, para. 5).

See also the report of the Secretary-General "Depositary practice in relation to reservations" (*Yearbook ... 1965*, vol. II, p. 102, document A/5687), paras. 23-25.

<sup>70</sup> That was the view expressed by the Special Rapporteur in his first report: *Yearbook ... 1972*, vol. II, p. 194, document A/CN.4/258, footnote 181.

<sup>71</sup> United Nations, *Treaty Series*, vol. I, p. 15.

<sup>72</sup> United Nations, *Juridical Yearbook*, 1965 (Sales No. 67.V.3), pp. 234 *et seq.*

<sup>73</sup> See: United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of Signatures, Ratifications, Accessions, etc. at 31 December 1979* (Sales No. E.80.V.10), pp. 334 *et seq.*

58. A number of precedents concern EEC, and at least one of them is of particular interest. The Community is a party to several multilateral conventions, usually on clearly specified conditions. Some of these conventions prohibit reservations or give a restrictive definition of the reservations authorized; in other cases there are no indications.<sup>74</sup> EEC has already entered reservations authorized under such conventions.<sup>75</sup> One case which merits some attention is the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), concluded at Geneva on 14 November 1975.<sup>76</sup> This Convention has established that customs or economic unions may become parties to the Convention, either at the same time as all the member States do so or subsequently; the only article to which reservations are authorized is the article relating to the compulsory settlement of disputes. Both Bulgaria and the German Democratic Republic have made declarations to the effect that:

the possibility envisaged in article 52, paragraph 3, for customs or economic unions to become Contracting Parties to the Convention, does not bind Bulgaria [the *German Democratic Republic*] with any obligations whatsoever with respect to these unions.<sup>77</sup>

The nine member States of the Community and the Community have jointly formulated an objection in the following terms:

The statement made by Bulgaria [the *German Democratic Republic*] concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention.

The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void.<sup>78</sup>

There is no need to discuss or even to consider the legal problems created by this precedent. It merely indicates that international organizations (or at least, organizations sharing many common features with international organizations) are henceforward called upon to take cognizance of questions relating to reservations at a time when it would not perhaps be universally recognized, even

<sup>74</sup> Examples of prohibition have already been cited in the Commission's report on its twenty-ninth session (*Yearbook ... 1977*, vol. II (Part Two), pp. 108-109, footnotes 458-462). Mention can also be made of the Convention on the Conservation of Migratory Species of Wild Animals, signed at Bonn on 23 June 1979, which recognizes, in article I, subpara. 1(k), "any regional economic integration organization" as a party; article XIV restricts the right to enter reservations, but states that the reservations permitted are open to "any State or any regional economic integration organization" (*International Protection of the Environment, Treaties and Related Documents*, eds. B. Rüster, B. Simma and M. Bock (Dobbs Ferry, N.Y., Oceana, 1981), vol. XXIII, pp. 14 and 24). The USSR objected to the mention of such organizations and has not become a party to the Convention.

<sup>75</sup> The International Convention on the Simplification and Harmonization of Customs Procedures, concluded at Kyoto on 18 May 1973, authorizes certain reservations: EEC, which is a party to the Convention, has on several occasions accepted "annexes" while availing itself of the power to formulate reservations. (*Official Journal of the European Communities* (Luxembourg), vol. 18, No. L 100 (21 April 1975), p. 1; *ibid.*, vol. 21, No. L 160 (17 June 1978), p. 13; and *ibid.*, vol. 23, No. L 100 (17 April 1980), p. 27).

<sup>76</sup> ECE/TRANS/17.

<sup>77</sup> United Nations, *Multilateral treaties ... (op. cit.)*, p. 335.

<sup>78</sup> *Ibid.*



in the context of inter-State relations, that the rules of the Vienna Convention have become customary rules of international law. All that can be said is that this precedent, taken in conjunction with that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies and the 1946 Convention on the Privileges and Immunities of the United Nations, shows that it is not unknown in current practice for international organizations to formulate reservations or objections.

### *Equality or inequality?*

59. Bearing all these examples in mind, in conjunction with the comments made by representatives in the Sixth Committee and the written observations transmitted so far to the Commission, we should try to return to the crux of the matter, namely, the equality and inequality of international organizations in relation to States. It must be admitted, in this connection, that in draft articles dealing with the regime of treaty instruments, rather than the general status of international organizations, it is indeed equality that should come first, since the whole regime of treaty commitments itself is based on the freedom and equality of parties. While this premise is indisputable,<sup>79</sup> it does involve a major limitation from the outset. As far as accession to open multilateral treaties is concerned, there is a distinct tendency to open them to all States, and often some go so far as to say that all States even have a right to become parties to such treaties, but no one has ever invoked or even sought to invoke the principle that international organizations have a right or, for that matter, a disposition to become parties to open multilateral treaties. This is so self-evident that there is no need to give the reasons. On the contrary, international practice is visibly limiting accession by organizations to such treaties to well-defined categories of organizations or expressly designated organizations. Moreover, as we shall see later, specific conditions are often attached to their accession.

60. In examining the reasons that would none the less justify a regime of inequality at the expense of international organizations, we shall begin with one reason which is most often just suggested; it involves what might be described as the constitutional nature of international organizations. It is argued that the constitutional status of such organizations is fraught with uncertainties; their constituent instruments contain only sketchy provisions concerning their international commitments (when they contain any at all); it would be difficult to find one constituent instrument that includes a provision concerning reservations to treaties concluded by the organization. In the face of this uncertainty, some say it would be reasonable to limit, as far as possible, the right of international organizations to formulate reservations. Strangely enough, a line of argument based on the same facts has also been developed to support a diametrically opposed contention,<sup>80</sup> the point being made that collective

organs composed of government representatives are often faced with a choice between purely and simply rejecting or accepting the treaty as is.

61. While there is some merit in all these ideas, no absolute conclusions can be drawn from them. A regime for reservations cannot be established—in one way or another—on the basis of the risk which organizations would run of violating their constituent charters. If indeed such a principle were to be followed, organizations would have to be prohibited not only from formulating reservations, but purely and simply from concluding international treaties, and the thousands of treaties concluded to date by international organizations would never have seen the light of day.<sup>81</sup> On the other hand, if the option to formulate reservations is to be granted because of that risk, it should be granted in all cases and without any restriction at all. Accordingly, absolute and diametrically opposed conclusions may be drawn from the same situation.

62. Of greater importance are the ideas that could be prompted by another situation clearly illustrated in practice—the simultaneous participation in a convention of an organization and all its member States<sup>82</sup>—a situation which has specific implications for the other parties to the treaty. This situation could indeed give rise to the objection that the same States might seek to play a twofold part, in the performance of the treaty and in the administration of any organization established thereunder, thus participating severally as parties and again by acting collectively through an international organization. This objection has so far been voiced very strongly, and has been met by various mechanisms that give the

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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", (*Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (2) of the commentary to art. 19).

Written comments of the ILO:

"... from a practical point of view, the proposed rules could result in the organization's refusing to participate in the treaty at all until the reservation on the point at issue is authorized. This would be so, in particular, where organizations whose freedom of action is circumscribed by the terms of their constitution find that particular treaty provisions are not wholly consistent with those terms; it is not altogether fanciful to envisage such an occurrence." (*Yearbook ... 1981*, vol. II (Part Two) annex II, sect. B.2, para. 13).

<sup>81</sup> It would be beyond the scope of this report to examine, even superficially, the number, variety and complexity of treaty commitments governed by international law to which international organizations will be parties within the framework of the regime for the exploitation of the sea-bed instituted by the Third Conference on the Law of the Sea or under the Common Fund for Commodities. As far as the Fund is concerned, article 41 of the Agreement establishing it gives it "full juridical personality, and, in particular, the capacity to conclude international agreements with States and international organizations", and it is virtually inconceivable that the Fund's freedom of action could be limited without reasons of substance. See *Agreement Establishing the Common Fund for Commodities*, adopted at Geneva on 27 June 1980 (United Nations publication, Sales No. E.81.II.D.8).

<sup>82</sup> There is no need to examine here a hypothetical situation which is more complicated, but of which there are examples, namely, that of a treaty which has among its parties an organization and some of its member States (see *Yearbook ... 1977*, vol. II (Part Two), p. 108, footnote 458).

<sup>79</sup> See the written comments of the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

<sup>80</sup> Report of the Commission on its twenty-ninth session:

"It was pointed out ... that the opportunity for an international



participation of the organization a necessary distinctiveness.<sup>83</sup>

63. Apart from these political aspects, there are various technical issues arising out of such a situation. The crux of the matter is that it is difficult to divorce the exercise of the competence of the organization from the exercise of that of its member States. One can think of certain situations in which the problem would not arise.<sup>84</sup> For example, if the United Nations was responsible for administering a territory and became a party to a convention on the protection of nature as regards that territory, there would be no interference between the competence of the United Nations and that of its Member States which are parties to the same convention. However, the dividing line between the competence of the organization and that of the member States is frequently blurred. Moreover, it is often necessary to co-ordinate the exercise of the competence of the organization with that of its member States. The problem arising with regard to reservations is thus clear. If, on the one hand, the organization formulates reservations, and, on the other hand, the member States also formulate reservations, a confused situation full of contradictions is sometimes likely to result.<sup>85</sup> All the same, we should not assume that in a situation of this kind one need only deny the organization the right to make reservations; if it does not have this right, the reservations formulated by States will fail in their purpose, inasmuch as the exercise of the competence of States is bound up with the exercise of that of the organization. In fact, the organization must enjoy the same right as States, but at the same time, if the exercise of that right is to be consistent with the object and purpose of the treaty, it must be co-ordinated.<sup>86</sup> Failing this, the right cannot be invoked against the other parties to the treaty. The problem could therefore be solved on the basis of the general principles regarding reservations.

64. In this connection, the importance, both for international organizations and for States, of the restriction relating to respect for "the object and purpose of the treaty" should be stressed. Admittedly, this restriction has been criticized on the grounds that it is vague.<sup>87</sup> If this

criticism were to be entertained, the entire Vienna Convention would be called into question—not only the articles dealing with reservations, but also, *inter alia*, articles 18, 31, 41 and 58, and article 60, subpara. 3(b). If the Vienna Convention repeated so consistently a form of wording actually used by the International Court of Justice in connection with reservations, it did so not without good reason: it used general wording so as to avoid introducing numerous subdistinctions in all possible categories of treaties. It was through a deliberate choice of legislative policy that the Convention avoided introducing such distinctions and even refrained from using, in connection with reservations, the most conventional of distinctions, namely, the one dealing with bilateral and multilateral treaties. It might seem as if, with regard to treaties between States and international organizations, every effort is being made to find and mention cases in addition to the one that is referred to in article 19 *bis*, paragraph 2. Despite the wish expressed by some Governments, the Special Rapporteur did not take that approach, because such an investigation would not be in the spirit of the Vienna Convention, which sought to allow practice of some measure of freedom so that the general principles laid down in the Convention could be given concrete application.

#### *Conclusion: possible solutions*

65. Two successive choices must be made. First, it is essential to choose a general rule of principle: freedom to formulate reservations, or no reservations permitted. Once this choice has been made, it must be admitted that there are exceptions to the rule chosen. These exceptions (and this is where the second choice comes in) may in turn be stated in general terms or listed in detail. As far as the first choice is concerned, the first version of the draft articles which now stand before the Commission opted for the freedom to formulate reservations; as far as the second choice is concerned, the exception is stated in rather general terms. The Special Rapporteur, for his part, does not think it advisable to change these basic alternatives.

66. Thus, only two questions remain to be considered. The first relates to the wording used in article 19 *bis*, paragraph 2, which has rightly been described as unclear. As noted on several occasions in the foregoing text, the current wording concerns treaties in which two or more States entrust an organization (rarely two or more organizations) with a new function, namely, that of ensuring that those States observe and fulfil the obligations they have assumed in the treaty. Thus, the organization is not placed on the same footing as the States; it performs a supervisory function with regard to them. That function is closely linked to the object and purpose of the treaty: the States would not have accepted those obligations had there not been an international organization to supervise their fulfilment. The organization can refuse to accept the responsibilities entrusted to it, it can request during the negotiations that those responsibilities be modified, but once the treaty has been adopted the organization naturally cannot call in question, by formulating reservations, the scope of an international supervisory mechanism.

<sup>83</sup> An example was already given earlier (see footnote 74 above). For a more recent example, see the Convention on the Conservation of Antarctic Marine Living Resources, signed at Canberra on 20 May 1980, art. XII, para. 3 (*International Legal Materials* (Washington, D.C.), vol. XIX, No. 4 (July 1980), p. 849).

<sup>84</sup> There are instances where the parties have taken the view that problems did not arise; at least this is the conclusion that can apparently be drawn from the provisions of the Convention on Long-Range Transboundary Air Pollution of 13 November 1979 (ECE/HLM.1/2, annex I), which is open to organizations composed of sovereign States members of the Economic Commission for Europe. According to art. 14, para. 2, if the organization exercises its rights, the member States cannot exercise theirs.

<sup>85</sup> See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 171–173.

<sup>86</sup> This indeed is what actually happens with regard to reservations and objections to reservations (see para. 58 above).

<sup>87</sup> See the written comments (sect. II, para. 8) of the Federal Republic of Germany concerning the articles dealing with reservations (*Yearbook . . . 1981*, vol. II (Part Two), annex II, sect. A.7).

ism, which is always the result of a delicate adjustment process. If this line of reasoning is accepted, the current wording could be improved by amending it to read: "When, by reason of the functions entrusted to it by the treaty with regard to the application of the latter by States, the participation of an organization is essential to the object and purpose of the treaty . . .".

67. The second question relates solely to drafting matters. It would indeed be very useful to simplify the current wording of the articles on reservations, for they are hard to read and hence, hard to follow. The text can be simplified, provided that the Commission is not averse to drastic changes. However, the Special Rapporteur will bear in mind the need to be clear and the fact that the Commission may not wish to depart radically from the text already adopted. He will therefore submit alternative versions where appropriate.

### *Article-by-article review*

**ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations) and**

**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)**

68. In accordance with the foregoing, and provided that the Commission decides to maintain the structure of the current wording, paragraph 2 of article 19 *bis* would read as follows:

**When, by reason of the functions entrusted to it by the treaty with regard to the application of the latter by States, the participation of an organization is essential to the object and purpose of the treaty, 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.**

69. The current wording can nevertheless rightly be criticized as being somewhat unclear and unnecessarily cumbersome. It is unclear because the current wording of article 19 *bis*, paragraph 2, when compared with that of paragraph 3, leads to the conclusion that the formulation of reservations by international organizations is subject to the same principles as the formulation of reservations by States—with one exception, that set forth in paragraph 2. It would be highly desirable to say this in a simpler way. The text is unnecessarily cumbersome because the distinction between the two categories of treaties is not of fundamental importance in this context. Articles 19 and 19 *bis* can therefore be merged and the text considerably simplified as follows:

### *Article 19. Formulation of reservations*

**1. 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.<sup>88</sup>**

**2. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty, may formulate a reservation within the same limits as those set for States in paragraph 1, subparagraphs (a), (b) and (c); it may not do so when, by reason of the special functions entrusted to it by the treaty with regard to the application of the latter by States, the participation of the organization is essential to the object and purpose of the treaty.**

70. The wording given above could be further simplified without making any substantive changes, and the article, with the same title, would then read:

**A State or an international organization, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, 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; this is so in the case of an international organization when, by reason of the special functions entrusted to it under the treaty with regard to the application of the latter by States, the participation of the organization is essential to the object and purpose of the treaty.**

### *ARTICLE 19 ter (Objection to reservations)*

71. If one refers to the relevant passage in the report of the Commission,<sup>89</sup> it is clear that the latter did not adopt that article provisionally without some doubt or hesitation. The reasons for those doubts, as expressed in the commentary to article 19 *ter*, must be reviewed. The Vienna Convention contains no definition of the notion of an "objection" and no text analogous to article 19 *ter*; in that Convention, the regime concerning objections to reservations derives from articles 21, 22 and 23. In a footnote to that commentary,<sup>90</sup> doubts are expressed as to whether a distinction should be drawn between cases where a State bases its opposition to a reservation on the ground that it is not authorized under the treaty and cases in which the reason for the opposition is "the mere defence of an interest". A review of practice and further reflection have led the Special Rapporteur to conclude that such considerations are superfluous and probably groundless.

72. It must be observed, first, that under the regime of the Vienna Convention the effects of a simple objection are not radically different from those of acceptance. The

<sup>88</sup> This paragraph 1 is identical to article 19 of the Vienna Convention.

<sup>89</sup> See *Yearbook . . . 1977*, vol. II (Part Two), pp. 110–111.

<sup>90</sup> *Ibid.*, p. 110, footnote 467.

hypothetical case mentioned in the aforementioned footnote in which a State lodges an objection to a reservation while acknowledging that the latter is authorized under the treaty is somewhat gratuitous,<sup>91</sup> since the State would thus be acknowledging that it could not even request that the reservation be withdrawn. The only remaining hypothetical case is that in which a State not only objects to the reservation, but makes an express declaration to the effect that its obligation will prevent the treaty from entering into force with the reserving State, while acknowledging that its objection is designed merely to defend its own interests and that the reservation is perfectly legitimate. This, too, is an academic hypothesis, for a State will always seek to justify so serious a decision by a reference to law. Indeed, practice shows that legal reasons are always given for objections. This view is fully confirmed by the limited number of precedents concerning objections lodged by international organizations which are referred to above (paras. 53 *et seq.*). This has an important consequence: objections are always based on juridical allegations.

73. The Vienna Convention did not dwell on the question of the entities entitled to lodge an objection, for the simple reason that the power to object is linked to the status of signatory, contractor or party to a treaty in a natural and indissoluble manner. It constitutes a right which is even broader than the right to formulate a reservation, since in most cases an objection constitutes a response to an allegedly unlawful act, namely the formulation of the reservation. Thus, when a treaty prohibits reservations and a State party associates its commitment with a declaration, there is nothing to prevent its partners from demonstrating that its declaration in fact constitutes a reservation and objecting to that "declaration".

74. It is clear from the foregoing that, from the time when they embark upon the course of becoming parties or have become parties, international organizations have an unconditional right to lodge objections, irrespective of the solution adopted concerning their right to formulate reservations. That being so, article 19 *ter* is in any event superfluous, and the Special Rapporteur suggests that it should be deleted. This would make it possible to follow the Vienna Convention more closely and in a simpler manner.

**ARTICLE 20 (Acceptance of reservations in the case of treaties between several international organizations) and**

**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)**

75. These articles raise a substantive problem and a drafting problem, which must be considered separately. A

<sup>91</sup> This case was admitted in theory by the Expert Consultant at the Conference on the Law of Treaties. See *Official Records of the United Nations Conference on the Law of Treaties, First Session. Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 133, 25th meeting of the Committee of the Whole, para. 3.

number of Governments and one international organization (Byelorussian SSR, Ukrainian SSR, USSR and CMEA) criticized, in their written comments,<sup>92</sup> the final provisions of both draft articles, requesting that the provisions relating to the presumption of acceptance of reservations by international organizations after the expiry of a period of twelve months should be deleted. The reasons adduced for objecting to the solution arrived at are largely the same; they are based on a position of principle strikingly formulated by the Soviet Union:<sup>93</sup>

It would seem that any actions by an international organization relating to a treaty to which it is a party must be clearly and unequivocally reflected in the actions of its competent body.

Consequently, provisions which should not be accepted are those which

allow the tacit acceptance by international organizations of reservations without their clearly expressed consent to a particular reservation made by a party to a treaty to which the organization is a party.

The point of principle invoked as the basis for the observation certainly has merit and makes it necessary to review the question.

76. It is worth while to recapitulate the antecedents of the question for treaties between States.<sup>94</sup> The tacit acceptance of reservations was introduced in international practice, *inter alia*, by the depositaries, from the time when the number of parties to multilateral treaties increased, although some writers and some countries, including France and the United States of America, objected to such a principle. At the time of the first report on the law of treaties, Sir Humphrey Waldock introduced the machinery for a tacit acceptance of reservations.<sup>95</sup> In their written comments, Australia, the United Kingdom and the United States of America evinced some reluctance; the wording of the article in question was amended, but without affecting the principle itself.<sup>96</sup> The Commission's draft no longer presented any major difficulty at the Conference on the Law of Treaties. Certainly the proposed new system in respect of reservations would have led to an odd situation of uncertainty if, following the formulation of a reservation, the other States were to have remained silent. Such a situation cannot last long in the case of a treaty concluded between a small number of participants because the entry into force of the treaty dispels the uncertainty, but for an open multilateral treaty it would often have been necessary to wait a long time before knowing what the contractual status of the treaty was if a rule such as that proposed by the Commission had not been adopted<sup>97</sup> (see para. 78 below). Some delegations

<sup>92</sup> See *Yearbook . . . 1981*, vol. II (Part Two), annex II, sects. A.2, A.12, A.13 and C.1, respectively.

<sup>93</sup> *Ibid.*, sect. A.13, para. 2.

<sup>94</sup> See Imbert, *op. cit.*, chap. II, sects. I and II B.

<sup>95</sup> *Yearbook . . . 1962*, vol. II, p. 61, document A/CN.4/144, art. 18, para. subpara. 3(b).

<sup>96</sup> See *Yearbook . . . 1965*, vol. II, pp. 53–54, document A/CN.4/177 and Add.1 and 2, para. 17.

<sup>97</sup> Few delegations emphasized the disadvantages of this situation (see, however, the statement by Mr. Sepúlveda Amor on behalf of Mexico in *Official Records of the United Nations Conference on the*

even lauded tacit acceptance.<sup>98</sup> Finally, the text as a whole was adopted at a plenary meeting by 83 votes to none, with 17 abstentions, paragraph 5 having occasioned very few comments.<sup>99</sup>

77. This brief reference back to the origin of article 20, paragraph 5 of the Vienna Convention enables some elements of the question to be clarified. From the practical point of view, the specific circumstances in which this article will apply must be borne in mind. First of all, paragraph 5 provides for two distinct hypotheses depending on whether the State expressing its consent to be bound by the treaty is already notified of the reservation formulated or has not yet been notified. In the former case, it cannot be said that there is truly tacit acceptance because, as was pointed out, there is, rather, implicit acceptance by a formal act. Actually the competent authorities of the State have been perfectly aware of the reservation and they subsequently commit themselves in full knowledge of the facts. International practice proves that in this case States like to remain silent on the reservations because they accept them; hence it cannot be said that their acceptance is not established by a formal act. On the other hand, when the reservation is formulated after consent to be bound has been given by another State, silence on the latter's part is really tantamount to tacit acceptance without any formal act.

78. It may then be asked what the situation would be if article 20, paragraph 5, did not exist. Obviously this would create some uncertainty so long as States other than the one which formulated the reservation did not reveal their position; the uncertainty would be most serious for treaties which require the consent of all signatories for their entry into force. Could it be said that the treaty has really entered into force if all the States have consented to be

bound but if one has remained silent on a reservation made by another of them? Would the silent State thus retain indefinitely the right to enter an objection by declaring, in support of its objection, that it did not consider the reserving entity to be a party to the treaty? In other words, would it retain indefinitely the right to terminate the treaty by an act implying that the treaty had never been concluded? This situation is largely imaginary, because treaties are made to be applied and because the State remaining obstinately silent would nevertheless be obliged either to apply or not to apply it. But could it apply the treaty by declaring that, while it had not taken a position on the reservation, it would apply it only provisionally? Such a declaration could be interpreted as a refusal to consider itself bound. These remarks show that, when the treaty is intended to bind only a small number of parties, the difficulties are necessarily quickly resolved. Actually, the most important point of article 20, paragraph 5, concerns open general multilateral treaties, for which the entry into force question is of a different nature.

79. The foregoing points are valid for treaties to which international organizations are parties. It must therefore be acknowledged that for them the problem is rather minor from the practical point of view, because there are not, and probably never will be, many open multilateral treaties to which they may be called upon to become parties. It can rightly be said that for them, as for States, if the relevant paragraph of article 20 had established that silence on a reservation is equivalent to objection they could subsequently have changed their position because, unlike acceptance, objection is not definitive, but to equate silence with objection would have been contrary to the spirit of the Vienna Convention. Be that as it may, even if it were thought desirable to make a formal act mandatory for organizations and for them alone, it would be advisable to retain the rule laid down in article 20, paragraph 4, in cases where the wish to be bound is expressed subsequently to the reservation since, for them as for States, there is indeed a formal act in this case.

80. The theoretical explanation of the rule set forth in article 20 also raises some questions. Admittedly, the terminology of *tacit acceptance* has been used consistently, and that is due to the fundamental ambiguity of the Vienna Convention as regards the term "formulate" which means, depending on the circumstances and simultaneously, "propose" and "make", but the effect of paragraph 5 is simply to *place a time-limit* on the right to submit objections; hence any criticism prompted by the need to resort to certain forms is unconvincing. In fact, to subject international organizations to the rule laid down in paragraph 4 is to grant them an extraordinary privilege: whereas States forfeit the right to submit objections after one year, the international organizations would retain it indefinitely. Not only would the creation of such inequality be rather surprising, but it would also involve calling into question many solutions sanctioned by the draft articles. Indeed, whenever a time-limit expires and terminates the exercise of a right, it would be necessary to exempt the international organizations—*inter alia*, in the case of article 65, paragraph 2.

(Footnote 97 continued.)

*Law of Treaties, First Session, Summary records of the plenary meetings . . .*, p. 113, 21st meeting of the Committee of the Whole, para. 64). It should not be forgotten that it was not until its second session that the Conference radically changed the effects of an objection by accepting that, in the absence of an express declaration, the objection did not prevent relations under a treaty from being established between the reserving party and the objecting party.

<sup>98</sup> The USSR and Australia even proposed reducing the period from twelve to six months (*ibid.*, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 133, para. 175(a), and p. 136, para. 179, subpara. 1(v)(f), respectively. Mr. Khlestov (USSR) said he would have:

"thought it consistent with practice and in the interests of the stability of treaties to maintain the presumption that, in the absence of an expressed intention to the contrary, a treaty was in force between the objecting and reserving State." (*Ibid.*, *First session, Summary records . . .*, p. 134, 25th meeting of the Committee of the Whole, para. 18).

This was the solution which prevailed at the Conference, not without difficulty. But for this representative, one of the premises to this solution was tacit assent. Actually, he began by saying that "it would greatly simplify matters if tacit assent could be allowed as a method of accepting reservations" (*ibid.*). The representative of only one State (Trinidad and Tobago) strongly objected on principle to paragraph 5 (*ibid.*, *Second session, Summary Records . . .* (United Nations, Sales No. E.70.V.6), p. 35, 11th plenary meeting, para. 4).

<sup>99</sup> *Ibid.*, *Second session, Summary Records . . .*, p. 35, 10th plenary meeting, para. 82.

81. It is possible that, in the observations made on paragraph 4, the criticisms of the text may derive from questions of principle rather than from the specific problems it tries to solve. These questions of principle will be taken up in connection with article 45. Let it be noted simply that, however salutary and well-intentioned the principle on which the criticisms are based may be, it is very rare for a problem to be solvable by a single principle, for there are often several of them which need to be harmonized. The principle invoked is certainly equally valid for States, and it has been and still is acknowledged, with regard to article 20, that it should be brought into line with others, such as the principle whereby a legal entity is responsible for its conduct, or the principle urging each legal entity to define its juridical positions within a reasonable time.

82. For all the foregoing reasons, the Special Rapporteur is not convinced that any substantive amendment has to be made to articles 20 and 20 *bis*, especially as regards paragraph 4 in both texts.

83. Their wording can be considerably abridged by introducing the simplifications previously described and using the term "contracting entity" which was previously adopted. Articles 20 and 20 *bis* can be combined in a single article with the following title and text:

***Article 20. Acceptance of reservations and objections to reservations***

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting entities unless the treaty so provides.

2. When it appears from the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides,

(a) acceptance by another contracting entity of a reservation constitutes the reserving entity a party to the treaty in relation to that other contracting entity if or when the treaty is in force for those contracting entities;

(b) an objection by another contracting entity to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving entities unless a contrary intention is definitely expressed by the objecting entity;

(c) an act expressing consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting entity 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 entity 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.

**ARTICLE 21 (Legal effects of reservations and of objections to reservations),**

**ARTICLE 22 (Withdrawal of reservations and of objections to reservations),**

**ARTICLE 23 (Procedure regarding reservations in treaties between several international organizations), and**

**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)**

84. No substantive observation was made with regard to the other articles of the section on reservations (arts. 21, 22, 23 and 23 *bis*). The wording of these articles can be abridged in the same way as for the preceding articles; this entails a slight modification of article 21, paragraph 1; a slight modification of article 22, paragraph 1 and the combination of paragraphs 3 and 4 of article 22; and the combination of articles 23 and 23 *bis*; so that the titles and texts would read as follows:

***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:

...

[The rest of the article is unchanged]

***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 or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting entity only when notice of it has been received by that entity;

(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***

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 entities and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, formal confirmation, acceptance or approval, 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 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) *and*

ARTICLE 24 *bis* (Entry into force of treaties between one or more States and one or more international organizations),

ARTICLE 25 (Provisional application of treaties between international organizations) *and*

ARTICLE 25 *bis* (Provisional application of treaties between one or more States and one or more international organizations)

85. No substantive observations were made with regard to articles 24, 24 *bis*, 25 and 25 *bis*. The wording of these articles and of their titles may be simplified, and articles 24 and 24 *bis* and articles 25 and 25 *bis* may respectively be combined in a single article.

#### *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 participants in the negotiation may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the participants in the negotiation.

3. When the consent of a State or an international organization 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 or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of consent 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*

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 participants in the negotiation have in some other manner so agreed.

2. Unless the treaty otherwise provides or the participants in the negotiation have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or organization notifies the other States or organizations 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*) *and*

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

86. There is no question arising from article 26 and only one written comment, which was favourable, has been submitted on article 27, although in the Sixth Committee it gave rise to a broad exchange of views continuing and extended the discussions which took place in the Commission.<sup>100</sup> As has already been stated at length (see paras. 8 *et seq.* above), the Commission decided in 1977 to reconsider this text at the second reading. The basic question is whether the expression "rules of an ... organization" is correct in the case of article 27. It is apparent from the outset that this expression is too

broad, since it includes the rules of an organization in respect of its competence to conclude treaties, and an international organization has every right to invoke such rules to justify failure to perform a treaty. However, is it necessary to change the wording and replace it by an expression such as "rules of an organization other than those concerning the conclusion of treaties"? This seems doubtful as the present paragraph 3 makes a specific reservation relating to article 46. The matter thus becomes a question of drafting, since by dissociating the reservation relating to article 46 from the main statement, paragraph 3 leaves the impression that the main rule is too broad.

87. Another matter was raised by the ILO in its written comments:

Can changes in the rules of an organization subsequent to the conclusion of a treaty modify the obligations under the latter (and, given the mechanisms for making constitutional changes binding even on States which have not consented thereto, do so without the consent of all the parties thereto)?<sup>101</sup>

The Commission, had already raised this matter in its

<sup>100</sup> See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 179-183.

<sup>101</sup> *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.2, para. 15.

discussions in 1980<sup>102</sup> and again in its report.<sup>103</sup> While limiting itself in draft article 73 to including reservations relating to two examples of changes in the characteristics of international organizations, i.e. termination of the existence of organizations and termination of participation by a State member, it pointed out that those were merely examples. Since possible links between articles 73 and article 27 were mentioned in the discussions, it would seem advisable to make a reservation in article 27 not only in relation to article 46, but also to article 73.

88. From the drafting point of view, the concerns thus expressed might perhaps be resolved by mentioning article 46 not in a third paragraph, as in the present text, but at the beginning of both paragraphs 1 and 2. Also included in paragraph 2 would be the reservation relating to article 73. Without any change in title, and with the elimination of the square brackets around the words "article 46", article 27 would therefore read as follows:

#### *Article 27*

1. Without prejudice to article 46, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. Without prejudice to articles 46 and 73, 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.

### SECTION 2. APPLICATION OF TREATIES

ARTICLE 28 (Non-retroactivity of treaties),

ARTICLE 29 (Territorial scope of treaties between one or more States and one or more international organizations) and

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)

89. There has been no comment on articles 28, 29 and 30. The square brackets in paragraph 5 of article 30, where reference is made to articles 41 and 60, should be deleted, and only in paragraph 4 of article 30 may drafting changes be useful to simplify the wording considerably, as follows:

#### *Article 30*

...  
4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties which are each parties to both treaties, the same rule applies as in paragraph 3;

(b) as between two parties of which one is party to both treaties and the other to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

### SECTION 3. INTERPRETATION OF TREATIES

ARTICLE 31 (General rule of interpretation),

ARTICLE 32 (Supplementary means of interpretation), and

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

90. No observation has been made on articles 31, 32 and 33, which are identical to the corresponding texts in the Vienna Convention, and they require no comment or change.

### SECTION 4. TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS

ARTICLE 34 (General rule regarding third States and third international organizations),

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations),

ARTICLE 36 (Treaties providing for rights for third States or third international organizations), and

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

91. All the difficulties as regards substance have centred around article 36 *bis*, both in the Sixth Committee and in the written comments. For the moment, only minor points on drafting matters will be made until article 36 *bis*, which needs to be re-examined, is taken up. The first point is that article 36 *bis*, even with a new, amended text, will be kept in square brackets until the Commission reconsiders the decision it took in 1978;<sup>104</sup> obviously, this will also apply to the *renvois* in the articles (35, 36 and 37) as required. In addition, the wording of article 34 may be simplified by reducing it to a single paragraph, as follows:

#### *Article 34.*

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

92. Article 36 *bis* was discussed in the Sixth Committee not only in 1978,<sup>105</sup> but also, and extensively, in the following years.<sup>106</sup> It is not possible to do justice in a few

<sup>102</sup> See in particular the statements of Mr. Ushakov (*Yearbook ... 1980*, vol. I, p. 42, 1591st meeting, paras. 44–46) and the Special Rapporteur (*ibid.*, pp. 44–46, 1592nd meeting, paras. 6–16).

<sup>103</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 93, para. (10) of the commentary to art. 73.

<sup>104</sup> See *Yearbook ... 1978*, vol. I, p. 203, 1512th meeting, para. 41.

<sup>105</sup> See *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 233–248.

<sup>106</sup> See "Topical summary ..." (A/CN.4/L.311), paras. 177–180, and "Topical summary ..." (A/CN.4/L.326), paras. 180–184.

pages to a discussion of exceptional density, but three positions may be said to have emerged, reflecting schools of thought which had already become apparent in the Commission. One position is that article 36 *bis* is only concerned with the problems peculiar to economic integration systems which have gone beyond the stage of international organizations and that, without even going into its merits, it should be omitted from the draft articles. A second position favours such an article. A third position, sometimes overlapping with the second, recognizes that a problem does exist but considers it a complex and difficult one and is not sure that the current formulations for article 36 *bis* are satisfactory.

93. The written comments of the Byelorussian SSR, the Ukrainian SSR, the USSR and CMEA reflect the first position: one pointed comment of the USSR states that this article "goes beyond the scope of the questions to be dealt with in the draft".<sup>107</sup> The comments from the Federal Republic of Germany and EEC reflect the second position,<sup>108</sup> and the Canadian comments tend more towards the third.<sup>109</sup> The comments by the ILO are on the whole unfavourable, because:

the ILO does not, at present, have experience which could throw any light on the needs which might call for provisions of the kind envisaged in possible article 36 *bis*.<sup>110</sup>

Further, the ILO's comments do not seem to favour interpreting headquarters agreements between an organization and a host State to mean that such agreements would give rise to obligations on the part of member States vis-à-vis the host country.<sup>111</sup> The comments from FAO,<sup>112</sup> seem to indicate that, in a number of cases, treaties concluded by an organization give rise to rights and obligations on the part of member States, but that this has not caused any particular problem—a valuable observation because it suggests that the agreements adopted on theoretical grounds may give rise to problems which are easier to solve in practice.

94. It may be worth while in the present circumstances for the Commission to begin by taking stock and trying to show what the problem actually is. The Vienna Convention adopted very strict and very simple rules: for the purposes of treaties an entity must be either a "contracting" or a "third" party, and treaties do not affect third

parties. While this solution is generally foolproof, it does not cover all eventualities in international law, in the case of the succession of States, for example, there has had to be partial recourse to other solutions. In considering the effect on treaties of the existence of international organizations, it has to be decided whether an international organization is to be deemed a "third party" vis-à-vis the inter-State treaty establishing it and should therefore have to accept, expressly and in writing, the obligations which the treaty imposes on it.<sup>113</sup> It must be realized that the relationship between an organization and its membership may lead, where treaties are concerned, to delicate and awkward problems, some of which are forestalled by draft article 73, as pointed out apropos of article 27 (see paras. 87 and 88 above).<sup>114</sup> It might, on the other hand, seem rather odd to omit from the draft articles all problems which actually do relate specifically to the substance of treaties involving international organizations.<sup>115</sup>

95. The question dealt with in article 36 *bis* is only one of the problems surrounding treaties to which international organizations are parties. Article 36 *bis* concerns the consequences for member States of treaties concluded by an international organization. Can such treaties have consequences for member States? In order to avoid confusion, the nub of the question has to be made specific. The problem is not whether the conclusion of such a treaty can have *de facto* consequences for member States; this is obviously so. If an organization concludes a treaty with a non-member State which has repercussions on its finances, and if its funds are contributed to by member States (as is normal), there may be financial repercussions on the latter. Nor is the problem whether the treaty can have *de jure* consequences in the relations between the organization and its member States. That depends on the relevant rules of each organization, not on general international law. It is certainly hard to imagine that certain modes of behaviour would not be condemned by the principle of good faith, for example if member States were to seek to block the implementation of treaties duly concluded by an organization of which they were members. Likewise, most

<sup>107</sup> See *Yearbook . . . 1981*, vol. II (Part Two), annex II—comments of the Byelorussian SSR: sect. A.2, para. 3; of the Ukrainian SSR: sect. A.12, para. 3; of the USSR: sect. A.13, para. 1; of CMEA: sect. C.1, para. 3.

<sup>108</sup> *Ibid.*, Federal Republic of Germany: sect. A.7, II, para. 14; EEC: sect. C.2, III, paras. 11–18.

<sup>109</sup> *Ibid.*, sect. A.3, paras. 9–10.

<sup>110</sup> *Ibid.*, sect. B.2, para. 19.

<sup>111</sup> It is quite possible for an international organization to opt to deal exclusively with the host State in the event of difficulties over member States' observance of the obligations set forth in the headquarters agreements. However, another, equally possible solution was endorsed by the 1975 Vienna Convention (see footnote 21 above); according to this Convention, difficulties in implementation are essentially the concern of the host countries and member States.

<sup>112</sup> See *Yearbook . . . 1981*, vol. II (Part Two), annex II, sect. B.3, para. 5.

<sup>113</sup> In his second report the Special Rapporteur elaborated on these questions at length, leaning ultimately towards a different solution from that proposed in article 36 *bis* (*Yearbook . . . 1973*, vol. II, pp. 89–93, document A/CN.4/271, paras. 89 *et seq.*).

<sup>114</sup> During the Sixth Committee's discussions in 1980, one representative pointed out that article 73, para. 2, ought to be reconsidered, especially in view of its close relationship with article 36 *bis* (see "Topical summary . . ." (A/CN.4/L.326), para. 216). If the Commission finally decided not to include a provision in the same vein as article 36 *bis* in the draft articles, it would then have to decide whether to include a reservation on such problems in article 73.

<sup>115</sup> None the less, there are many questions which cannot be taken up in the draft articles. For treaties between States, any contradiction between a treaty between State A and State B and a treaty between State A and State C presents tricky problems, which the Vienna Convention chose not to tackle. Do they arise in the same terms if B is an organization and C a State member of that organization? See the written comments (sect. I.7) of the Federal Republic of Germany (*Yearbook . . . 1981*, vol. II (Part Two), annex II, sect. A.7).



instruments of association contain a more or less explicit *obligation* incumbent on member States *to co-operate* for the benefit of the organization;<sup>116</sup> and it must be recognized that States members' obligations will vary from one organization to the next and that the extent of their obligations vis-à-vis the organization in the case of treaties concluded by the organization must therefore be left to the "relevant rules of [each] organization". So this is not the matter at issue which will arise from the draft articles before the Commission.

96. The real question which may be dealt with in article 36 *bis* is how *direct* relationships can evolve between States members of an organization and parties other than the organization to a treaty concluded by the organization. The ultimate source of such direct relationships is clear: it can only be the consent of all interested parties. There seems to be no doubt on this principle. But having accepted this, the question is in what form and in what manner consent may be given.<sup>117</sup> This is the crux of the matter. If it is felt that articles 35 and 36 can cope with it adequately, article 36 *bis* is clearly useless. The only justification for article 36 *bis* would then be circumstances in which the conditions laid down in draft articles 35 and 36 seemed too exacting and inappropriate to the situation. This is the essence of the current question about the two sets of consent required: from the parties to the treaty and from the organization's member States.

97. If the parties to the treaty intended to establish rights and obligations for the benefit of the States members of the organization, the rules that apply are those of ordinary law. The intent may be expressed more or less directly; it may also derive from the very aim and purpose of the treaty. What is beyond dispute is that the functions of international organizations lead them to conclude treaties which by their very nature will establish rights and obligations for their member States. This is the case with headquarters agreements between an organization and a host State; this is the case when an international organization is empowered to conclude certain agreements on economic matters, for the implementation of which States members are at least partially responsible. The intent of the parties to such treaties to establish rights and obligations for member States must be defined according to the normal rules on the interpretation of treaties.

98. Here the focus is on the consent of States members of an organization, since they are in the position of third parties and it is on the subject of their consent that draft articles 35 and 36 impose special rules, which are different for rights and obligations. When it is a matter of establishing rights, consent is subject to the most liberal regime

imaginable, since it is presumed; when it is a matter of obligations, consent is subject to more rigorous conditions since it must be *expressly stated in writing*. The immediate consequence of this simple point, as far as the establishment of rights for member States is concerned, is that a special draft article—an article 36 *bis*—is unwarranted. Additionally, although this is a secondary point, when rights are established they are most often indissolubly bound up with obligations, making the stricter regime—the one governing obligations—the applicable one. It was on these grounds that the draft article 36 *bis* taken up in first reading mentioned both obligations and rights; but in the interest of strict textual accuracy, mention need only be made of obligations, and the comment on the subject made in the Commission can be borne in mind. At all events, one thing is certain: the utility of article 36 *bis* has to be considered in the light of the rules laid down to cover the establishment of *obligations*.

99. How should the words "expressly in writing", which qualify acceptance with respect to the establishment of obligations, be interpreted? The *travaux préparatoires* of the Vienna Convention shed little light on this expression. The text prepared by the Commission confined itself to "expressly accepted".<sup>118</sup> Only at the last minute, at a plenary meeting of the Conference on the Law of Treaties, was the requirement that it should be in writing inserted.<sup>119</sup> The Vienna Convention has entered into force as a treaty; its interpretation is henceforth a matter for States parties. But that interpretation cannot but reflect whatever interpretation is subsequently placed on the same wording in draft article 35, which is closely modelled on the Vienna Convention. That the term might be deemed to require a written communication in the form of an "instrument", subsequent to the conclusion of the treaty, cannot therefore be ruled out. This would exclude all cases where there was no formal communication, the written statement simply taking the form of minutes rather than of a document drawn up for the specific purpose of giving written assent, and it would also preclude assent given in a written form but deviating from the procedure for concluding a treaty. It is here precisely that the Commission has a choice: either it finds that member States must be protected in the most strictly formal manner with respect to any commitment that might arise from their membership in the organization, because vis-à-vis its treaty commitments they are third parties in the fullest sense of the term—in which case article 36 *bis* should be eliminated on principle—or it considers that the solidarity and close ties which exist between an organization and its member States justify their giving their assent in a less

<sup>116</sup> See P. Reuter: *Introduction au droit des traités* (Paris, Armand Colin, 1972), p. 124, para. 183.

<sup>117</sup> All States members of an organization can, of course, be required to participate in the treaty *as parties* ("mixed agreements"), which eliminates the problem; but it creates others in their stead, and the procedure is so cumbersome as to create serious disadvantages. This question was raised in some oral and written comments, but it seems to lie beyond the scope of the draft articles.

<sup>118</sup> *Yearbook . . . 1966*, vol. II, p. 227, document A/6309/Rev.1, part II, chap. II, art. 31.

<sup>119</sup> The representative of Viet Nam who introduced this amendment merely stated: "The words 'expressly accepts' could be understood in the widest sense as embracing acceptance by solemn declaration or any other form of oral acceptance which did not provide the necessary safeguards." The amendment was adopted by 44 votes to 19, with 31 abstentions. See *Official records of the United Nations Conference on the Law of Treaties, Second session, Summary records . . .*, p. 59, 14th plenary meeting, para. 5.

formal manner in respect of the effects on them of treaties concluded by the organization of which they are members, yet without sacrificing the principle. In this case, an article 36 *bis* has a place in the draft articles, subject to eventual discussion of its exact tenor. When the Commission considered draft article 36 *bis* in first reading, it chose the second alternative. It discussed two cases in which this flexible approach to assent seemed to meet the practical requirements, namely the two cases dealt with in subparagraphs (a) and (b), which need to be commented upon and critically scrutinized.

100. The case for which provision is made in subparagraph (a) of article 36 *bis* is one where the rules of the organization provide that the States members are bound by the treaties concluded by it. Such a formulation has a twofold effect: on the one hand, it governs the relationship between the organization and its members and, on the other, with respect to the parties to treaties concluded by the organization it constitutes prior blanket acceptance of whatever obligations may be set forth in the treaties by that organization. There is certainly assent, but it has a number of peculiar features in that it is given *ex ante*, not *ex post* as is usual. In fact, in order to conclude this collateral instrument linking the members of the organization to its treaty partners, it is the members of the organization which, in the first instance, have to enunciate the principle of consent which will subsequently be given concrete expression through the conclusion of the treaties of the organization.

101. The case for which provision was made in subparagraph (b) of article 36 *bis* at the time of the first reading of the article concerns the hypothesis that "the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects", that is to say, gives rise to obligations on the part of States members. So in what manner is the required assent expressed here? The key to the answer lies in the fact that there are situations where, as already indicated (para. 97 above), it is the treaty which, by its very purpose, *entails* such assent. In this case, we are dealing with something more than a *presumption*, because a presumption, by its very nature, can be invalidated if the contrary can be indicated. What we have here is a situation in which the very purpose of the commitments precludes the treaty from not being binding on member States. Several examples of this can easily be found. For instance, in a customs union which includes an organization competent to conclude tariff agreements with third States, it is the member States which collect the customs revenues through their agents; it would be inconceivable for one of those States to refuse to grant an exemption authorized under a duly concluded tariff agreement which it had had no part in negotiating and to which it had not expressly given its written consent. Likewise, in the case of a headquarters agreement concluded between a host country and an international organization and involving particular obligations on the part of States members of that organization vis-à-vis the host country, it would be unimaginable for member States that recognized the full validity of the headquarters

agreement to refuse to honour such obligations on the ground that they had never explicitly accepted them in writing. These are not theoretical questions. Recourse, through arbitration or even judicial remedy, may be available to a State which has successfully negotiated a tariff agreement with an organization, vis-à-vis a State member of the organization which fails to comply with the agreement, while such recourse is unavailable vis-à-vis the organization.

102. In this case, every assent required in order to impose obligations on States members of an organization therefore derives from an *implication*, and this implication is equally valid for the assent of the organization and of its treaty partners, on the one hand, and for the assent of the States members of the organization, on the other. This does not mean that the implication does not have to be recognized,<sup>120</sup> but recognition is not subject to any formalities and, for this reason, subparagraph (b) uses the term "acknowledged", which here has the same connotation as "recognized". Since this "acknowledgement" requires the assent of all interested parties, there would have to be reference not only to the organization and its treaty partners, as in subparagraph (b), but also to the members of the organization. If objections were to be raised to the very notion of "implication", the analysis could be simplified and, though the reference to the notion of "implication" reflects the true nature of the situation, it could be dropped and a much simpler approach adopted, giving members of the organization more flexibility in the matter of assent. It would then have to be made clear that assent may be constituted by "any unequivocal manifestation" of such assent. The reference to a "manifestation" would exclude implied or presumed assent but, by qualifying it as "unequivocal", there would be no mention of any particular form of assent.

103. In conclusion, an article 36 *bis* does not really purport to revolutionize the fundamental principles underlying the law of treaties. It acknowledges that for a treaty to take effect with regard to a State which is not a party thereto,<sup>121</sup> but which is a member of an organization which is party thereto, the State must assent in some form. Article 36 *bis* is designed to make that assent more flexible. The basic reason for such flexibility is that the relations established between an organization and its member States create particular conditions whereby excessive formality is not only unnecessary but a seemingly unjustifiable obstacle to the functioning of international organizations.

<sup>120</sup> As usual, there are some obvious cases and others that are less obvious. The first example given above (case of the customs union) (para. 101) leaves no room for doubt; the second (headquarters agreement) will depend on the actual stipulations of the agreement. Conceivably an organization might wish to maintain a monopoly on relations with the host country and, as a consequence, claim that the latter cannot have direct recourse to a remedy against any member State which may fail to fulfil its obligations under the agreement.

<sup>121</sup> In theory, the case of an international organization which is a member of another organization is conceivable, but it was felt that there was no need to complicate the text. In a case of this nature, the member organization would be in the same situation as member States and the same rules would apply to it.

104. A new text of article 36 *bis* is proposed below. Compared with the version submitted at the first reading, it presents three changes of varying importance. First of all, it makes it formally explicit that the assent of members of an organization is necessary before the treaties of the organization create obligations for them. Secondly, it no longer mentions the establishment of rights, but covers only the establishment of obligations, and thus takes account of the comment made by some of the Commission to the effect that no specific provision was necessary to facilitate the establishment of rights, given the liberal provisions of article 36. Thirdly, in subparagraph (b), States members of the organization have been added to the States and organizations participating in the negotiation of the treaty. It is only natural that they too should acknowledge that the treaty entails certain obligations for the States members of the organization. The text of article 36 *bis* would thus read as follows:<sup>122</sup>

#### **Article 36 bis**

**The assent of States members of an international organization to obligations arising from a treaty concluded by that organization shall derive from:**

**(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty which provide that States members of the organization are bound by such a treaty; or**

**(b) the acknowledgement by the States and**

<sup>122</sup> Should the Commission follow the general trend of this new version, it would certainly be necessary also to change the title and probably the position and number of the article too. The title might perhaps read: "Assent to the establishment of obligations for the States members of an organization". As the article would thereafter appear only as a derogation from article 35, it would take its logical place immediately after the latter, as article 35 *bis*.

**organizations participating in the negotiation of the treaty as well as the States members of the organizations that the application of the treaty necessarily entails such effects.**

Should the Commission object to subparagraph (b), it could be drafted, as has just been indicated, in the following manner:

**(b) any unequivocal manifestation of such assent.**

#### **ARTICLE 37 (Revocation or modification of obligations or rights of third States or third international organizations)**

105. No particular comment was made on this article. Nevertheless, two of its paragraphs, 5 and 6, are linked to article 36 *bis* and therefore depend of the fate reserved for that article. While remaining in square brackets for the time being, in accordance with the proposal of the Special Rapporteur that article 36 *bis* should no longer cover rights, the words "or a right" should be deleted from the first line of each paragraph. Moreover, since in the new draft of article 36 *bis* the expression "third States which are members of an international organization" has been deleted to take account of certain criticisms already made, it should be possible to delete the word "third" here too. The two paragraphs would therefore begin as follows:

**When an obligation has arisen for States which are members of an international organization under the conditions provided for in . . .**

#### **ARTICLE 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)**

106. No criticism was expressed of this article, so no amendment is required.

### **PART IV. AMENDMENT AND MODIFICATION OF TREATIES**

**ARTICLE 39 (General rule regarding the amendment of treaties),**

**ARTICLE 40 (Amendment of multilateral treaties), and**

**ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)**

107. No comments were made on the three articles which comprise this part, so no amendment is required, save to article 40, paragraph 2. As a result of the

introduction of the term "the contracting entities" into the draft articles, the introductory wording of article 40, paragraph 2, can be simplified to read:

**Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting entities, each one of which shall have the right to take part in:**

...



# STATE RESPONSIBILITY

[Agenda item 4]

DOCUMENT A/CN.4/342 and Add.1-4

## Comments of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts

[Original: English, Russian]  
[10 April, 2, 29 and 30 June and 24 July 1981]

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### NOTE

The text of part 1 of the draft articles on State responsibility appears in *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

### Introduction

1. The International Law Commission, having completed at its thirty-second session in 1980 the first reading of the whole of part 1 of the draft articles on State responsibility for internationally wrongful acts, decided to renew its 1978 request<sup>1</sup> to Governments to transmit their comments and observations on the provisions of chapters I, II and III of part 1, and to ask them to do so before 1 March 1981. At the same time, the Commission decided, in conformity with articles 16 and 21 of its Statute, to communicate the provisions of chapters IV and V part 1 of the draft to the Governments of Member States, through the Secretary-General, and to request them to

transmit their comments and observations on those provisions by 1 March 1982. The Commission stated that the comments and observations of Governments on the provisions appearing in the various chapters of part 1 of the draft would, when the time came enable the Commission to embark on the second reading of that part without undue delay.<sup>2</sup>

2. The General Assembly, by paragraph 6 of its resolution 35/163 of 15 December 1980, endorsed the Commission's decision. The General Assembly also, by paragraph 4(c) of the same resolution, recommended, *inter alia*, that the Commission should, at its thirty-third session:

Continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need of a second reading of the draft articles constituting part one of the draft;

<sup>1</sup> The previous request for comments and observations on chapters I, II and III of part 1 of the draft articles was made to Governments by decision of the Commission at its thirtieth session, in 1978 (see *Yearbook* . . . 1978, vol. II (Part Two), pp. 77-78, para. 92). The comments and observations received following that request were published in *Yearbook* . . . 1980, vol. II (Part One), pp. 87 *et seq.*, document A/CN.4/328 and Add.1-4.

<sup>2</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 29-30, para. 31.

3. Pursuant to the Commission's decision, the Secretary-General, by means of a letter sent by the Legal Counsel, dated 8 October 1980, requested Governments of Member States which had not yet already done so to transmit their comments and observations on the above-mentioned provisions of chapters I, II and III of part of

the draft not later than 1 March 1981, and also to transmit their comments and observations on the provisions of chapters IV and V of part 1 of the draft not later than 1 March 1982. The comments and observations received from five Governments by 24 July 1981 are reproduced below.

#### Bulgaria

[Original: English]  
[2 June 1981]

The Government of the People's Republic of Bulgaria has on many occasions reiterated that it shares the common opinion that the fundamental objective of the United Nations is the maintenance of world peace and security and the strengthening of international law. The codification of norms of international law in the field of responsibility of States for internationally wrongful acts will undoubtedly be conducive to the implementation of this objective.

The Government of the People's Republic of Bulgaria welcomes the texts prepared by the International Law Commission of chapters I, II and III of the draft articles on State responsibility.

Not only has the Commission drawn a general definition of international crime in article 19, paragraph 2 of the draft, but it has, moreover, indicated the categories of especially dangerous international crimes such as aggression, maintenance by force of colonial domination, genocide, *apartheid* and slavery.

The Bulgarian Government, however, is sceptical about the pertinence of regarding massive pollution as an international crime of the same magnitude as aggression, genocide, *apartheid* and slavery. Quite naturally, it subscribes to the idea of qualifying massive pollution as an internationally wrongful act and is of the opinion that the Declaration of the United Nations Conference on the Human Environment<sup>1</sup> can by no means bridge the legal gap which still exists in this field, despite some principles and norms of international law in force.

It is the view of the Bulgarian Government that there exists no pronounced trend toward treating pollution *per se* as an international crime. In the Third Committee of the Third United Nations Conference on the Law of the Sea, for instance, where the problem of pollution of marine environment has been discussed for a number of years, no proposal has ever been made to recognize the pollution of the seas by ships or other sources as an international crime. Therefore, the text of subparagraph 3(d) of article 19 raises questions that should be subject to further discussion to clarify whether it might not be more relevant

to define pollution as an international delict, rather than an international crime.

The Bulgarian Government supports the definition of international delict as any internationally wrongful act which is not an international crime, as proposed in article 19, paragraph 4, of the draft.

The clear distinction between international crime and international delicts is a major success in the field of codification of international law on State responsibility, for it is consonant with the factual situation in contemporary international law and, more specifically, with such instruments as the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>2</sup> the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>3</sup> the Definition of Aggression,<sup>4</sup> and others.

The Government of the People's Republic of Bulgaria also states that the above comments should not be regarded as final or exhaustive, and therefore reserves its right to submit, if necessary, further considerations on the draft.

#### Czechoslovakia

[Original: English]  
[24 July 1981]

The draft articles of chapters I, II and III, adopted by the International Law Commission on first reading and submitted to the member States of the United Nations for comments and observations, represent as a whole a significant contribution to the progressive development and codification of international law, as well as a good point of departure for continuing codification efforts. Having in mind that for the time being the draft articles are incomplete, the comments and observations of Czechoslovakia are of purely provisional nature.

1. Taking into account the fact that a considerable amount of time has elapsed from the time when the Commission elaborated the first draft articles, it is necessary to make the appropriate corrections in the text of part 1 in the light of more detailed conclusions arrived at in the course of the codification efforts on subsequent articles.

<sup>1</sup> Stockholm Declaration of 16 June 1972 (*Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part I, chap. I).

<sup>2</sup> General Assembly resolution 1514 XV, of 14 December 1960.

<sup>3</sup> General Assembly resolution 2625 XXV, of 24 October 1970.

<sup>4</sup> General Assembly resolution 3314 (XXIX), of 14 December 1974, annex.

2. The Czechoslovak Government is in full agreement with the principle expressed in article 1, according to which every internationally wrongful act of a State entails the international responsibility of that State, i.e. that no internationally wrongful conduct is possible without legal consequences. The Czechoslovak Government is therefore of the opinion that article 1 is not only the basic principle of the codification draft as a whole, but that it represents at the same time the key principle of international law. Likewise, the principle in article 2, according to which the responsibility of States for wrongful conduct applies to all States without exception, is the expression of mutual connection between the responsibility of States and the sovereign equality of States and has firm support in international practice, jurisprudence and theory.

3. The Czechoslovak Government reserves the right to take a position on article 3, relating to elements of internationally wrongful conduct, later on. For the time being, it is not possible to take a definite stand on the question whether the existence of guilt, of a damage as well as the existence of causal connection, which the Commission had deliberately left aside when considering article 3, should or should not be looked upon as elements of the internationally wrongful conduct. This question is closely connected with the question of content of responsibility obligation, which has not been yet examined by the Commission.

4. Article 4, defining the notion of an internationally wrongful act of a State, which was already contained in article 1, can be accepted without reservation. The principle under which a State can not invoke its internal law to justify its conduct not in conformity with international law is recognized in international practice, without exceptions.

5. The internal organization of a State is not subject to international law, but is governed by its national law. That is principally why the acts of State organs established as such by national law are to be considered as acts of the State, irrespective of their position within the hierarchy of the organization of that State laid down by national law. This principle has been duly reflected in articles 5 and 6. As far as the acts of organs of entities of territorial division of States are concerned, these organs should be taken as forming part of the structure of a State. Consequently, acts of organs of this kind should be already covered by the provisions of articles 5 and 6. In this light, the provision of article 7, paragraph 1, seems to be superfluous, at least as far as the entities of territorial division of a State without any international personality are concerned.

6. Articles 14 and 15 concern questions relating to the conduct of organs of insurrectional movements. However, neither the articles mentioned nor the commentary to them specify what is meant by the term "insurrectional movement". It seems to be appropriate, then, that the commission pay due attention to the definition of this particular notion during the second reading of the draft. In this respect, it can proceed from the Additional Protocols to the Geneva Conventions of 12 August 1949, in which the definitions of "national-liberation movement" [Additional Protocol I, art. 1, para. 4] and "insurrectional

movement" [Additional Protocol II, art. 1, para. 1] are included.<sup>1</sup>

7. The basic idea of article 19—the possibility of establishing varying degrees of responsibility for violations of international law according to the significance of content of the legal rule that had been breached for the strengthening and development of international peace and security—serves, in the opinion of the Czechoslovak Government, as proof of the mounting conviction of the family of nations that in contemporary international law there are rules the respect for eventual violation of which are the concern of each nation individually, as well as for the family of nations as a whole.

That is why the consequent, precise and unequivocal inclusion of this basic idea in the codification draft would be a significant contribution to progressive development of international law. An appropriate inclusion of this principle into the eventual codification instrument, however, calls for detailed consideration of all the possible implications in the context of which the principle could and should find its place. However, in the present stage of the codification work of the Commission, not all the aspects of this kind have yet been examined. The Government of Czechoslovakia, for this reason, is of the opinion that the time is not ripe enough to take a detailed position on draft article 19.

8. Other provisions of chapter III (draft articles 20 to 26) govern some particular aspect of State responsibility and do not, by their substance, invoke any reservations of a principal nature. Like draft article 19, they could serve—provided that necessary changes in substance and drafting as well are made—as a basis for elaboration of an appropriate codification instrument.

#### Germany, Federal Republic of

[Original: English]  
[30 June 1981]

The Government of the Federal Republic of Germany has from the beginning taken a great interest in the Commission's work on this topic and is of the opinion that the codification of the rules governing State responsibility for internationally wrongful acts will constitute another landmark in the codification and progressive development of international law. It is to be hoped that ultimately a convention can be elaborated which meets with the widest possible acceptance.

The Federal Government deeply appreciates the important contribution which Mr. Ago, now Judge on the International Court of Justice, has made to the draft articles in his capacity as Special Rapporteur for the articles to which these comments relate.

The Commission's decision to confine the work on the present draft to the conduct of States on the one hand and to internationally wrongful acts on the other seems to be a wise one, as does the decision not to include any primary rules, that is to say, the material rules of general

<sup>1</sup> ICRC, *Additional Protocols to the Geneva Conventions of 12 August 1949* (Geneva, 1977), pp. 5 and 90 respectively.

international law whose breach entails an international delict.

The Federal Government takes the overall view that the codification of such an important topic as that of the rules governing State responsibility for internationally wrongful acts can only be achieved if the Commission concentrates upon those aspects of the subject-matter which are of a practical importance in international relations and if the Commission resists the temptation to achieve too great a degree of perfection from the theoretical, abstract point of view.

Before commenting on the individual chapters of the draft, the Federal Government wishes to put forward two general proposals for the Commission's further work.

The first is that an article should be included to make it clear that the provisions of a future convention apply only to events that take place after its entry into force. None of the articles should give rise to any uncertainty about disputes that have already been settled or which are a consequence of events that have taken place prior to the convention's entry into force, since this could lead to renewing international controversies or to aggravating them. The second proposal is that the convention should embrace a procedure for the settlement of disputes. Binding decisions by an independent international body recognized by the prospective States parties to the convention would ensure the peaceful settlement of disputes resulting from an internationally wrongful act.

#### *Chapter I (articles 1 to 4)*

Chapter I (General principles) of the present draft seems to have achieved its purpose. Articles 1, 3 and 4 in particular reflect the Commission's decision to limit the scope of the topic to the responsibility of States, in that they codify fundamental rules that have developed within the framework of general international law. In this context, special importance attaches to article 4, which reaffirms the principle of the priority of international law over internal law with regard to internationally wrongful acts. This provision will have considerable significance in helping to afford more effective protection of human rights.

However, the Federal Government has some reservations about article 2, although they are of a more formal nature. Much as this clause's purpose of allowing no State an opportunity to avoid having to answer for a breach of international law is to be welcomed, it does seem to express a concept which seems to be self-evident, and the necessity of which may therefore be questioned. In any case, this rule can be deduced from the wording of article 1. Should the Commission not wish this provision to be removed altogether, it might at least be expedient to incorporate its legal substance in article 1.

#### *Chapter II (articles 5 to 15)*

The wording of the provisions of chapter II (The "act of the State" under international law) likewise seems to be appropriate. This applies in particular to articles 5, 7, 8, 10 and 11. Taken as a whole, these provisions should help considerably to ensure a larger measure of legal certainty with regard to the law on international delicts.

However, several articles which concern the same subject-matter could be merged, while other provisions might be omitted altogether. For instance, the Federal Government sees no cogent reason for the inclusion of the provision embodied in article 6 of the draft. There is no known case of general international law in which the aspect covered by the provision, that is to say, the position in the organization of the State of the organ committing an act, would have been a point at issue. And the legal content of articles 12 and 13 is, after all, something that can be taken for granted and that could without harm be omitted from the draft, which would help streamline the convention. On the other hand, it is suggested that the purview of article 11 be worked into article 8, so as to ensure a uniform provision on the question of the extent to which the conduct of a person or a group of persons should be considered an act of the State. This would not only merge two provisions dealing with the same subject-matter, but would also make for a better overview of the draft.

#### *Chapter III (articles 16 to 26)*

##### *(i) Articles 16 to 18*

The introductory articles 16 and 17 to chapter III (Breach of an international obligation) are to be welcomed. The wording of these provisions on fundamental aspects of law relating to internationally wrongful acts is an important and clarifying codification of the present state of the law. Consideration should, however, be given to the possibility of incorporating in article 17 the concept embodied in article 19, paragraph 1, that the breach of an international obligation is not conditional upon its subject-matter.

There is no basic objection to article 18, except perhaps for the second paragraph, although it is felt that such specific provisions governing these individual legal aspects are not absolutely necessary. The second paragraph of article 18 introduces for the first time the "peremptory norm of general international law" into the framework of the draft articles. It is true that the concept of *ius cogens* is widely accepted in the international community, but in many instances there is disagreement as to the content and limits of corresponding rules.

It would therefore seem appropriate to include in the convention a procedure for the mandatory judicial settlement of disputes, at least on the lines of the provisions contained in article 66 of the Vienna Convention on the Law of Treaties<sup>1</sup> of 23 May 1969 and its annex. There appears to be no reason to depart from this provision in the law on the international responsibility of States.

##### *(ii) Article 19*

Article 19 raises a number of complex problems.

*Paragraph 1* does not appear to contain any provision of fundamental significance in itself. The purport of the

<sup>1</sup> *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.



first half of the sentence is identical to that of article 3, which in turn follows the wording of Article 36, subparagraph 2(c) of the Statute of the International Court of Justice. The idea conveyed in the second part of the sentence can be said to have been covered by article 17, paragraph 1. If not, it might be coupled with that provision (“... and regardless of the subject-matter of the obligation breached”). Moreover, the more important criterion for determining whether a delict has been committed is, in both cases, the question whether international law actually establishes a legal obligation to perform an act or omission in an individual case, as expressed in article 16.

Doubt also exists with regard to *paragraphs 2 and 3* of article 19, on account of the introduction of the notion of international crime into the present codification. The Commission has undertaken the task of establishing provisions governing the liability of States for internationally wrongful acts and the obligation to make good any injurious consequences of such acts. But the notion of crime, culled from the principles of criminal law that have developed in national legal systems, introduces an essentially new concept. Doubts seem to be permitted as to the advisability of introducing the concept of international crime into the present draft—although no objection is raised to the proposition that a specific provision must be found to cover serious violations by States of elementary international obligations.

The distinction between crimes and delicts might, however, find its justification in the treatment of the legal consequences. It is indeed a generally held concept that the gravity of a breach of an obligation shall determine the gravity of the legal consequence. Another justification for distinguishing between international crimes and international delicts may be seen in the possibility of a different position of third States vis-à-vis an international delict and vis-à-vis an international crime. As the delegation of the Federal Republic of Germany has outlined in the debate on the Commission's report to the thirty-fifth General Assembly,<sup>2</sup> it seems that there are nowadays world circumstances, however, exceptional they may be, in which a third State might, with respect to an internationally wrongful act that is committed not to his immediate detriment and not directed against him, nevertheless have the right to take up a non-neutral position. If rules of international law are violated in the observation of which the community of States as a whole has a vested interest, third States, although not immediately involved, might well be entitled to take countermeasures or to participate in such measures.

Returning for a moment to the criteria of international delicts and international crimes, it has to be asked whether it is in the interest of the progressive development of international law to introduce a third category of international crimes beyond the existing categories of normal rules of international law and *jus cogens*. Much seems to speak in favour of a definition of an international crime which refers to peremptory norms of international law, rather than to the criterion used in article 19, paragraph 2.

Independently of how the norms the breach of which constitutes an international crime are defined, objections must be raised against article 19, subparagraph 3(d). The notion of safeguarding and preserving the human environment as a legal duty is a comparatively new one. It comprises a huge complex of rules and obligations, until now characterized in many instances by an apparent lack of precision and definition. In many instances there is a constant interaction between the application of the most basic general rules of international law and specific norms of a more precise ecological character. To include this entire sector of international legal relations in the area where a wrongful act is by its very nature a crime rather than a delict seems to go much too far. It is earnestly urged that article 19, subparagraph 3(d), be reconsidered.

On the other hand, it should be pointed out, even at this stage, that the codification should on no account extend to the completely different area of the criminal responsibility of individual persons. These areas of law differ fundamentally in the national law of States and must therefore also be kept strictly separate in international law. If the concept of material or non-material compensation were to be associated with penalties for acts of individuals, international law might prove to be less rather than more reliable and thus defeat the object of the codification.

### (iii) Articles 20 to 26

Articles 20 to 26 show that the Commission has been at pains to cover all possible courses of conduct in connection with an international delict. However, these provisions have become very abstract and theoretical. Their intention, which is appreciated, is to make it easier to apply the existing law without leaving any gaps, but they are open to many different interpretations which do not tally with the purpose of these provisions and might indeed be open to abuse. In practice, they might defeat their objective of making the law more reliable in international relations. Fewer clauses would be more effective. This group of provisions has therefore to be treated with some reserve. Moreover, since their conceptual framework is to a large extent based on continental European legal theory, their present wording is not likely to be conducive to a later, and as far as possible universal, acceptance of their codification.

Comment can be made on two other points concerning articles in this group. First, although the Commission has obviously tried to cover every possibility, the relationship between article 20 and article 23 is not unequivocal. This may lead to cases of doubt if it is not clear from an international obligation whether it requires a particular course of conduct, the prevention of the occurrence of a given event, or both at the same time. It therefore appears necessary, in the opinion of the Federal Government, to clarify the relationship between these two articles.

The other remark concerns article 22. Doubt arises concerning the treatment of the local remedies rules within the scope of the various courses of conduct constituting an internationally wrongful act. Article 22 makes the requirement that all local remedies must first be exhausted—a concept which has developed in the context of international law relating to aliens—a *substantive* condition for the

<sup>2</sup> *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 45th meeting, para. 11.*

breach of an international obligation. The Federal Government, however, has always understood this rule as a procedural condition for the assertion of claims arising out of the breach of an already substantively defined international obligation and considers that this view is consistent with general international law.

The Government of the Federal Republic of Germany would like these comments on chapters I, II and III of the draft articles on the responsibility of States to be seen as a constructive contribution to the further work of the Commission. It will continue to follow the work of the Commission with great interest, and hopes that its comments and proposals will be of value to the Commission in its discussions and decisions.

#### Mongolia

[Original: Russian]  
[29 June 1981]

1. The Mongolian People's Republic, proceeding from its foreign policy aims and objects, welcomes the work done by the International Law Commission on the draft articles on the origin of international responsibility, which form the first part of the draft articles on State responsibility for internationally wrongful acts. The Mongolian People's Republic sees the main purpose of the elaboration of general principles of State responsibility as being to ensure the social orientation and juridical effectiveness of the principles and norms of contemporary international law.

2. The content of chapter I, the general principles (articles 1 to 4 of the draft) is, in the main, consistent with this purpose. The general basis for the international legal responsibility of States is the commission by them of internationally wrongful acts. Put another way, State responsibility can arise both as a result of unlawful action by a State and as a result of unlawful inaction. The Mongolian People's Republic considers that the Commission has taken a correct position in defining the basic principles establishing responsibility for internationally wrongful acts.

3. Chapter II, concerning the "act of the State" under international law (articles 5 to 15), defines the conditions under which specific conduct is to be considered as an "act of the State" under international law. In principle, the Mongolian People's Republic shares the position taken in these articles, which establish both general and special rules relating to organs and persons whose wrongful acts are to be considered as acts of the State itself. However, some provisions clearly need to be made more precise. For example, the provisions of draft article 7, paragraph 2, must in no case and in no circumstances be made the basis for the attribution to a State of the acts of those of its organs which are not State organs. Article 7, paragraph 1, requires appropriate clarification. It appears from this paragraph that the conduct of organs of a State which belongs to a federation should be attributed to the federation as such. However, such a solution of the problem of the attribution to a federal State of the actions of organs of its member States seems too one-sided. In order really to resolve the problem, it is essential to take into account any differences in the status of the individual federated States.

4. Concerning chapter III, which deals with the breach of an international obligation, the Mongolian People's Republic reaffirms the comments made in 1977<sup>1</sup> by its representative to the Sixth Committee concerning the report on the work of the twenty-ninth session of the Commission.

5. As regards the responsibility of one State for an internationally wrongful act of another State, it is noted that article 28 contains such words as one State's being "subject" to another and the "coercion" of another State to perform some wrongful act. Mongolia is, therefore, uncertain of the appropriateness of the present drafting of this article.

6. Articles 29 to 35, which relate to circumstances precluding wrongfulness, generally fall within the framework of the concepts appropriate to the topic. However, the Mongolian People's Republic has some observations on articles 32, 33 and 34. For example, article 32 envisages "distress" as a circumstance which can, in a situation of extreme need, justify conduct differing from that required under normal conditions for the fulfilment by a State of its international obligations. There can be a subjective factor here, in addition to the objective factor. The Mongolian People's Republic therefore feels it desirable that this provision should be made more precise on second reading of the article.

7. The concept of a "state of necessity", which article 33 proposes as one precluding wrongfulness, is by its nature complex and capable of many interpretations. The criterion of an "essential interest" used in the article not only fails to solve the problem, but may even create new problems. It is virtually impossible to establish whose interests are essential when the interests of two States clash. If article 33 is to remain in the draft, it must be so formulated that the state of necessity is subject to strict conditions and limitations which prevent all possibility of abuse.

8. The Mongolian People's Republic is not opposed to article 34. Nevertheless, it has two observations to make on its text. The first observation relates to the words "an act of a State not in conformity with an international obligation of that State", which are incompatible with the concept of "self-defence". Acts of a State constituting self-defence do not violate any international obligation whatsoever of any State. Self-defence is the inalienable right of every State. Hence, what is "unlawful" cannot be part of the concept of self-defence. The second observation is this: in order to avoid differing interpretations of the concept, the article should include a reference to "self-defence" in accordance with Article 51 of the Charter of the United Nations.

9. Article 35 gives no cause for objection, since it is of a precautionary and transitory nature.

10. The Mongolian People's Republic reserves the right to revert to any of these articles as necessary.

<sup>1</sup> Official Records of the General Assembly, Thirty-second Session, Sixth Committee, 38th meeting, paras. 25 and 26.

11. The Mongolian People's Republic is gratified by the great efforts made by the Commission to complete the first thirty-five articles of the draft on State responsibility and wishes the Commission success in its further work on the second part of the draft.

**Sweden**

[Original: English]  
[10 April 1981]

The provisions proposed in chapter IV (articles 27 and 28) and chapter V (articles 29 to 35) relate, for the most part, to the question of the lawfulness of certain acts, rather than to the secondary question of the consequences of the breach of an international obligation. According to article 27, it would be unlawful, that is, "internationally wrongful", for a State to render aid or assistance to another State for the breach by the latter of an international obligation. From the commentary<sup>1</sup> it appears that the Commission has had in mind breaches by the other State of its obligations under general international law, and in particular the case where that State commits an act of aggression against a third State. However, the wording of article 27 is wider and refers to "an internationally wrongful act, carried out by the latter", which includes the breach of a treaty. In this respect, however, article 27 does not seem to be compatible with article 34 of the 1969 Vienna Convention on the Law of Treaties,<sup>2</sup> which lays down that a treaty does not create either obligations or rights for a third State without its consent. Assuming, for example, that State A, by treaty with State B, has undertaken not to increase the size of its navy beyond a certain level, would it be unlawful for a third State to sell warships to State A, if that level is thereby exceeded?

Similar questions can be asked with regard to the provisions of draft article 28, according to which a State, because of its dominant position in relation to another State, or as a result of coercion exercised by it against another State, could be held internationally responsible for the breach by the other State of an international obligation. Is, for example, a State which exercises a power of direction or control over another State under a duty to respect the obligations incumbent upon the latter State under treaties concluded by that State with third States?

Indeed, it seems that the provisions proposed in articles 27 and 28 regarding situations where a State is implicated in the internationally wrongful acts of another State should not apply in cases where the wrongful act of the latter State consists in the breach of a treaty to which the former State is not a party.

Article 29 deals with "consent" as a circumstance precluding wrongfulness. Its provisions are of a descriptive rather than normative nature. No attempt is made to indicate how and by what organs the consent of a State to an act of another State should be given, which indeed can hardly be stated in general terms, since it must depend on the nature of the act in the individual case. The article

merely states that the consent should be "validly given". As regards the question to what kind of acts the principle of consent does not apply, the article simply refers to peremptory norms of general international law, defining these norms in the same abstract way as does the Vienna Convention on the Law of Treaties.

Similar observations can be made with regard to article 30, which refers to acts of a State which are "legitimate under international law" as countermeasures against an internationally wrongful act of another State. The article provides no guidance as to what countermeasures may be legitimate. It would seem that the latter question is one of those that could be dealt with in part 2 of the draft articles, in which case there might be no need for article 30.

With regard to articles 31, 32 and 33 regarding *force majeure*, fortuitous events, distress and a state of necessity, it cannot be denied that such exceptional circumstances have in the past sometimes been regarded as justifying acts which would normally be violations of international law. On the other hand, it does seem extremely difficult to formulate general rules on the basis of such precedents. As regards a state of necessity, perhaps all that can safely be said is that necessity is recognized, in principle, as an admissible plea, but that the conditions in which it can be invoked have not been clearly established by international law, which means that each case will have to be judged individually on the basis of moral rather than legal considerations. Under article 33 the possibility of invoking necessity would be subject to certain limitations, which, however, are rather vague in some respects, particularly since the Commission here again has had recourse to the notion of peremptory norms of general international law, without attempting to specify any such norms.

As regards chapters I, II and III of the draft articles on this topic, we refer to the comments of the Swedish delegate in the Sixth Committee of the General Assembly of the United Nations on 14 November 1980; an extract from the statement reads as follows:

*Extract from the statement of  
the Swedish representative<sup>3</sup>*

As regards the item "State responsibility", the Swedish delegation wishes to congratulate the Commission and the Special Rapporteur, on having completed the first reading of a complete set of draft articles comprising the first phase of the Commission's work on this topic.

Generally speaking, the Swedish delegation considers that these articles are well drafted and that they accurately reflect generally accepted rules of international law.

We would like, however, to express certain reservations in regard to two articles, namely, articles 18 and 19.

<sup>1</sup> Yearbook . . . 1978, vol. II (Part Two), pp. 99 *et seq.*

<sup>2</sup> Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), p. 287.

<sup>3</sup> For a resumé of the statement of the representative of Sweden, see Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 49th meeting, paras. 1 *et seq.* See also "Topical summary, prepared by the Secretariat, of the discussion of the report of the International Law Commission held in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), para. 105.

In paragraph 2 of article 18 it is stated that an act which, when it was performed, was wrongful ceases to be considered a wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law. According to its wording, this paragraph would seem to give retroactive effect to peremptory norms of international law. An act which was wrongful when it was committed will no longer be regarded as wrongful, once a new rule of *jus cogens* has been created which makes the act compulsory.

It would seem to the Swedish delegation that this paragraph is not compatible with articles 64 and 71 of the Vienna Convention on the Law of Treaties. According to these articles, a treaty which is in conflict with a new, emerging peremptory norm of general international law becomes void and terminates, but it is explicitly stated in article 71 that this does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. In other words, the treaty becomes void but is not invalidated *ab initio*. In paragraph 2 of article 18 of the draft articles, however, an act is deprived of its wrongful character *ab initio*.

Moreover, it may be argued that paragraph 2 of article 18 deals with the existence or not of an obligation and not with the consequences of a breach of an obligation and that, therefore, it should not be included in a legal instrument aimed at codifying secondary rules only.

Moreover, it seems strange, as a matter of drafting, that the term "peremptory norm of general international law" is not defined until article 29, paragraph 2, of the draft

articles, although the term appears already in article 18, paragraph 2.

The Swedish delegation also has some doubts about paragraphs 4 and 5 of article 18. These paragraphs are drafted in a complicated manner. They are difficult to understand and they deal with problems which could presumably be solved by using ordinary logic. The terminology used in these paragraphs is rather unusual, since they speak about one "act" being composed of several "actions or omissions".

Article 19 of the draft articles—with the exception of its first paragraph—expresses a new doctrine which attempts to divide international obligations in two categories on the basis of their importance to the international community. The breach of an international obligation would be a crime or a delict according to which of the two categories the obligation belongs. We do not think that the Commission has given a satisfactory justification of this theory. The basic problem which it raises is that it assumes that the relative importance attached by the international community to the various obligations of States is an objective criterion on which legal consequences can be based. In reality, however, judgements on such questions as to whether an obligation is essential for the protection of fundamental interests of the international community must necessarily be subjective and political. We doubt, therefore, that the distinction made between different obligations in article 19 is a useful one, and believe, rather, that it would create considerable difficulties in practice.

DOCUMENT A/CN.4/344\*

**Second report on the content, forms and degrees  
of international responsibility (part 2 of the draft articles),  
by Mr. Willem Riphagen, Special Rapporteur**

[Original: English]  
[1 May 1981]

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**Introduction**

1. The present report is the second submitted by the Special Rapporteur for consideration by the International Law Commission on the topic of State responsibility (part 2 of the draft articles).
2. The Special Rapporteur submitted a preliminary report<sup>1</sup> on the topic during the course of the Commission's thirty-second session, in 1980.
3. The historical development of the consideration of the draft articles on the topic of State responsibility is

summarized in the preliminary report. 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. With respect to part 1, the Commission has completed its first reading by adopting provisionally the text of thirty-five draft articles.<sup>2</sup>

\* Incorporating A/CN.4/344/Corr. 1 and 2.

<sup>1</sup> See *Yearbook* ... 1980, vol. II (Part One), p. 107, document A/CN.4/330.

<sup>2</sup> For the text of these draft articles, see *Yearbook* ... 1980, vol. II (Part Two), pp. 30 *et seq.*

4. Part 2 of the draft, the subject of the present report, deals with the content, forms and degrees of international responsibility, that is to say, with determining the consequences that internationally wrongful acts of a State may have under international law, in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may decide to add to the draft a part 3 concerning the "implementation" (*mise en*

*oeuvre*) of international responsibility and the settlement of disputes.

5. By its resolution 35/163 of 15 December 1980, the General Assembly, having considered the Commission's report on its thirty-second session, recommended, in paragraph 4(c), that the Commission should, at its thirty-third session:

continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles constituting part one of the draft.

## CHAPTER I

### Status of the work on the topic

#### A. The Special Rapporteur's first report

6. The preliminary report<sup>3</sup> submitted by the Special Rapporteur in 1980 in the course of the Commission's thirty-second session analysed in a general way the various possible new legal relationships (i.e. new rights and corresponding obligations) arising from an internationally wrongful act of a State as determined by part 1 of the draft articles on State responsibility.

7. Having noted at the outset a number of circumstances which are, in principle, irrelevant for the application of part 1<sup>4</sup> but relevant for part 2, the report set out three parameters for the possible new legal relationships arising from an internationally wrongful act of a State. The first parameter was the new obligations of the State whose act is internationally wrongful; the second, the new right of the "injured" State; and the third, the position of the third State in respect of the situation created by the internationally wrongful act.

8. In thus drawing up a catalogue of possible new legal relationships established by a State's wrongfulness, the

report discussed the duty to make "reparation" in its various forms (first parameter), the principle of non-recognition, *exceptio non adimpleti contractus*, and other "counter-measures" (second parameter); and the right, possibly even the duty, of "third" States to take a non-neutral position (third parameter).

9. The report then turned to the problem of "proportionality" between the wrongful act and the "response" thereto, and in this connection discussed limitations of allowable responses by virtue of the particular protection given by a rule of international law to the object of the response; by virtue of linkage, under a rule of international law, between the object of the breach and the object of the response; and by virtue of the existence of a form of international organization *lato sensu*.<sup>5</sup>

10. Finally, the first report addressed the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act, and suggested that this matter be dealt with, rather, within the framework of part 3 of the draft articles on State responsibility (the implementation of international responsibility).<sup>6</sup>

#### B. Comments in the Commission on the Special Rapporteur's first report

11. The discussion of the topic in the Commission<sup>7</sup> was of a preliminary character, calling for the need to draw up a concrete plan of work for the topic.

12. It was generally recognized that in drafting the articles of part 2 the Commission should proceed on the basis of the articles of part 1, which it had already provisionally adopted on first reading, although, of course, on second reading some revisions, rearrangements and mutual adaptations should not be excluded.

<sup>3</sup> See footnote 1 above.

<sup>4</sup> The report noted at the outset that a number of circumstances—such as the conventional or other origin of the obligation breached, the content of that obligation, and the seriousness of the actual breach of that obligation—may, however, have relevance for the determination of the new legal relationships in part 2. It also recalled that some draft articles in part 1—notably article 11, para. 2; article 12, para. 2; article 14, para. 2—may give rise to the question whether or not the content, forms and degrees of State responsibility are the same for this "contributory" conduct as for other internationally wrongful conduct, and that similar questions arise in respect of the cases of implication of a State in the internationally wrongful act of another State (arts. 27 and 28). Furthermore, the report recalled that the Commission, in drafting the articles of chapter V of part 1, entitled "Circumstances precluding wrongfulness", deliberately left open the possibility that an act of a State, committed under such circumstances, might nevertheless entail some new legal relationships similar to those entailed by an internationally wrongful act. The report recommended that such new legal relationships be dealt with in part 2 of the draft, rather than within the context of the topic "International liability for injurious consequences arising out of acts not prohibited by international law". (*Yearbook . . . 1980*, vol. II (Part Two), p. 62, para. 36).

<sup>5</sup> *Ibid.*, para. 38.

<sup>6</sup> *Ibid.*, para. 39.

<sup>7</sup> *Ibid.*, pp. 62–63, paras. 40–47.

13. It was also noted that, while liability for injurious consequences arising out of acts not prohibited by international law might include the obligation of a State to give compensation, any possible degree of "overlap" with the treatment, in part 2 of the articles on State responsibility, of the obligation of reparation resulting from a wrongful act, or even from an act the wrongfulness of which was precluded in the circumstances described in chapter V of part 1, would do no harm.

14. Some members of the Commission expressed doubts as to the advisability of dealing extensively with "countermeasures", international law being based not so much on the concept of sanction and punishment as on the concept of remedying wrongs that had been committed. Other members, however, considered the second and third parameters to be of the essence of part 2.

15. It was generally recognized that the principle of proportionality was at the basis of the whole topic of the content, forms and degrees of responsibility, though some members contested its character as a rule of international law or were inclined to regard it as being a primary, rather than a secondary rule.

16. Several members stressed the need to avoid the enunciation of primary rules within the context of part 2. There was the feeling, however, that some "categorization", according to their content, of the primary obligations with which an act of a State was not in conformity was inevitable when determining the new legal relationships arising from the breach of those obligations.

17. Some members underlined the necessity of looking carefully at the distinction made in the preliminary report between the "injured" State and a "third" State, particularly in view of modern developments in international law which assert the interdependence of States.

18. Various members advocated that the Commission adopt an empirical or inductive approach to the topic, as it had hitherto in dealing with State responsibility.

#### C. Comments in the Sixth Committee on the topic

19. In the course of the review of the Commission's 1980 report by the Sixth Committee of the General Assembly at its thirty-fifth session, several delegations made comments on this topic.<sup>8</sup>

20. Most of the delegations agreed with the approach adopted by the Special Rapporteur in connection with the three parameters he suggested for the discussion of the content, forms and degrees of international responsibility.

21. It was generally observed that the work on part 2 should proceed as quickly as possible, and in harmony with part 1, care being taken of the possible link between issues dealt with in both parts.

22. Thus, one representative, commenting on the three parameters, noted that account should be taken of the

distinction made in article 19 of part 1 between international delicts and international crimes and that the rule of proportionality should also apply in the same way as with respect to the "new" rights of the injured State which correspond in a large measure to the "new" obligations of the State bearing the responsibility. He also noted that other "independent rights" should also be mentioned, such as the right to terminate a treaty in accordance with article 60 of the 1969 Vienna Convention on the Law of Treaties<sup>9</sup> and the right to apply countermeasures, in conformity with article 30 in part 1 of the draft articles.

23. On the question whether the legal consequences of breaches of international obligations which do not constitute wrongful acts should be dealt with under the topic, there was the view that such consequences of situations that did not involve State responsibility should not be dealt with in part 2. It was observed, in this connection, that the view had been expressed in the Commission that the exclusion of wrongfulness did not exclude the possibility that different rules might operate in cases of breaches of international obligations and place upon the State obligations for total or partial compensation which were not connected with the commission of a wrongful act.

24. Another representative was of the view that part 2 of the draft articles on State responsibility should be concerned essentially with the consequences of a wrongful act and the rights afforded to the injured State. The position of third States affected by the internationally wrongful act was a secondary aspect; he therefore had some hesitation about the concept that new legal relationships inevitably arose in all cases where an internationally wrongful act had been committed, particularly in the case of material breach of a treaty obligation. Consequences might flow from that material breach. As article 60 of the Vienna Convention had made clear, the other party or parties might be entitled to terminate the treaty, to suspend its operation, to seek reparation or even, depending on the circumstances, to seek *restitutio in integrum*. In principle, it would be wise to eschew doctrinal questions in formulating part 2 of the draft and to concentrate on determining the rights of the injured State in the various contingencies contemplated. In a definition of those rights, the obligations of the State which had caused the injury would simultaneously be defined. He therefore hoped that the Special Rapporteur would bear in mind that the normal remedy in cases of breach of an international obligation was reparation and that the application of countermeasures or other forms of sanction was admitted only exceptionally—namely, in circumstances where the essential interests of the injured State could not be protected by reparation alone.

25. The view was also expressed that, in formulating a definition of the different forms of responsibility, two factors should be taken into account: first, the greater or lesser importance which the international community

<sup>8</sup> Those comments are summarized in "Topical summary, prepared by the Secretariat, of discussion of the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 145–154.

<sup>9</sup> Hereinafter called "Vienna Convention". For the text, 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.

attached to the rules at the origin of the obligations violated, and, second, the greater or lesser gravity of the breach itself. In defining the degrees of international responsibility, it was necessary to determine the role to be played by the concepts of reparation and sanction. The Special Rapporteur had suggested a method whereby the international community could determine the response proportional to the breach of a particular obligation. Accordingly, the Committee would have to await the new report of the Special Rapporteur in order to decide whether the proposed plan of work was satisfactory.

26. A number of representatives observed the possible link between the issues treated under part 2 and part 1 of the topic of State responsibility and those examined under the topic of "international liability for injurious consequences arising out of acts not prohibited by international law". A question accordingly was raised as to whether draft article 35 (Reservation as to compensation for damage) in part 1 of the draft on State responsibility, belongs to that part, which deals with secondary rules, or to part 2, dealing with the content, forms and degrees of responsibility—or whether the question of compensation should appropriately be treated under the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

27. A question was also raised with respect to the link between article 34 in part 1, on self-defence, and the issues to be covered under part 2. One representative observed that measures of self-defence did not constitute a violation of international law and that their function as a legal consequence of an armed attack, or as a measure intended to restore and ensure the implementation of the legal rules violated, had not been fully exhausted. The question of self-defence should therefore be dealt with in part 2 of the draft, in connection with other legal consequences that might result from an aggression; in that case, a distinction must be made between aggression and other international crimes. It would appear, he noted, that the comments of the previous Special Rapporteur, Mr. Ago (now Judge on the International Court of Justice) regarding defence against armed attack, and Article 51 of the Charter of the United Nations, gave a more precise description of self-defence in contemporary international law than the text proposed by the Commission, which involved a danger of misinterpretation.

28. In the second chapter of the present report, an attempt has been made to analyse the topic further on the basis, *inter alia*, of the comments in the Commission and the Sixth Committee of the General Assembly, as reflected above.

## CHAPTER II

### The first parameter: the new obligations of the State whose act is internationally wrongful

#### A. The relevance of the structural difference between internal and international law

29. By way of introducing this chapter, it may not be superfluous to recall the fundamental structural difference between any system of internal law, on the one hand, and international law on the other hand. International law is based upon the sovereign equality of States, and, as such, however progressively developed, can never reach a structure comparable to that of national, internal law. Surely, modern international law (particularly in its conventional form) has introduced other entities than States, as possessing interests protected by rules of international law, and even sometimes as "actors" on the international plane. At the same time, the emergence of concepts such as "the general principles of law" (as mentioned in Article 38 of the Statute of the International Court of Justice) and of *jus cogens* in various contexts, testifies a progressive development, tending, at least at first sight, towards "bodies of rules" similar to those we can find in internal law systems. However, those developments do not destroy the original basis of international law, and the new entities and concepts remain in a way something like a *corpus alienum*, requiring a mutual adaptation in respect of the principle of sovereign equality of States.

30. The fundamental structural difference between internal law and international law would seem particularly

relevant for the topic of State responsibility. Indeed, the (relatively) sharp distinction made within the framework of internal law between "norms" and "sanctions" cannot simply be transplanted to international law. Actually, this distinction is predicated upon another one, that between a central "authority" and its "subjects", which is conspicuously lacking in the international community of States.

31. In view of the above, it might be useful to remark at the outset that the distinction made by the Commission between "primary rules", "rules of State responsibility"—further divided into rules relating to "the origin of international responsibility (part 1) and rules relating to "the content, forms and degrees of international responsibility" (part 2)—and rules of "implementation of international or State responsibility" (part 3), though certainly justified from a methodological point of view, should not be carried so far as to dissimulate the essential unity of the structure of international law as a whole, determined by its functions in the international community of States. Indeed, the manner in which the "primary rules" are established and the different functions of those "primary rules" cannot but influence both the various contents of "State responsibility" and the modalities of its "implementation".

32. The same remark is, of course, valid in respect of the methodological distinctions made by the Special Rapporteur



teur in his preliminary report, as will be made clear further on in the present report.

33. A few random examples of the interrelationship between methodologically separated items may be given here in order to illustrate the above remarks.

34. As was mentioned in paragraph 8 above, a distinction was made in the preliminary report between three parameters of the "new legal relationships" that may be established by international law as a consequence of a State's wrongful act.<sup>10</sup> There is nothing against making such a methodological distinction, which, indeed, was generally accepted in the debates on the topic in the Sixth Committee of the General Assembly at its thirty-fifth session (see paras. 19 to 27 above). It should not, however, be forgotten that—as will be more fully explained below—a good deal of the legal phenomena under the so-called first parameter is based on considerations derived from a primary rule on "domestic jurisdiction". In the same way, some legal phenomena appertaining to the second and third parameters are based on considerations relating to the absence of a machinery of implementation. Indeed, no treatment of the law of State responsibility could be complete without answering the question: what are the legal consequences of a breach of the *new* legal obligations of the first parameter?

35. Also, to take an example from the Commission's report on its twenty-fifth session:

The term "sanction" is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation.<sup>11</sup>

One may well wish to make such a distinction, which is a real one, but one must not forget that the idea of punishment in the sense of "eye for eye and tooth for tooth" is wholly alien to international law, and, contrariwise, that, again from the viewpoint of international law, there may be a general interest in providing for measures intended to discourage future breaches of the obligation involved (*ex ante*-aspect). In other words, the distinction between "reparation" and "punishment" is less clear-cut than one might think in reading the above-quoted words. There is a common denominator in the sense of the purpose to "secure the fulfilment of the obligation".

36. Throughout part 1 the term "obligation" is used, rather than "relationship", or "norm". On the other hand, in part 2 the Commission has referred to "(new) legal relationships". The preference for the term "obligation" in part 1 is explained in the Commission's above-mentioned report.<sup>12</sup> Again, these methodological considerations may be quite valid. But, again, one should not forget that this is not merely a matter of terminology. Indeed, in part 2, one should keep in mind the fact that an "obligation" under

international law is always (or almost always) a mirror reflection of a "right" of another State, and that the term "norm" somehow implies the idea of an obligation *erga omnes*. This, it is submitted, is clearly relevant for the determination of the content, forms and degrees of State responsibility, as well as for the implementation of international responsibility. In short, methodological distinctions, as expressed in the use of particular terms, should not lead to a dissimulation of the essential unity of the elaboration of "justice" in international law as a whole.

37. The essential unity of purpose in the various phases of the elaboration and implementation of rules of international law has still another aspect. It should make us wary of sweeping statements on State responsibility in general. Thus, to take but one example, almost all writers on the topic refer, with apparent approval, to a passage of the famous judgement of 13 September 1928 of the Permanent Court of International Justice in the case *Factory at Chorzów* (Merits), where the Court stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".<sup>13</sup>

38. Now, within the framework of the judgement as a whole, no fault should probably be taken with this formulation. Taken out of context, however, and transformed into a general principle of "integral reparation" for all cases of breach of any international obligation whatsoever,<sup>14</sup> the correctness of the statement becomes doubtful.

39. If, for instance, the international obligation breached by an act of a State is one "requiring it to adopt a particular course of conduct" (art. 20 of part 1 of the draft articles), such obligation is generally not meant to guarantee all the "consequences" of the performance of that obligation. Why then, one might well ask, should the breach create a new obligation "to wipe out all the consequences of the illegal act"? This criticism, of course, is meant, at this stage, only to indicate the danger of over-simplification. The matter of reparation will be discussed somewhat more extensively below.

40. Actually, the foregoing paragraph suggests a much more general problem relating to the relevance of international judicial decisions for our task of progressive development and codification of rules of international law. In drawing up rules, the Commission attempts to fulfil a double task: stating the rights and obligations of States, and providing guidance to international courts and tribunals for the performance of their task. On the other hand, the Commission is itself guided by the practice of States and the pronouncements of international courts and tribunals.

41. In this connection, it may be useful to recall that (at least on the international plane) the judge is always in a

<sup>10</sup> See *Yearbook ... 1980*, vol. II (Part One), p. 112, document A/CN.4/330, para. 28.

<sup>11</sup> *Yearbook ... 1973*, vol. II, pp. 174–175, document A/9010/Rev.1, chap. II, sect. B, para. (5) of the commentary to article 1.

<sup>12</sup> *Ibid.*, p. 184, para. (15) of the commentary to article 3.

<sup>13</sup> *P.C.I.J., Series A, No. 17*, p. 47.

<sup>14</sup> See, for example, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), part III, pp. 163 *et seq.*

position different from that of the legislator, inasmuch as he is, as it were, *ad hoc* a central authority in respect of States as subjects within his jurisdiction.<sup>15</sup> As such he may possess powers or competences which allow him to go further in the determination of the rights and obligations of State parties to a dispute under his jurisdiction or, inversely, may lack the power to indicate the concrete contents of an existing right or obligation of those States.

42. Possible examples of the first of those situations are the powers given to the Tribunal in the *Trail Smelter* case<sup>16</sup> to determine the allowable amounts of future emission of fumes (*ex ante* aspect), and the power envisaged in article 290 of the draft convention on the law of the sea<sup>17</sup> to order not only interim measures to protect the rights of parties to the dispute, but also interim measures for the protection of the marine environment as such. A possible example of the second situation is given by the various decisions of mixed arbitral tribunals which considered themselves without power to award "punitive damages", leaving expressly aside whether or not there was any obligation to pay such damages.

43. Consequently, in assessing the suitability of the translation of a pronouncement of an international court or tribunal into a draft rule, the Commission should take into account the possibility that such pronouncement was a consequence of a special task entrusted to that court or tribunal, rather than an application of a general rule of international law. Again, the link between "primary rule", "State responsibility" and "implementation" is obvious.

#### B. Plan of work for elaboration of the draft

44. As is noted in chapter I above, in the course of the discussion on the preliminary report in the Commission—and also in the course of the discussions on the Commission's report in the Sixth Committee of the General Assembly at its thirty-fifth session—several members stressed the necessity of drawing up a plan of work for the elaboration of part 2 of the draft articles. Such a plan of work could draw inspiration from earlier pronouncements of the Commission. Indeed, as early as 1963, the Commission approved unanimously the report of the Sub-Committee on State responsibility, including

the proposed programme of work contained therein. The relevant part of that programme was at that time headed: "The *forms*\* of international responsibility". Again, in its 1969 report to the General Assembly, the Commission proposed a plan as regards part 2, there referred to as "the definition of the various *forms and degrees*\* of responsibility". Finally, in 1975, the Commission elaborated somewhat on what it then called a "definition of the *content, forms and degrees*\* of international responsibility".<sup>18</sup>

45. It is hardly surprising that the three earlier plans of work vary slightly in wording, emphasis and approach. However, the main points are the same, and indeed are also reflected in the preliminary report, be it that the latter sometimes uses a different terminology.

46. Furthermore, throughout its commentaries on the various draft articles of part 1, the Commission refers to topics to be dealt with in part 2.<sup>19</sup> These commentaries, though not strictly relevant to a plan of work, should be kept in mind during our work on part 2.

47. Perhaps the most striking difference between the earlier plans of work and the preliminary report is the emphasis the report puts on the "rule of proportionality". Again, this may only be a matter of terminology. Indeed, when the Commission, in 1969, stated that:

two factors in particular would guide it in arriving at the required definition: namely, the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the violation itself.<sup>20</sup>

The idea of proportionality would seem to be implied. The same goes for the Commission's statement in its 1975 report where it is said that:

It will first be necessary to establish in what cases a State which has committed an internationally wrongful act may be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming liable to a penalty.<sup>21</sup>

48. Be that as it may, the Special Rapporteur feels it useful to refer once again to the "rule of proportionality" and to try to correct some misunderstanding which his preliminary report—in particular, paragraphs 98 to 100 thereof—may have raised in this respect.

49. Following an inductive method, it is relatively easy to establish a "*scala* of responses" of international law to breaches of international law. Introducing at that stage a rule of proportionality may create the impression that, in international law, there would exist a perfect correlation between breach and response. Now that is obviously not the case in practice. Indeed, in view of the particular structure of international law (in contradistinction to the structure of a national legal system), this could not be the

<sup>15</sup> One of the reasons why the Commission adopted, in part 1 of the draft articles on State responsibility, the term "obligation" rather than "rule" or "norm" was that an obligation "may very well have been created and imposed upon a subject . . . by a decision of a judicial or arbitral tribunal" (*Yearbook . . . 1973*, vol. II, p. 184, document A/9010/Rev.1, para. (15) of the commentary to article 3). This is no doubt true, but if part 2 is meant to cover also the legal consequences of a breach of an obligation imposed by an international judicial decision, one should take into account that such a breach generally has very particular legal consequences under international law.

The limited possibility of invoking the nullity of an international arbitral award (art. 35 of the Commission's Model Rules on Arbitral Procedure: *Yearbook . . . 1958*, vol. II, p. 86, document A/3859, chap. II, sect. II), Articles 12 to 15 of the Covenant of the League of Nations, and Article 94 of the Charter of the United Nations come to mind here.

<sup>16</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949, V.2), p. 1911.

<sup>17</sup> A/CONF.62/L.78 and Corr.3 and 8.

<sup>18</sup> The relevant passages concerning the three above-mentioned plans of work of the Commission are reproduced in the Special Rapporteur's preliminary report, paras. 1–6 (*Yearbook . . . 1980*, vol. II (Part One), pp. 107–109, document A/CN.4/330).

<sup>19</sup> For the Commission's commentaries to articles in Part 1 of the draft, *ibid.*, p. 110, para. 8, and footnotes 15–20.

<sup>20</sup> *Yearbook . . . 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 81.

<sup>21</sup> *Yearbook . . . 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 43.

case. In other words, if we can establish the existence of rules of international law concerning a degree of correlation between breach and response, those rules are likely to be rather of a negative kind, excluding particular responses to particular breaches.<sup>22</sup> It is in this sense that paragraph 99 of the preliminary report should be understood. The formulation of such rules in part 2 of the draft articles need not be exhaustive, as indeed the draft articles in part 1 concerning "Circumstances precluding wrongfulness" are not meant to be exhaustive.<sup>23</sup> In this connection, it should be recalled that the preliminary report uses the term "response" (of international law to a breach) in a very general way, as indicating all possible new legal relationships arising out of an internationally wrongful act, including new legal obligations of the State which has committed such act—which State, incidentally, might perhaps from now on be called, for short, "the author State" (cf. art. 32, para. 1, in part 1 of the draft) in order to avoid any implication of *mens rea*.

50. In the same line of thought, a question arises relating to the plan of work. In the earlier plans the Commission seemed to envisage part 2 as dealing straight away with the definition of the "forms" (and "degrees" and "content") of international responsibility. The Special Rapporteur would like to submit to the Commission's scrutiny the advisability of starting the draft articles of part 2 with a number of general principles, not unlike those contained in chapter I of part 1.

### C. The relevant preliminary rules

51. What the Special Rapporteur has in mind are three rules of a preliminary kind, namely that (a) a breach of an international obligation does not, as such and in respect of the author State, affect that obligation; (b) the "primary rule" itself (particularly if stated in conventional form) may explicitly or implicitly determine legal consequences of its breach; (c) a breach of an international obligation does not, in itself, deprive the author State of its rights under international law. All three rules may seem self-evident (as indeed are articles 1, 2 and 4 of part 1), but a restatement at the outset of a formulation of possible responses to breaches and the limitations of such responses may nevertheless serve a useful purpose in a comprehensive codification of the rules of State responsibility.

52. The *first rule* has been recalled, *inter alia*, in the discussions of the Commission on the preliminary report; its restatement, in the opinion of the Special Rapporteur, may be useful for the following main reasons.

53. In a purely "voluntarist" approach to international law, a conduct of a State amounting to a breach of an international obligation of that State might be considered as a "repudiation" of that obligation, creating a new situation, which surely may give rise to (new) legal relationships under international law, but then to new relationships which, as it were, "start from scratch" and have no direct and necessary link with the old legal relationship as expressed in the primary rule which the State breached by such conduct.<sup>24</sup>

54. Contrariwise, in any "normative" approach to international law which recognizes rules of international law the existence of which is, in principle, independent from their "origin" in the express or tacit consent of States (and from a later withdrawal of that consent), the "old" relationship created by such rule necessarily "survives"—again, in principle—the breach of an obligation under that old relationship, and the legal consequences of such a breach are of necessity linked with and based upon that old relationship, not wholly unlike the link between norm and sanction under a national legal system. Now, leaving aside the doctrinal question to what extent present-day international law has developed from a "voluntarist" to a "normative" approach, we may conclude from earlier commentaries to several draft articles of part 1 that the Commission has rather a "normative" approach. A reaffirmation of that approach in a rule as suggested here might therefore not be amiss.

55. Such reaffirmation would also underline the specific character of a true legal obligation; indeed, it would be the counterpart of a statement made by the Commission in a different context. In its commentary to article 17, the Commission states:

For it to be actually decided that an act of a State which conflicts with a supposed international obligation of that State is not wrongful, it would be necessary to conclude, rather, that the obligation did not exist, or at least that it was not a legal obligation.<sup>25</sup>

56. Actually, in international practice we find various examples of "instruments", possibly even common oral statements which, though perhaps formulated in a way which does resemble a statement of rights and obli-

<sup>22</sup> Indeed the Commission encountered a question of "proportionality" earlier in discussing some of the "circumstances precluding wrongfulness"—which the Special Rapporteur would be tempted to call a "zero-parameter"—for example, in article 32 para. 2: "if the conduct in question was likely to create a comparable or greater peril", and article 33 subpara. 1(b): "[unless] the act did not seriously impair an essential interest of the State towards which the obligation existed".

<sup>23</sup> See *Yearbook . . . 1980*, vol. II (Part Two), p. 61, para. (29) of the commentary to article 34.

<sup>24</sup> H. Kelsen, in an article published in 1932 and quoted in the Commission's report on its twenty-eighth session, seemed to go even further, holding that "an 'obligation' to perform specific acts, by way of reparation for the damage or otherwise, can only derive from an agreement between the State committing the breach and the injured State" (*Yearbook . . . 1976*, vol. II (Part Two), p. 111, para. (38) of the commentary to article 19 and footnote 519).

One may compare this opinion with that of older writers on international law; thus Grotius, for example, stated:

"The fact must also be recognized that kings . . . have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever." (*De Jure Belli ac Pacis, Libri Tres* [1646], book II, chap. XX, para. XL, in *The Classics of International Law*, trans. F.W. Kelsey (Oxford, Clarendon Press, 1925), p. 504.)

There might indeed exist an intellectual link between the absence of "first parameter" obligations and the stipulation of "third parameter" rights.

<sup>25</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 81, para. (7).

gations, are meant by their authors not to create an independent "rule", but rather as a formulation of a conclusion as to what each of them intends to do, it being understood that non-performance by one of the authors simply invalidates the conclusion, earlier arrived at, itself, thereby at the same time releasing the other authors from performance of their part of the conclusion. Thus, no "true legal obligations" are created by such an instrument.

57. Finally, a preliminary first rule as envisaged above would seem to lay the foundation for a more specific rule which, in the opinion of the Special Rapporteur, should be incorporated in part 2. Indeed, the first obligation incumbent upon a State that has committed a breach of an international obligation, is to stop the breach (obviously this obligation is relevant only in cases of breaches "by an act of the State extending in time"; see the title of article 25 in part 1 of the draft). As will be explained later in the present report, this obligation may include conduct which some writers have characterized as *restitutio in integrum, stricto sensu*; i.e. as a new legal consequence arising from the breach. There seems to be no objection to this characterization, provided it is not used as a proof of a general obligation of *restitutio in integrum, stricto sensu* in all cases of a breach of an international obligation.

58. The *second preliminary rule*, envisaged above (para. 51, point (b)) is in conformity with a statement already made by the Commission in its commentary to article 17. There it is noted that:

Subject to the possible existence of peremptory norms of general international law concerning State responsibility, some States may at any time, in a treaty concluded between them, provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision.<sup>26</sup>

59. First of all, it would seem useful to state this rule in the text of the draft articles itself. Secondly, the rule seems to be of a larger scope than that expressed in the foregoing quotation, in particular in respect of the limitation of possible responses to a breach. Thus, in its Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Teheran*,<sup>27</sup> the International Court of Justice refers to a possible breach of the international obligation of the sending State, to the effect that its diplomatic agents in the receiving State shall respect the laws and regulations of the receiving State and shall not interfere in the internal affairs of that State. This obligation is doubtless an obligation under general international law.<sup>28</sup> In the same Judgment, the Court held that a breach of this obligation cannot under any circumstances legitimately entail the response of a disregard of such privileges and immunities by the

receiving State. As the Court states in paragraph 86 of its Judgment:

The rules of diplomatic law, in short, constitute a *self-contained régime\** which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other hand, foresees their possible abuse by members of the mission and *specifies the means at the disposal\** of the receiving State to counter\* any such abuse.<sup>29</sup>

60. The *third preliminary rule* envisaged (para. 51, point (c)) is, as it were, a negative statement of the rule of proportionality, inasmuch as it states that a breach of an international obligation does not, in itself, deprive the author State of its rights under international law. At the same time, this proposed preliminary rule is the counterpart of the first preliminary rule stipulating the continuing force of the obligation breached. While the first preliminary rule, as remarked above (para. 57), lays the foundation for the more specific obligations of the author State, the third preliminary rule lays the foundation for a number of more specific limitations of the possible response to a breach. The author State does not, by the mere fact of committing any breach of any obligation, become an "outlaw". Rather, the rules of international law determine the legal consequences of the breach, i.e. the possible responses, including the new obligations of the author State. These responses are not necessarily strictly proportional to the breach. They may involve legal consequences having a serious impact on the sovereignty of the author State, as, for example, in the case of a response against aggression committed by the author State. But the point is that even the most serious "international crime" (in the sense of art. 19 of part 1 of the draft) does not in itself—i.e. automatically—deprive the author State of its sovereignty as such.

61. It is submitted that a restatement of this third preliminary rule is particularly useful in view of the tendencies in modern international law to recognize and protect interests which are "extra-State" interests in the sense that their ultimate beneficiaries are entities which are not States, but individual human beings, peoples or even humanity as a whole. Since those entities are not normally—at least in general international law—given a status separate from but similar to that of a State, the rules of international law protecting their interests are still rules creating rights for and imposing obligations on States. Consequently, such rights and obligations must generally "survive" a breach of an international obligation by a State to which those rights and obligations are given, so to speak, "in trust", for the benefit of these extra-State entities.

62. In this connection it would seem relevant to refer to two considerations of the International Court of Justice in its Advisory Opinion of 21 June 1971 in the Namibia case.<sup>30</sup> Discussing the right of termination of a treaty on

<sup>26</sup> *Ibid.*, p. 80, para. (5).

<sup>27</sup> *I.C.J. Reports 1980*, p. 3.

<sup>28</sup> It is codified in art. 41, para. 1, of the 1961 Vienna Convention on Diplomatic Relations in the form of a duty "of all persons enjoying such privileges and immunities". (United Nations, *Treaty Series*, vol. 500, p. 120.) It is to be noted that the Court, in para. 1 of its dictum in the above-mentioned case, expressly refers to "long-established rules of general international law" (*I.C.J. Reports 1980*, p. 44).

<sup>29</sup> *Ibid.*, p. 40.

<sup>30</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16.

account of breach, the Court expressly notes as an exception to this right "provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention)".<sup>31</sup> Even more generally, the Court held that: "In general, the non-recognition of South Africa's administration of the territory should not result in depriving the people of Namibia of any advantages derived from international co-operation".<sup>32</sup>

63. Obviously the third preliminary rule does refer to rights of the author State existing at the moment of the breach by it of an international obligation. The rule, as suggested, does not address the question whether conduct of a State which in itself is a breach of an international obligation of that State may nevertheless create a situation entailing certain rights for that State, for example, as an occupying Power.<sup>33</sup>

64. While in the foregoing paragraphs the relevance of the third preliminary rule was illustrated with respect to responses of the second and third parameters, it should be noted that the rule may also be relevant for the responses of the first parameter, i.e. the new obligations of the author State. Indeed, as will be discussed below, the requirement of *restitutio in integrum stricto sensu* may well run contrary to a right of the author State to preserve its "domestic jurisdiction". This does not mean that a new obligation to proceed to *restitutio in integrum stricto sensu* may never be entailed by the commitment of a breach of an international obligation, but only that such a new obligation is not necessarily always entailed by any breach of any international obligation.

65. It should perhaps also be noted here that if the third preliminary rule is to be incorporated in the draft articles, it should be made clear that the "rights" of the author State referred to in this rule are not to be equated with a mere "faculty". Obviously, any "new legal relationship" created by the breach of an international obligation involves, as does the original primary obligation, a limitation of the sovereignty of the author State, taken in the sense of its complete freedom of action. "Sovereignty" in this primitive, unlimited, sense, is clearly not a "right" of the State under international law.<sup>34</sup>

<sup>31</sup> *Ibid.*, p. 47, para. 96.

<sup>32</sup> *Ibid.*, p. 56, para. 125; see also para. 127.

<sup>33</sup> Nor, of course, does the rule address the question of the obligations resulting from such a factual situation for the author State. Compare the—perhaps, taken out of the context, somewhat sweeping—statement of the Court in its Advisory Opinion relating to Namibia—to the effect that: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability\* for acts affecting other States." (*Ibid.*, p. 54, para. 118.)

<sup>34</sup> Compare also the famous statement of the Arbitral Tribunal in the *Trail Smelter* case: "... under the principle of international law ... no State has the right\* to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another ...". (United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1965.)

#### D. Possible contents of the new obligations arising from breach of international obligation

66. Returning now to the plans of work envisaged by the Commission in its earlier reports, we note that in its report on its twenty-seventh session the Commission stated:

It will first\* be necessary to establish in what cases a State which has committed an internationally wrongful act may be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming liable to a penalty.<sup>35</sup>

67. The Special Rapporteur, however, rather continues to feel—as stated in his preliminary report—that it would be more appropriate to start with a description of the various possible contents of the new obligations of the author State arising from its breach of an international obligation. The main reason for advocating such a course of action is, in his opinion, the lack of clarity as to what exactly constitutes a "reparation" and what exactly constitutes a "penalty".

##### 1. THE THREE STEPS ASSOCIATED WITH THE FIRST PARAMETER

68. As already remarked above, the first duty of the author State is to stop the breach of its international obligation. It does not seem relevant whether one considers this duty as a consequence of the continuing "validity" or "force" of the primary obligation or as a duty which arises as a consequence of the breach. Actually these are, so to speak, the two sides of one and the same coin.

69. Next in the *scala* of obligations of the author State would seem to come the obligation to make "reparation", which in principle is a substitute for the performance of the primary obligation. Logically, the final step would seem to be a restoration of the situation which the primary obligation sought to ensure—in other words, the *restitutio in integrum, stricto sensu*, including, in principle, "retro-active" measures.

70. Now, obviously, the three steps described above are dependent upon the factual possibilities existing after the breach has occurred. Indeed—as remarked in paragraph 29 of the preliminary report—there always is an element of impossibility, and, therefore, the need to fall back on a substitute performance in pecuniary or other terms.

71. On the other hand, it is clear that the three steps impose an increasing burden on the author State, and the question therefore arises whether rules of international law make distinctions as to the new obligations of the author State according to the nature of the obligation breached. Thus, one could imagine, for example, that rules of international law made a distinction according to the nature of the right of the injured State affected by the breach.<sup>36</sup>

<sup>35</sup> *Yearbook* ... 1975, vol. II, p. 56, document A/10010/Rev.1, chap. II, para. 43.

<sup>36</sup> In paragraph (9) of its commentary to article 3 of part 1 of the draft, the Commission stated: "It should be noted that in international law the idea of breach of an obligation can be regarded as the *exact equivalent\** of the idea of the infringement of the subjective rights of others." (*Yearbook* ... 1973, vol. II, p. 182, document A/9010/Rev.1, chap. II, sect. B.)

72. It might then be thought that a distinction—well known in other rules of international law—would be made between the infringement of a right “directly” belonging to a foreign State and the infringement of a right belonging to a foreign State “through” its nationals, to the effect that, while in both cases there would exist an obligation of the author State to stop the breach, a *restitutio in integrum, stricto sensu* would be required only in the former case, as in the latter case reparation would be sufficient.<sup>37</sup>

73. It would not seem, however, that such a “qualitative” distinction (in fact such a rule of “proportionality” between breach and response) is clearly reflected in international judicial decisions and the practice of States. This is no doubt due to (a) the graduality of the distinction between stopping the breach, reparation and *restitutio in integrum, stricto sensu*, in particular in view of the factual possibilities in a given situation; and (b) the impact of other “quantitative” factors in the given situation, such as the attitude of the author State in respect of the breach and the seriousness of the result of the breach from the point of view of the injured State.

74. As to the first point, it should be noted that the term “reparation” is often used in a sense covering all the three possible consequences, and not only as reparation in pecuniary terms (i.e. as a substitute performance). The term is even often used as covering “satisfaction” given to the injured State in the form of a solemn declaration, penal or disciplinary measures taken against the physical person which is the actual author of the act of the State, “punitive damages” and other forms of “penalty”.<sup>38</sup>

75. But even if that distinction is made, and consequently the term “reparation” within that context is limited to compensation in pecuniary terms by way of substitute for the performance of the original primary obligation,<sup>39</sup> the distinction remains a gradual one. Indeed, were one, within the context of part 2, to follow the terminology adopted—within the different context of determination of the *tempus delicti commissi*—in articles 24, 25 and 26 of part 1 of the draft, then the notion of

stopping the breach could only be relevant as regards breaches other than those committed “by an act of the State not extending in time”.

76. But—quite apart from other doubts as to the contents of these articles, which are not relevant in the present stage of the Commission’s work—the present Special Rapporteur is inclined to feel that the obligation of the author State to stop the breach should include such measures as take away, *ex nunc*, the factual effects of the wrongful act of the State which, in the terms of article 24, in part 1 of the draft, otherwise would “continue subsequently”. Indeed, in the numerous cases in which the liberation of persons, the restitution of ships, documents, monies, etc. was proceeded to by the author State on the instigation (protest, etc.) of the injured State, or was ordered by an international judicial body, it would seem that stopping the breach was involved, rather than reparation or *restitutio in integrum, stricto sensu*.<sup>40</sup>

77. It is not always clear whether the physical measures of restitution taken in those cases always included a formal annulment of the legal decisions (under the national law of the author State) taken by the author State. In any case, there are also various examples of such annulment, at least by administrative action.<sup>41</sup>

78. Obviously, if the object of the wrongful act is no longer there, its liberation or restitution is physically impossible and there is no other way but to look for a substitute performance, or “reparation” in the narrow sense. Furthermore, the injury during the time-span in which the breach has not been stopped has to be compensated in some other way. But even if those two things have been done in addition to the liberation and restitution measures which are physically possible, one has still not arrived at the *Chorzów Factory* case standard that “reparation” must “wipe out all the consequences of the

<sup>37</sup> Such a distinction would correspond, *inter alia*, to the one made in respect of the applicability of the rule concerning exhaustion of local remedies. In a different context—relating to what we have called the third parameter—the International Court of Justice, in its Judgment of 5 February 1970 in the case concerning the *Barcelona Traction, Light and Power Company Limited*, also seems to treat “obligations the performance of which is the subject of diplomatic protection” on a different footing from other international obligations. (*I.C.J. Reports 1970*, p. 32, para. 35).

<sup>38</sup> Again, there is not even uniformity of views and terminology as regards the characterization of such measures as compensation for “moral” damage (cf. H. Lauterpacht: “La réparation morale contient un élément distinct de châtement”, *Recueil des cours de l’Académie de droit international de la Haye, 1937–IV* (Paris, Sirey, 1938), p. 355), or the cancellation on the ground of “*injustice patente*” of certain pecuniary obligations of a private person under a final judgement of a national court (*Martini* case (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1002)). Obviously, under such a wide definition of the term “reparation”, the distinction made in paras. 68–69 above disappears.

<sup>39</sup> Or, in the terms of draft article 22 of part 1 of the draft, as an “equivalent result” or an “equivalent treatment” or conduct.

<sup>40</sup> These cases are referred to in the Arbitral Award of 19 January 1977 in the case *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic* (hereinafter called *Topco-Calasiatic* case), and are discussed by M.B. Alvarez de Eulate in his article “La *restitutio in integrum* en la práctica y en la jurisprudencia internacionales”, *Temis* (Revista de ciencia y técnica jurídicas de la Facultad de Derecho de la Universidad de Zaragoza), Nos. 29–32 (1971–1972), p. 11.

<sup>41</sup> See Alvarez de Eulate, *loc cit.*, pp. 27 *et seq.* The situation of national decisions contrary to international law is often expressly provided for in treaties for the pacific settlement of international disputes. Compare *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948* (United Nations publication, Sales No. 1949.V.3), pp. 291 *et seq.*, and articles 1 and 2 of the “Additional Protocol to the Convention relative to the creation of an International Prize Court” (*The Reports to the Hague Conferences of 1899 and 1907*, ed. J.B. Scott (Oxford, University Press, 1920), p. 809). It would seem significant that in those treaties the legal impossibility of annulment by administrative action under the national law of the author State is taken into account and equitable satisfaction in some other form is then provided for. Indeed, it may be doubted whether, in the absence of special provisions to that effect, an international judicial body is empowered itself to annul, or even order the formal annulment, of a legal decision taken by a national authority under its applicable law, at least without leaving to the State concerned the alternative of another form of satisfaction, as indeed arbitral awards often do.

illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".<sup>42</sup> Indeed, as the Judgment just quoted admits, the question of "impossibility" arises here, so to speak from the other end of the *scala*, and a substitute for *restitutio in integrum, stricto sensu*, i.e. "payment of a sum corresponding to the value which a *restitutio* in kind would bear",<sup>43</sup> has to be found.

79. Strict application of the *Chorzów Factory* standard then seems to pose the following double question: what is considered to be "impossible", and what is the financial substitute for the "impossible"?

80. On both scores there are considerable doctrinal difficulties to overcome. Indeed, if it is true that under article 4 of part 1 of the draft—in the words of the Commission's commentary:

the fact that some particular conduct conforms to the provisions of internal law, or even is expressly prescribed by those provisions, in no way precludes its being characterized as internationally wrongful if it constitutes a breach of an obligation established by international law,<sup>44</sup> would then the same not be valid for the new obligation "to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"?<sup>45</sup>

81. On the other hand, articles 31 and 33 of part 1 of the draft can clearly not be invoked in respect of this new obligation, since "the State in question" has certainly contributed to the occurrence of the situation of material impossibility or of the state of necessity, respectively.

82. Nevertheless, it is an established fact that, very often, *restitutio in integrum, stricto sensu*, according to the *Chorzów Factory* standard, is not even claimed, let alone awarded, and it even seems doubtful—though in practice this is difficult to prove—that the financial substitute for the "impossible" is always fully claimed or awarded.

83. On the other hand—and with references to the second point mentioned above (para. 75)—the quantitative factors of the attitude of the author State in respect of the breach and the seriousness of the result of the breach from the point of view of the injured State cannot but influence the opinion of the international judicial body dealing with the case. Surely no such body would be inclined to treat a case in which, in the course of the normal exercise of its jurisdiction, a State incidentally commits a breach of an international obligation altogether on the same footing as a deliberate breach of the same obligation committed for no other purpose than to harm another State. Nor would it be inclined to ignore the difference in importance, for the injured State, of a breach of the same obligation towards it, committed in an isolated case, and a breach which forms part of a systematic policy directed against its personal or territorial elements.<sup>46</sup>

Furthermore, it would seem that, whether the breach is one of an obligation of conduct, of result or of preventing (or promoting) the occurrence of a given event, the question whether the wrongful act occurred within or outside the jurisdiction of the author State must influence the determination of the content of its new obligations arising from the breach.

84. The plan of work referred to above (para. 66) is predicated upon a distinction between "reparation" and "penalty". As noted in paragraph 74 above (see also paras. 37–39), it is not quite clear where the dividing line between the two lies, in particular in respect of the first parameter, the new obligation of the author State. Indeed, if one starts from the *Chorzów Factory* standard, one could well ask the question what more could be claimed from the author State than "to wipe out *all*\* the consequences of the illegal act", including pecuniary compensation of consequences which it is materially impossible to wipe out. Surely the answer to this question could be that, since the author State has "contributed to the occurrence of the situation of material impossibility", something more than the compensation just referred to may be required. In this line of thought it is understandable that controversy exists between learned writers, for example, as to whether pecuniary compensation for moral damage has or has not a punitive character. Actually, in all cases where, somehow or other, a pecuniary compensation is awarded as a counterpart of an irreparable loss, the obvious incomparability between the receipt of a sum of money and the loss suffered invites an analogy with a "penalty". Nevertheless, in many national legal systems such pecuniary compensation is awarded under the title of damages, rather than under any other title.

85. In any case, in the relationship between States, and even when a direct loss of the injured State is involved (such as destruction, in whole or in part, of the embassy premises of the sending State or murder of or physical injury to its diplomatic representatives), the payment of a sum of money by the author State may not wholly make good what has been done to the injured State by the wrongful act. Some other satisfaction for the injured State may be required, and indeed is often given in the practice of States, such as apologies and even declarations of "guarantee" that the author State will take care that similar wrongful acts will not occur in the future. To the extent that the question arises before an international judiciary body, the statement by that body itself to the effect that the author State has committed a wrongful act may constitute a "satisfaction" for the injured State.<sup>47</sup>

86. The Special Rapporteur is inclined to consider such measures of "satisfaction" as examples of the *ex ante* aspect of the new legal relationship, involving the "credibility" of the primary rule itself, and not as a penalty to which the author State is made liable.<sup>48</sup>

<sup>42</sup> *P.C.I.J., Series A, No. 17*, p. 47

<sup>43</sup> *Ibid.*

<sup>44</sup> *Yearbook . . . 1973*, vol. II, p. 185, document A/9010/Rev.1, chap. II, para. (5) of the commentary to article 4.

<sup>45</sup> See footnote 42 above.

<sup>46</sup> Cf. also para. 36 of the preliminary report (*Yearbook . . . 1980*, vol. II (Part One), p. 114, document A/CN.4/330).

<sup>47</sup> Cf. the *Corfu Channel* case (*Merits*), Judgment, *I.C.J. Reports 1949*, p. 4.

<sup>48</sup> See the preliminary report, paras. 30–31 (*Yearbook . . . 1980*, vol. II (Part One), p. 113, document A/CN.4/330). This does not, of

(Continued on next page.)



87. Indeed—since we are still dealing with the first parameter only—the whole idea of the author State, by the fact of its having committed a wrongful act, being obliged to inflict a penalty on itself, does seem alien to the whole structure of international law.<sup>49</sup>

88. The foregoing analysis does not exclude an obligation of the author State to take punitive measures in application of its internal law, and this within the framework of its obligation to stop the breach. This is particularly apparent if the international obligation breached is an obligation “concerning the treatment to be accorded to aliens”. It may well be that the alien concerned, in the course of exhausting the effective local remedies available to him, succeeds in getting himself a satisfaction, for example, in the form of penal or disciplinary action being taken against the actual person responsible for the injury caused to that alien.<sup>50</sup>

89. Obviously the next question which arises in such a case is whether the internal law of the author State does or does not fall short of an international standard existing in this respect. One may even question an international obligation of the author State to give effect to its internal legal system if its rules are particularly favourable—possibly for reasons of “risk allocation”—to the victim of a particular conduct, in a way going beyond what is generally provided for in national legal systems. In other words, the international standard may put a “maximum” as well as a “minimum”. A particular form of international standard is the obligation, imposed by a (conventional) rule of international law, to punish physical persons who have committed certain crimes known as “crimes de droit international”.<sup>51</sup> It is interesting to note that the international standard referred to here is often accompanied by deviations from the normal rules relating to the limits of national jurisdiction. In a sense, this may be regarded as a particular legal consequence attached to that “international standard”, i.e. a non-recognition of an otherwise recognized exclusive jurisdiction of the State of which the perpetrator of the crime is an organ.

90. But this is clearly a matter of primary rules and thus beyond the scope of our present inquiry.<sup>52</sup>

91. What is, however, in principle not beyond the scope of our inquiry is the legal consequence of a situation in which internal law is not applied or falls short of such international standard—in other words, the precise content of the reparation due by the author State to the injured State on the international plane. It is submitted that the reparation in such a case should be the equivalent, in pecuniary terms, of the application of internal law—or, as the case may be, of the international standard—to the direct victim of the wrongful act, national of the injured State.

92. Obviously, such a solution implies an acceptance of an “impossibility” for the author State to stop the breach, an impossibility which is not a “material” one, but one which results from the content of the internal legal system (including the remedies and their application by the competent national authorities) of that State.<sup>53</sup>

93. This is the doctrinal difficulty, referred to above (para. 80). Strictly speaking, the sovereignty of the author State, comprising its internal legislative power to change, even with retroactive effect and even for a particular case, its internal legal system, seems to exclude the acceptance, on the international plane, of such “impossibility”.<sup>54</sup>

94. Nevertheless, this is exactly what the provisions of treaties on the pacific settlement of disputes do.<sup>55</sup> If “administrative action” cannot bring about the desired result, “compensation”, “reparation” or another form of “equitable satisfaction” shall take its place. Indeed, in the relationship between the States involved, a “satisfaction” (in the sense of para. 85 above) may well be an equitable substitute, in addition to pecuniary compensation.<sup>56</sup>

95. Furthermore, even if one excludes *a priori* from the first parameter—as the Special Rapporteur is inclined to do—a new obligation of the author State to inflict a “penalty” on itself, the question remains in which cases a “satisfaction” (in the sense of para. 85 above) can be claimed.

96. Here again (see para. 72 above) it is submitted that, while in the first instance a distinction may be made

(Footnote 48 continued.)

course, imply that there could never be an element of vengeance in a “satisfaction” claimed by an injured State.

<sup>49</sup> As is, at least in the opinion of the Special Rapporteur, the idea of vengeance (see para. 35 above). On the other hand, an expression of regret for the occurrence of the event and declaration that repetition will be avoided are no more than a tribute to the primary rule and may well be paid by the author State *sua sponte*.

<sup>50</sup> Thus, to take an example from a national legal system familiar to the Special Rapporteur, the Dutch code of penal procedure gives a right to the “interested” person victim of a criminal act to claim before a court that prosecution be instituted against the alleged perpetrator of the criminal act; the court, in taking its decision, must take into account a possible “public interest” in not proceeding to a penal prosecution (see arts. 12 *et seq.*: *Wetboek van Strafvordering*, 9th ed. (Zwollen, Tjeenk Willink, 1977)).

<sup>51</sup> Cf. *Yearbook* ... 1976, vol. II (Part Two), pp. 102–104, paras. (16)–(21) of the commentary to article 19.

<sup>52</sup> Compare article 22 in part 1 of the draft, which does not define either the “equivalent result” or “treatment”, or the “effectiveness” of the local remedies.

In this connection, it is interesting to note that even within the framework of the particular rules governing the member States of the European Communities—which rules have “direct effect” within the national legal systems of those member States—the jurisprudence of the European Court of Justice leaves the determination of some of the legal consequences of a breach of those rules by national administrative authorities of such member States to the national legal system of that State and to its courts, subject, of course, to the rule of non-discriminatory treatment. In a certain sense this amounts to making the precise content of an international obligation dependent on internal law, but such reference is often unavoidable and, indeed, in conformity with the structure of international law.

<sup>53</sup> The same goes for the impossibility of *restitutio in integrum*, *stricto sensu* in cases concerning the treatment of aliens.

<sup>54</sup> Under article 6 of part 1 of the draft the author State is responsible for the conduct (including, under article 3, the omission) of its “constituent, legislative [and] judicial or other power”.

<sup>55</sup> See footnote 41 above.

<sup>56</sup> Again the “adaptation” of the application of international rules to the application of national rules, is—like the reverse situation—rather typical for the structure of international law.



between cases of direct injury to the other State and cases in which the other State is injured "through" its national (qualitative difference), the other circumstances of the case (the quantitative differences mentioned in para. 83, including the question whether the breach is or is not a flagrant violation of the primary rule) may blur this distinction insofar as the determination of the content of the reparation due by the author State is concerned.<sup>57</sup>

97. While normally satisfaction is due only in cases of direct injury, the quantitative circumstances of the case may justify an obligation to give satisfaction also in other cases, and vice versa.

98. It is perhaps useful to note, in connection with the adaptation of national law to international rules, that while under the constitutional rules of a given country the executive organs cannot take action without a mandate of the judiciary organs, the same internal legal system may not provide for a request to that effect from the executive organs, made not strictly on its own behalf but in order to ensure the fulfilment of the international obligations of the State towards a foreign State. Thus, many national legal systems do not provide for an official intervention of an executive organ in a procedure before a national court where the jurisdictional immunity of a foreign State is involved.<sup>58</sup>

<sup>57</sup> The distinction between direct injury and injury suffered through a national is in itself not always easy to apply. Leaving aside the cases of wrongful conduct "against the territorial integrity or political independence of another State" (cf. also the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex) and, in particular, the second part of article 2 thereof), a "direct" injury to a foreign State may result from a violation of the rule of general international law prohibiting the use of the territory of another State for the purpose of exercising a governmental activity, and perhaps the wrongful interference with navigation of ships or aircraft under the flag of a foreign State (cf. the question of the possible non-applicability of the local remedies rule in the latter case, as discussed *inter alia* in the Arbitral Award of 9 December 1978 in the case concerning the *Air Services Agreement of 27 March 1946 (United States v. France)* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 417)). For comment on the case, see, for example, L.F. Damrosch, "Retaliation or arbitration—or both? The 1978 United States–France aviation dispute", in *American Journal of International Law* (Washington, D.C.), vol. 74, No. 4 (October 1980), pp. 785–807. Cf. also the "prompt release of vessels" under article 292 of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr. 3 and 8). In both cases, as in the case of violation of diplomatic immunities, the limits of national jurisdiction under the general rules of international law are at stake.

<sup>58</sup> It may be recalled here that, under the second preliminary rule suggested above (para. 51(b)), a treaty may explicitly or implicitly vary the legal consequences of a breach, e.g., by excluding some of the normal legal consequences to be provided for in part 2 of the draft articles. Thus, it is generally held that in the relationship between the member States of the European Communities, reprisals of one member State against another (or by a member State against the Communities as such, and, except as expressly provided for in the constituent treaty, even vice versa) are implicitly excluded. This, of course, concerns the second parameter. But even as regards the first parameter, the new obligations of a member State will—also in view of the direct effect of

## 2. SUMMARY OF THE ANALYSIS OF THE STEPS ASSOCIATED WITH THE FIRST PARAMETER

99. Summing up the above analysis, it is submitted that, in respect of the first parameter (the new obligations of a State which has acted not in conformity with what was required of it by an international obligation):

- (a) One may distinguish between:
  - (i) an obligation to stop the breach;
  - (ii) an obligation to pay to the injured State a sum of money corresponding to the value of the loss suffered and not repaired;
  - (iii) an obligation to re-establish the situation which would have existed if the breach had not been committed; and
  - (iv) an obligation to give satisfaction in the form of formal apologies for the breach, a formal reconfirmation of the obligation breached, or a declaration to the effect that measures will be taken in order to prevent similar breaches in the future;

(b) While the obligation mentioned under (a)(i) arises in any case of a breach and includes the obligation to effect a release of persons and a return of objects held by the State as a result of the breach, as well as the application of remedies existing under the internal law of the State, and while the obligation mentioned under (a)(ii) also arises in any case and may comprise the payment of a sum of money corresponding to the value of the fulfilment of the obligation mentioned under (a)(iii), the question whether the latter obligation has arisen has to be answered in the light of:

- (i) the character of the primary injury ("direct" injury to another State, or injury "through" its nationals); and
- (ii) the "quantitative" factors of intention to harm in the conduct on the part of the author State, and seriousness of the result of the breach on the part of the injured State.

In appropriate cases, the obligation mentioned under (a)(iv) may be a substitute for the obligation mentioned under (a)(iii).

100. The above summing up deals with "international delicts" in the sense of paragraph 4 of article 19 of part 1 of the draft. In the opinion of the Special Rapporteur, the possible responses to an "international crime" require a special and separate treatment.<sup>59</sup> Surely, in the case of an international crime, the author State is also obliged to stop the breach. But apart from that, there does not, within the

community law (being the constituent treaties plus the binding rules established by the community organs)—in principle not include any obligation of compensation or satisfaction to be given to another member State or to the Community as such (see, among the more recent literature on this matter, A. Bleckmann, "Zwangsmittel im Gemeinsamen Markt?", *Recht der Internationalen Wirtschaft* (Heidelberg), vol. 24, No. 2 (February 1978), p. 91). Similar variations may explicitly or implicitly result from other multilateral or regional treaty regimes.

<sup>59</sup> Indeed, such a separate treatment is implied by the Commission's commentary to article 19 (*Yearbook . . . 1976*, vol. II (Part Two), pp. 96 *et seq.*).

framework of the first parameter, seem to be room for the distinctions made in the summing-up. As a matter of fact, paragraph 3 of article 19 already embodies the quantitative factors mentioned in paragraph 99, under (b)(ii) above. Furthermore, if a breach "is recognized as a crime" by the international community as a whole, it may be assumed that such recognition particularly relates to what this international community and its members consider to be an adequate response on their part to such a breach.<sup>60</sup>

101. Finally, in the field of international crimes the emphasis would seem to lie on the "implementation" of State responsibility, in particular on the existence and powers of the competent international organization(s).<sup>61</sup>

102. In this connection, attention may be drawn to a matter which might perhaps be considered as being of a terminological kind. In paragraph (1) of the commentary to article 19 of part 1 of the draft, the Commission states:

Article 19 is concerned with the question of the possible bearing of the *subject-matter of the international obligation*\* breached ... on the régime of responsibility applicable to that act [i.e., the act of the State committing such a breach] if its wrongfulness should be established.<sup>62</sup>

In paragraph (10) of the same commentary, the Commission refers to an International Court of Justice opinion as drawing "a fundamental distinction between international obligations *and hence*\* between the acts committed in breach of them".<sup>63</sup>

103. On the other hand, after noting in paragraph (12) of the commentary to article 19:

the possibility that internationally wrongful acts in that category ["exceptionally important obligations, breaches of which could have very serious consequences for the international community as a whole"] can occur in this field [the field of obligations relating to the treatment of foreigners] as well<sup>64</sup>

the Commission states, in paragraph (66) of the same commentary:

... the conclusion that an international crime has been committed depends in every case on two requirements being met: (a) the *obligation*\* ... must be "of essential importance" for the pursuit of the fundamental aim characterizing the sphere in question; and (b) the *breach*\* of that obligation must be a "serious" breach.<sup>65</sup>

Indeed, in paragraph 3 of article 19, the seriousness of the breach is incorporated in the description of some "international crimes".

104. It would seem to the Special Rapporteur that it is of some importance to recognize that, in determining the

content, forms and degrees of State responsibility, it is rather the character of the (concrete) breach and its factual circumstances (the "quantitative" aspects referred to above) than the (abstract, qualitative) subject-matter of the primary obligation which has to be taken into account, although, of course, it cannot be denied that the latter and the former are interrelated.

### 3. ANALYSIS IN LIGHT OF JUDICIAL AND ARBITRAL DECISIONS, STATE PRACTICE AND DOCTRINE

105. Turning now to the decisions of international courts and arbitral tribunals, the practice of States and the teachings of the most highly qualified publicists of the various nations, it would seem that references, in earlier commentaries of the Commission,<sup>66</sup> notably the very extensive commentary to article 19, cover most of the available material, and no useful purpose would be served by repeating them in the present report. Some annotations may, however, be made in order to compare this material with the analysis attempted in the present report.

106. In respect of international courts and arbitral tribunals, it must be recalled (see para. 41 above) that their decisions are of necessity taken within a special framework, the framework of their particular mandate and powers. Furthermore, such decisions are usually taken a long time after the (alleged) breach, and more often than not deal with the determination of the existence of such a breach and its legal consequences at the same time. Finally, they are not always explicit on the way in which the amount of damages awarded is assessed. Anyway, far the greater number of those decisions deal with cases involving primary rules concerning the treatment to be accorded to aliens. In short, for the purposes of drafting articles dealing with the content, forms and degrees of international responsibility in general and independent of the existence of a machinery for implementation, they are of limited value.

107. Thus, it is hardly surprising that most of those decisions concentrated on the obligation of the author State to make "reparation" in pecuniary terms, i.e. to pay damages. Surely, in determining the amount of damages, indirect consideration is given to what the author State should have done in the first place. This consideration is indeed indirect, inasmuch as it is given within the context of another obligation, to wit, the obligation to pay a sum of money to the injured State. It would seem clear that, in the relationship between States, the amount of the sum of money to be paid is usually of relatively minor importance; it does not normally affect either State's domestic jurisdiction nor to any appreciable extent the conduct of its internal or external affairs. Under the *Chorzów Factory* standard (see para. 37 above), this consideration is directly linked to the obligation under the primary rule. The reparation "must wipe out all the consequences of the

<sup>60</sup> Such response may include a "penalty" inflicted upon the author State.

<sup>61</sup> Cf. also the Definition of Aggression (see footnote 57 above), and paragraphs (20) to (26) of the Commission's commentary to article 19, notably, in para. (22), the statement that "in formulating the 'primary' obligation ... under international law, the United Nations Charter combines the formulation with an explicit indication of the consequences attendant upon any breach" (*Yearbook ... 1976*, vol. II (Part Two), pp. 103-106).

<sup>62</sup> *Ibid.*, p. 96.

<sup>63</sup> *Ibid.*, p. 99.

<sup>64</sup> *Ibid.*, p. 100.

<sup>65</sup> *Ibid.*, p. 120. The distinction between "obligation" and "breach" also plays a role in distinguishing between the two notions of *jus cogens* and "international crime" (see, for example, para. (62) of the commentary to art. 19 (*ibid.*, pp. 119-120)).

<sup>66</sup> In particular, those referred to in the preliminary report, para. 8 and footnotes 15 to 20 (*Yearbook ... 1980*, vol. II (Part One), pp. 109-110, document A/CN.4/330).

illegal act" and, as such, should correspond to the *status quo sine delicto*.<sup>67</sup>

108. The obligation "to wipe out all the consequences of the illegal act" is, as it were, mitigated by the notion of "proximate" or "effective" causality.<sup>68</sup> Indeed, in the factual chain of events connecting a particular conduct to a particular result, there may be "extraneous links" which cannot but influence the decision as to the amount of damages (if any) to be paid.<sup>69</sup>

109. Such extraneous links are, on the one hand, the element of "hazard", and, on the other hand, the element of "intentions" of the author State. While the former element tends to limit the extent of consequences taken into account in determining the amount of damages to be paid, the latter element tends to increase this extent, and thereby, the amount of damages.<sup>70</sup>

110. It should be noted here that the question by which conduct which result should, or should not, be caused, is obviously a matter of the content—express or implied—of the primary rule. Accordingly, such primary rule may embody the element of "intention"—or even the element of "hazard"—in determining the obligations and the rights of the States bound by that primary rule. Thus, the primary obligation may cover only intentional acts of the State, or, on the other hand, may create an "absolute liability" of that State.

111. Furthermore, the primary rule may, so to speak, extend the chain of events and take into account (again, even by implication) the actual capacity of the obliged State (or States)—and even the State the right of which is involved—to prevent (or to create) the situation which the primary rule wishes to avoid (or to attain).<sup>71</sup>

112. Much of the jurisprudential (and doctrinal) discussion on what is often called "the principle of fault" and "the principle of integral reparation" would thus seem to turn on the interpretation and application of the primary

rule, rather than on any supposed general rule relating to the content of State responsibility, irrespective of the content of the primary rule. This point is particularly illustrated by the Judgment of the International Court of Justice in the *Corfu Channel* case and the dissenting opinions appended to it.<sup>72</sup>

113. If judicial decisions concentrate on reparation in pecuniary terms, the obligation to stop the breach does not, of course, as such find specific mention or consideration; it is, as it were, submerged in the determination of the amount of damages to be paid.

114. There are however also judicial decisions which order measures other than the paying of a sum of money. In this connection, reference should be made to: (a) final decisions which order a *restitutio*, and (b) decisions ordering interim measures of protection of the kind mentioned in article 41 of the Statute of the International Court of Justice. It should be recalled that in both cases considerations relating to the specific function and powers of the Court may be involved.

115. It is interesting to note that, while in the practice of States there are many cases in which, as a consequence of protests of the injured States, the author State liberated the persons and returned the objects it held as a consequence of a wrongful act, there are relatively few cases in which such liberation or return was ordered as a final decision by an international court or tribunal.<sup>73</sup>

116. As remarked above (para. 57), it does not, in practice, matter much whether a final judicial decision ordering the return of certain objects, the liberation of certain persons or the annulment of certain acts, does so as (part of) a reparation or as a consequence of the obligation to stop the breach. The point is rather whether or not, *independently of the existence of a machinery for implementation*, there exists an obligation of the author State to effect a *restitutio in integrum stricto sensu (ex tunc)*. The establishment of such an obligation may be relevant for the other parameters of the legal consequences of the breach, such as the right of the injured State to apply "counter-measures". It is, however, not in the latter context that the question is normally looked at in judicial decisions. Nevertheless, such decisions may throw light on the existence or non-existence of the obligation and its scope.

117. Little information can be gathered from the numerous cases in which the international judicial body, in a final judgement, orders the return of a sum of money acquired by the author State through an internationally wrongful act. Such return obviously amounts to the same

<sup>67</sup> This is, of course, *ex tunc* and is to be distinguished from the obligation to stop the breach, the latter corresponding to what the author State should do after the breach has occurred (*ex nunc*, and possibly, *ex ante*). See the preliminary report, para. 31 (*ibid.*, p. 113).

<sup>68</sup> See Cheng, *op. cit.*, chap. 10, where the author mentions the ruling in the case *H.G. Venable (Opinions of Commissioners, under the Convention concluded September 8, 1923, between the United States and Mexico, February 4, 1926 to July 23, 1927)* (Washington D.C., 1927) and chaps. 8 and 9 on the principle of integral reparation and the principle of fault.

<sup>69</sup> In a sense, one might also consider both the act of a third State and the injury suffered by a third State as extraneous elements in a factual chain of events. This is, however, a matter to be dealt with separately.

<sup>70</sup> Obviously, "hazard" and "intentions" meet in the objective criterion of what is a "normal" or "reasonably foreseeable" chain of events.

<sup>71</sup> The primary rule may also be laid down *ex post facto* in the *compromis* which is the basis of a judicial decision; a notable example of this is given by the Treaty between Great Britain and the United States of America signed at Washington on 8 May 1871, on which the Award of 14 September 1872 in the "*Alabama*" claims arbitration was founded (see J. Gillis Wetter, *The International Arbitral Process: Public and Private* (Dobbs Ferry, N.Y., Oceana, 1979), vol. I, p. 44. See also the (controversial) question whether or not the *compromis* excluded any damages for "indirect losses" (*ibid.*, pp. 60 *et seq.*).

<sup>72</sup> See above, footnote 47. Actually, to the extent that the element of "hazard", breaking the chain between conduct and result, takes the form of "*force majeure* and fortuitous event" (art. 31 of the draft articles), there may be a "circumstance precluding wrongfulness" in the sense of part 1 of the draft, which deals with the origin of State responsibility rather than the content of State responsibility.

<sup>73</sup> Many examples taken from the practice of States and judicial decisions are mentioned in the study of Alvarez de Eulate referred to above (see above, footnote 40).

as (part—i.e. apart from interest—of) a reparation in pecuniary terms.<sup>74</sup>

118. Furthermore, the cases in which the Franco/Italian Conciliation Commission set up under the Treaty of Peace with Italy of 10 February 1947<sup>75</sup> ordered the refund of sums collected for certain taxes<sup>76</sup> are also rather irrelevant for the present issue, since the refund was expressly provided for, as a primary obligation of Italy, under article 78, para. 6, of the Treaty. Moreover, not only was the Conciliation Commission made competent, under article 83, para. 2, of the Treaty, to deal with any dispute relating to the interpretation and application of articles 75 and 78 and annexes XIV to XVII of the Treaty, but it was also stipulated that the Commission “shall perform the functions attributed to it by those provisions”.<sup>77</sup> The same is true of the cases in which the Conciliation Commission ordered “the restitution of property” removed by force or duress from the territory of “any of the United Nations” (art. 75, para. 2)<sup>78</sup> or the re-establishment of property, rights and interests in Italy (art. 78).<sup>79</sup>

119. One might possibly consider the obligation imposed on Italy by articles 75 and 78 of the Peace Treaty not so much as a primary obligation as an example of a particular conventional determination of the legal consequences of internationally wrongful acts, but this construction does not change the conclusion that the decisions taken by the Conciliation Commission are irrelevant for the present issue. It is to be noted that article 78, subparagraph 4(a) of that Treaty reads as follows:

The Italian Government shall be responsible for the restoration to complete good order of the *property*\* returned to United Nations nationals under paragraph 1 of this Article. In cases where *property*\* cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to *property*\* in Italy, *he shall receive*\* from the Italian Government *compensation in lire*\* to the extent of *two-thirds*\* of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . .<sup>80</sup>

120. More interesting for the present purpose are the final judicial decisions which order something else than the payment of a sum of money. One of the more recent decisions—the Arbitral Award of 19 January 1977 in the *Topco-Calasiatic* case—was already referred to in the preliminary report.<sup>81</sup> In this case the Sole Arbitrator, Mr.

René-Jean Dupuy, devoted a large part of the Award on the Merits to the question whether, “having disregarded its obligations, the Libyan Government should be held to *restitutio in integrum* or *restitutio in pristinum*”<sup>82</sup> and, somewhat implicitly, ordered such *restitutio*.<sup>83</sup>

121. The learned Sole Arbitrator, on the basis of “international case law and practice” as well as of “writings of scholars in international law” arrives at the conclusion that “*restitutio in integrum* is, . . . under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible”.<sup>84</sup> Again, in the Award, it was held “the solution in principle which is constituted by *restitutio in integrum* should be discarded when there is absolute impossibility of envisaging specific performance, or\* when an irreversible situation has been created”.<sup>85</sup>

122. It is interesting to note that the Sole Arbitrator cites in support of his opinion a statement by an eminent member of our Commission, Mr. Reuter, to the effect that *restitutio in integrum* is, in principle, “the most perfect performance possible of the original obligation”.<sup>86</sup> Indeed, if one looks at the primary rule and takes into account that the original obligation does not lapse as a consequence of its breach, the conclusion would seem inescapable. The primacy of the rule of international law would, it seems, admit no other solution. What justification could be found for the substitution of an obligation to pay a sum of money, for the original obligation?

123. In strict logic, such justification could only be found in another, second, rule of international law, which specifically allows a State (in this case, the author State) the discretion itself to determine the consequences of a given situation (in this case, the situation which has arisen after a breach of an international obligation has occurred). If such a rule exists, it could come into conflict with the rule of international law mentioned before, and it would be up to a third rule of international law to determine whether the former or the latter rule prevails in a given situation. What could be those “second” and “third” rules?

124. As to second rule, the most likely candidate is the rule stipulating the domestic jurisdiction of States. Surely this rule does not exclude nor override a primary obligation of the State under another rule of international

<sup>74</sup> This is particularly clear in cases where not even all the money received as taxes is returned, as, for example, in the case of the *Palmarejo and Mexican Gold Fields* (United Kingdom v. Mexico). United Nations, *Reports of International Arbitral Awards*, vol. V (Sales No. 1952.V.3.), pp. 298 *et seq.* See also the decisions in the cases *Jethro Mitchell*, *The Macedonian*, *King and Gracie*, *Turnbull*, *Orinoco Company*, *Compagnie générale des asphaltes de France*, cited by Alvarez de Eulate (*loc. cit.*, pp. 23–24).

<sup>75</sup> United Nations, *Treaty Series*, vol. 49, p. 3.

<sup>76</sup> The case *Società anonima Michelin italiana* (United Nations, *Reports of International Arbitral Awards*, vol. XIII (Sales No. 64.V.3), p. 612); and *Wollemborg* case (*ibid.*, vol. XIV (Sales No. 65.V.4), p. 283).

<sup>77</sup> United Nations, *Treaty Series*, vol. 49, p. 168.

<sup>78</sup> *Ibid.*, p. 157.

<sup>79</sup> *Ibid.*, pp. 160–163.

<sup>80</sup> *Ibid.*, p. 161.

<sup>81</sup> See footnote 40 above and *Yearbook . . . 1980*, vol. II (Part One), p. 112, footnote 27.

<sup>82</sup> *International Legal Materials* (Washington, D.C.), vol. XVII, No. 1 (January 1978), sect. III, p. 31, para. 92.

<sup>83</sup> One might doubt the final character of this Award inasmuch as the dictum of the Award, after granting to the Libyan Government “a time period of five months . . . in order that it may bring to the notice of the Arbitral Tribunal the measures taken by it with a view to complying with and implementing the present arbitral award”, immediately adds the decision “that, if the present award were not to be implemented within the time period fixed, the matter of further proceedings is reserved . . .” (*Ibid.*, p. 37). Furthermore the dispute is one between private companies and a State, and as such, is not directly relevant to our enquiry. However, the Sole Arbitrator founded his decision also on “the principles of international law with respect to *restitutio in integrum*” (*ibid.*, p. 32).

<sup>84</sup> *Ibid.*, p. 36, para. 109.

<sup>85</sup> *Ibid.*, para. 112.

<sup>86</sup> *Ibid.*, p. 35, para. 102.

law. But it may override (depending on the third rule of international law) an obligation of *restitutio in integrum*, *stricto sensu* in case a breach of the primary obligation has occurred.<sup>87</sup>

125. Obviously such a second rule cannot provide a justification for not proceeding to a *restitutio in integrum*, *stricto sensu*, if the situation created by the breach lies *beyond* the domestic jurisdiction of the author State. Thus it is clear that if, for example, a State *wrongfully* occupies part of the territory of another State, not only should the occupation be ended, but also objects taken away from the occupied zone should be returned.<sup>88</sup> The same goes for other "direct" injuries to another State, such as the breach of the inviolability of the premises of the diplomatic mission of that State.

126. It is therefore not surprising to find international judicial decisions declaring void measures taken by the author State as regards a territory under the sovereignty of another State, as in the case of the *Legal Status of the South-Eastern Territory of Greenland* (1933).<sup>89</sup>

127. The situation would be different if the international judicial body were to order the annulment of a decision taken by a national authority of the author State under its internal law. The *Martini* case is sometimes cited as a case in point, in which the Arbitral Tribunal held (in respect of a judgement of the "Cour fédérale et de cassation" of Venezuela of 4 December 1905) that:

... the parts of the judgement of 4 December 1905, which are tainted by patent injustice, impose on the firm of Martini certain obligations to pay. Although such payment has never been made ..., the obligations exist in law. These obligations must be annulled, by way of reparation.

<sup>87</sup> In this connection, a parallel may be drawn with an internal rule of an international organization. In case the United Nations Administrative Tribunal determines that the Secretary-General of the United Nations has acted not in conformity with his obligations by terminating a contract of service of a staff member under the statute of the Tribunal:

"If the Tribunal finds that the application is well-founded, it shall order the rescinding of the decision contested or the *specific performance*\* of the obligation invoked. At the same time the Tribunal shall fix the amount of *compensation*\* to be paid to the applicant for the injury sustained should the Secretary-General ... decide, *in the interest of the United Nations*,\* that the applicant shall be compensated without further action being taken in his case". (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports* 1954, p. 52.)

It is interesting to note that in the original version of the same statute the second sentence read in part:

"... if, in exceptional circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, *impossible or inadvisable*\*, the Tribunal shall ... order the payment to the applicant of compensation for the injury sustained". (*Ibid.*)

<sup>88</sup> Cf. the Judgment of 15 June 1962 of the I.C.J. in the case concerning the *Temple of Préah Vihear*, Merits, *I.C.J. Reports* 1962, p. 37.

<sup>89</sup> *P.C.I.J., Series A/B, No. 53*, p. 22. See also the Award of 30 June 1865 in the case concerning fishery rights around the Aves Islands. The Award declares those islands to be under the sovereignty of Venezuela, but orders Venezuela to recognize the Dutch fishing rights or pay an indemnity for the loss of those fishing rights (see J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C.: U.S. Government Printing Office, 1898), vol. V, p. 5037).

In pronouncing their annulment, the Arbitral Tribunal emphasizes that an illegal act has been committed and applies the principle that the consequences of the illegal act must be wiped out.<sup>90</sup>

However, in the *dictum* of this Award we find a somewhat different formula:

[the Tribunal] decides that, by reason of the attitude adopted by the "Cour fédérale et de cassation" towards the firm of Martini and Co. in the said case, *the Government of Venezuela is required to recognize, by way of reparation, the annulment of the obligations to pay\** imposed on the firm of Martini and Co., as set out under 2(a)-(d) above.<sup>91</sup>

128. In actual fact, therefore, since the obligations of Martini, imposed by part of the judgement of the Venezuelan Court, were obligations to pay a sum of money to the Venezuelan Government, the case is comparable to those cited above in which a sum of money wrongfully received by the author State was ordered to be refunded.<sup>92</sup>

129. Even in the *Topco-Calasiatic* case the Sole Arbitrator held that *restitutio in integrum* "should be discarded ... when an irreversible situation has been created".<sup>93</sup> It is to be noted that the Sole Arbitrator was of the opinion—thoroughly motivated in the Award—that the legal relationship between the private companies and Libya was governed by the rules of international law. Though the Award does not contain any indication in this direction, one might perhaps consider that a consequence of such opinion would be that the rights acquired by the companies under the contracts with Libya could somehow be assimilated to sovereign rights of a State beyond the domestic jurisdiction of another State. Obviously, what is "irreversible" *in law*, as distinguished from material impossibility (in fact), is difficult to determine.<sup>94</sup>

<sup>90</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 1002.

<sup>91</sup> *Ibid.*

<sup>92</sup> No more relevant for the present issue are the cases of the *Buzau-Nehoiashi Railway* (United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1827 *et seq.*, and of the *Société Radio-Orient* (*ibid.*, pp. 1871 *et seq.*).

In the first of these cases, the Arbitral Tribunal did indeed order the return by the Romanian Government of a specific number of shares in the railway company to the Berliner Handels-Gesellschaft (not to the claimant Government), but it did so *under a treaty provision* not unlike the one laid down in article 75 of the Treaty of Peace with Italy (see para. 118 above).

In the second case, the dictum of the Arbitral Award reads, *inter alia*, as follows:

"[The Tribunal] orders the cancellation, six weeks after the date of this award, of the instruction whereby, on 16 April 1935, the Egyptian Telegraph Administration forbade Egyptian telegraph offices to accept telegrams for dispatch over the routes of the "Radio-Orient" company ..." (*ibid.*, p. 1881).

This is clearly a case of an order to stop the breach of an international obligation through a discretionary administrative act of the author State itself. In this case the author State has invoked "its sovereign right to maintain law and order in its territory": this plea was rejected by the Tribunal on the ground that "the sovereign rights of each State are restricted by the commitments it has undertaken towards other States, in this case by the Madrid Convention and the Telegraph Regulations" (*ibid.*, p. 1880). Again, the question turned rather on the interpretation of the primary obligation.

<sup>93</sup> See footnote 85 above.

<sup>94</sup> Alvarez de Eulate uses the term "*imposibilidad jurídica*" as a reason for not ordering *restitutio in integrum* (*loc. cit.*, pp. 17-18). Article 9 of the Draft Convention on the responsibility of States for

(Continued on next page.)

130. Indeed, the use of such vague terms seems rather to point to a certain discretion to be left to the international judicial body in deciding on the measures to be taken by the author State as a consequence of the breach of an international obligation. Actually there is some analogy with the power of an international tribunal to order "interim measures of protection".

131. As is well known, the power to order (or "indicate") provisional measures of protection is not generally given to all international judicial bodies, and, if it is given, is seldom used by such bodies. Judicial practice in this respect cannot be regarded as in any way conclusive as regards the existence or non-existence of new obligations of an author State in case of breach of an international obligation. Indeed, the very existence of a breach—both in terms of fact and in terms of law—as well as the competence of the court and the fulfilment of other "preliminary" conditions are often in dispute between the parties at the moment the question of interim measures of protection turns up. While, therefore, an international judicial body must of necessity have a wide measure of discretion in deciding whether or not to order interim measures of protection, the reasoning underlying its decision on the issue might give some indication of its opinion as regards the legal consequences of the alleged breach of an international obligation.<sup>95</sup>

132. In essence, interim measures of protection are directed against (a) a continuation of the (alleged) breach (possibly in the form of similar infringements of the same right) and/or (b) a frustration of the obligation to conform to a final decision of the court (concerning the "response" to the breach from the side of the defendant State). Accordingly, one might perhaps expect that in deciding on the exercise or non-exercise of the power to indicate interim measures of protection, the court would take into account the prospects of its final judgement obliging the defendant State to something *more* than a reparation in pecuniary terms.<sup>96</sup>

(Footnote 94 continued.)

injuries caused in their territory to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930, while stating, even within the limited scope of the draft, from an obligation of the author State to *restitutio in integrum stricto sensu*, and even while stating, in paragraph 2, that

"Difficulties in effecting such re-establishment, and in particular the necessity of expropriating and compensating third-party assignees, do not preclude the right to demand such re-establishment", provides, in paragraph 3, that:

"Re-establishment may not be demanded if such demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person". (See *Yearbook* . . . 1969, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII).

<sup>95</sup> Cf. United Nations, the Gilbert Amado Memorial lecture *The International Court of Justice and the Indication of Provisional Measures of Protection*, delivered by Judge T.O. Elias of the International Court of Justice on 7 June 1978. See also the Court's order of 15 December 1979 in the case concerning *United States Diplomatic and Consular Staff in Teheran*, Provisional Measures, *I.C.J. Reports* 1979, p. 7.

<sup>96</sup> Cf. the separate opinion of Judge Jiménez de Aréchaga in the *I.C.J.'s* Order of 11 September 1976 in the *Aegean Sea Continental Shelf* case:

"... the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence

133. To a certain extent, the emphasis placed by the International Court of Justice on the threat of "*irreparable*\* prejudice being caused to rights which are the subject of dispute in judicial proceedings" as a condition for indicating interim measures of protection does go in this direction.<sup>97</sup>

134. However, all depends on what is considered to be an "irreparable" prejudice. In the *Aegean Sea Continental Shelf* case, the Court, in its Order of 11 September 1976, held that:

... the alleged breach by Turkey of the exclusivity of the right claimed by Greece to *acquire information*\* concerning the natural resources of areas of continental shelf, if it were established, is one that might be *capable of reparation by appropriate means*\*; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation.<sup>98</sup>

On the other hand, Judge Elias, in his separate opinion in this case, seems inclined to take into account "the fact that the injury by itself might be sufficient to cause *irreparable harm to the national susceptibilities of the offended State*\*".<sup>99</sup>

135. Obviously, information, once acquired, cannot be given back, and "harm to national susceptibilities" is almost always irreparable. In any case, the practice relating to interim measures of protection does not seem to indicate any hard and fast correlations between the nature of the breach (such as, for example, the distinction between "direct" injury and injury "through nationals") and the content of the new legal obligations of the author State.

136. Some special questions may arise in respect of international obligations relating to the respect for human rights. Here again, a treaty in this field may not only

and on the merits is that the action of one party '*pendente lite*' causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour." (*I.C.J. Reports* 1976, pp. 15–16).

<sup>97</sup> See, *inter alia*, the aforementioned Order of 11 September 1976 (footnote 96 above), paras. 32–33; and the Order of 15 December 1979 in the case concerning *United States Diplomatic and Consular Staff in Teheran*, paras. 36 and 42 (*I.C.J. Reports* 1979, pp. 19–20).

In a way, this notion of "irreparable prejudice" as a condition for ordering interim measures of protection can be linked with the notion of "irreversible situation" as excluding *restitutio in integrum stricto sensu*; in a similar way, the justification of indicating interim measure of protection in order to prevent a frustration of the obligation to conform to the final judgement may be compared with the obligation under article 18 of the Vienna Convention not to defeat the object and purpose of a treaty, signed but not yet ratified.

<sup>98</sup> *Aegean Sea Continental Shelf*, Interim Protection, *I.C.J. Reports* 1976, p. 11, para. 33.

<sup>99</sup> *Ibid.*, p. 30. In his opinion (p. 28), Judge Elias also criticizes the *obiter dictum* in the case *Legal Status of the South-Eastern Territory of Greenland* (*P.C.I.J., Series A/B, No. 48*, p. 268) to the effect that even action calculated to change the legal status of the territory would not in fact have irreparable consequences for which no legal remedy would be available, and considers that this *obiter dictum* "must be regarded as limited to the peculiar circumstances of that case".

In his Memorial Lecture (see footnote 95 above), Judge Elias rejects the "emphasis on aggravation of the situation as essentially limited to the possibility of destruction or disappearance of the subject-matter of the dispute . . ." (*Op. cit.*, p. 13).

provide for an international tribunal to judge the fulfilment of the treaty obligations in individual cases, but also give such tribunal special powers to determine the legal consequences of a breach.<sup>100</sup>

137. Both the (few) judicial decisions which, as a final judgement, order a *restitutio* and the (equally few) judicial decisions ordering interim measures of protection seem to confirm, or at least not to contradict, the statements made in paragraph 99 above. In essence, the breach of an international obligation is considered as creating a new

<sup>100</sup> The European Convention on Human Rights is a case in point. It establishes a European Court of Human Rights and, in its article 50, provides that:

"If the court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party". (United Nations, *Treaty Series*, vol. 213, p. 248.)

The particular character of this provision is underlined by the jurisprudence of the European Court of Human Rights. Under the Convention, the injured individual has no direct access to the Court, but only to the European Commission on Human Rights, which in its turn may refer a case to the European Court. The Commission, under article 26 of the Convention, may only deal with a matter after all domestic remedies have been exhausted. The European Court has consistently held that this rule applies only to the original petition addressed by an individual to the Commission under article 25 of the Convention, and not to a claim for compensation made by him after the Court has held that in his case there has been a violation of a right guaranteed by the Convention. Let it be noted that the Court has done so, *inter alia*, on the ground that:

"... if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention". (European Court of Human Rights, *De Wilde, Ooms and Versyp cases* ("Yagraney" cases), *Judgment of 10 March 1972* (article 50), *Series A*, vol. 14, p. 9, para. 16).

Furthermore, as to the merits, the Court held:

"No doubt, the treaties from which the text of Article 50 was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precludes this being done. Nevertheless, the provisions of Article 50 which recognize the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of *restitutio in integrum* follows from the very nature of the injury; indeed, common sense suggests that this must be so *a fortiori*. The Court sees no reason why, in the latter case just as in the former, it should not have the right to award to the injured persons the just satisfaction that they had not obtained from the Government of the respondent State". (*Ibid.*, pp. 9-10, para. 20).

On the other hand, the Court underlines the necessity of a link of causality between the breach and the situation which gave rise to the claim for compensation (see *De Wilde, Ooms and Versyp cases* (quoted above)) and takes account of the "satisfaction" already received by the Court's decision itself (see European Court of Human Rights, *Neumeister case, Judgment of 7 May 1974* (article 50), *Series A*, No. 17). From the cases cited, and others, it would appear that, apart from compensation for legal costs, the Court awards compensation for moral damage to the extent that such damage is a direct consequence of the breach. The effective protection of the individual human being seems to be the paramount consideration of the Court, rather than the relationship between States under the general rules of international law.

situation, to be dealt with by rules of international law *separate* from the primary rule which stipulates the obligation breached (unless, of course, that primary rule at the same time determines the legal consequences of its breach). Consequently, an obligation of *restitutio in integrum stricto sensu*—"the most perfect performance possible of the original obligation" (see para. 122 above)—is not necessarily a legal consequence of the breach. Whether or not such an obligation arises as an "automatic" legal consequence of the breach, depends on (a) the character of the right infringed, and (b) the character of the conduct infringing the right.

138. As regards (a), the distinction between (i) rights belonging to the injured State as such; (ii) rights belonging to the injured State through its nationals; and (iii) the intermediate category of rights belonging to the injured State through the ships or aircraft flying its flag.<sup>101</sup> may be relevant. As regards (b), the distinction between (i) intentional harm inflicted on the injured State; (ii) conduct in the normal exercise of national jurisdiction, incidentally infringing an international obligation; and (iii) the intermediate category of application of national rules and procedures falling short of international standards, may be relevant.<sup>102</sup>

139. One might compare—and contrast—such circumstances, aggravating international responsibility, with the circumstances precluding wrongfulness (see also para. 49 above). In any case, the distinctions under (a) and (b) are not more than guidelines relating to the "proportionality" between the breach and the response, insofar as this response relates to the new obligations of the author State. The gradual differences between direct and indirect injury, and between intentional and incidental conduct, do not seem to admit a more stringent "third" rule of international law (in the sense of para. 123 above).

140. We have already noted above (*inter alia*, para. 99(b)) that the obligation to stop the breach may include the obligation to liberate persons and to return objects, if those persons have been deprived of their liberty by an internationally wrongful act of the State or the objects have been acquired by such an act. Very often rules of national law provide for other remedies as well, including the payment of indemnities, the "reparation" of moral damages or even a claim for punishment of, or disciplinary measures taken against, the physical person responsible for the wrongful act.

141. These are remedies under national law for wrongs, thus qualified by national law. Even without accepting in any way the doctrine of "direct effect" of rules of international law within a national legal system,<sup>103</sup> one may recognize that on the international plane, the

<sup>101</sup> The exclusive right of a State, in relation to its territory, to use it in order to conduct governmental activities therein, may also belong to this intermediate category.

<sup>102</sup> An international obligation of the State to provide effective local remedies against a violation of rules of international law is a specific case in point; compare, *inter alia*, article 232, last sentence, of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8).

<sup>103</sup> This being a matter of internal constitutional law.



obligation to stop the breach of an international obligation includes the obligation to treat, within the framework of the national legal system of the author State, wrongful acts under international law in the same way as "corresponding" wrongful acts under national law. The fulfilment of such an obligation may then amount to a result equivalent to "reparation" and even "satisfaction" on the international plane.

142. In the case of international obligations "concerning the treatment to be accorded to aliens" (art. 22 of part 1 of the draft articles), this result may even be allowed to be achieved by subsequent conduct of the State, to the effect that there is not even a breach if such equivalent result is thereby reached.

143. However, even if the international obligation breached is one corresponding to a direct right of another State (and art. 21, para. 2, therefore does not apply), application *proprio motu*, by the author State, of measures available to that State under its internal law may come near to an "equivalent" of the fulfilment of the original "primary" obligation, and as such may be considered as a further step in the obligation to stop the breach. This seems to be the case, in particular, if the primary obligation concerns a right of the "intermediate" category mentioned above (para. 138). Indeed, such primary obligations may, just like obligations "concerning the treatment to be accorded to aliens", allow an "equivalent result" to be reached—in other words may stipulate a "substitute performance". Actually, the distinction between (primary) rules determining the legal consequences of their "breach", and (separate) rules defining the legal consequences of a breach of an international obligation, becomes less and less definite.<sup>104</sup>

144. One might call this obligation to apply local remedies an obligation to stop the breach *lato sensu*, as contrasted with the obligation to stop the breach *stricto sensu*, i.e. to stop the continuing effects of the breach, such

as release of persons and objects wrongfully held by an act of the author State.

145. With these three gradations of the obligation of the author State to live up to its primary obligation—i.e. obligation to stop the breach *stricto sensu*, obligation to stop the breach *lato sensu*, and obligation to effect a *restitutio in integrum stricto sensu*—correspond three gradations of reparation on the international plane, that is, in the State-to-State relation. Two of those gradations are in pecuniary terms and relate to the quantum of damages; the third is "satisfaction" in other terms (apologies, guarantees).<sup>105</sup> All three are substitutes for the non-performance of the original primary obligation. As such (see paras. 123 and 138 above) they need a justification in fact or in law in order to be considered a sufficient response to the (new) situation created by the breach.<sup>106</sup>

146. Under the *Chorzów Factory* standard there would seem to be only *one* reparation in pecuniary terms: the one the quantum of which corresponds to a *restitutio in integrum stricto sensu* (which under the circumstances is materially impossible), namely, "payment of a sum corresponding to the value which a *restitutio* in kind would bear (see para. 78 above). However, as explained in paragraphs 106 to 111 above, the Special Rapporteur is inclined to feel that the quantum of damages may be differently assessed in a way that does not go so far as the *Chorzów Factory* standard ("to wipe out *all*\* the consequences of the illegal act") does. Indeed, the quantum of damages would seem to be inextricably related to the characteristics of the primary rule.<sup>107</sup>

147. On the other hand, satisfaction in other than pecuniary terms (or "reparation *ex ante*") corresponds in a way with *restitutio in integrum stricto sensu*, inasmuch

<sup>105</sup> One could call these three gradations of reparation "reparation *ex nunc*", "reparation *ex tunc*" and "reparation *ex ante*".

<sup>106</sup> The approach of considering the breach of an international obligation as creating a new situation, to which other rules of international law provided the response is, it would seem, typical for the structure of international law. Compare—in the field of the third parameter—art. 60, subpara. 2(c), of the Vienna Convention (see footnote 9 above) for the situation in which "a material breach of its provisions by one party *radically changes*\* the position of every party with respect to the further *performance*\* of its obligations under the treaty". Compare also the approach in the Vienna Convention on Succession of States in respect of Treaties, of treating State succession as a *fact* having an impact on treaty obligations, sometimes equated with a fundamental change of circumstances. (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.)

<sup>107</sup> Cf. also paras. 81 and 82 of the preliminary report (*Yearbook ... 1980*, vol. II (Part One), p. 124, document A/CN.4/330). Such reparation "*ex nunc*" would also seem the appropriate "compensation" in the cases of "circumstances precluding wrongfulness" mentioned in article 35 of part I of the draft articles. Actually, there seems to be a gradual transition from (a) primary rules of international law determining the legal consequences of certain acts without qualifying such acts as wrongful to (b) rules of international law determining both an international obligation and the legal consequences of its breach; and to (c) separate rules of international law determining the legal consequences of a breach of an international obligation imposed by other rules of international law.

<sup>104</sup> In this connection, it is interesting to note the very elaborate rules laid down in the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8) concerning the powers (and their exercise) of port States and coastal States as regards ships flying a foreign flag, notably arts. 223–233 concerning "safeguards" (and the corresponding dispute settlement provision of art. 292, which is also applicable to arrest of foreign fishing vessels under art. 73). Most of these rules are indeed primary rules (though art. 232 relates to "liability" and art. 292 to "implementation") and are clearly an integral part of the total regulation of this specific subject matter, based on a combination of the (domestic) jurisdictions of port State and coastal State on the one hand, and flag State on the other. This combination is, *inter alia*, effected through rules comparable to those which, according to paragraph 137 above, are generally relevant for the determination of the legal consequences of a breach of international obligations. Thus we find, in the first sentence of art. 232, an international responsibility for measures which "were unlawful or *exceeded those reasonably required in the light of available information*"; see also art. 227, in particular the prohibition of discrimination *in fact*; in art. 230, international standards of treatment; in art. 232, second sentence, an obligation to provide for local remedies. On the other hand, the practical effect of art. 292—and of arts. 226 and 73—comes close to creating a kind of "immunity" of foreign vessels and their crews, subject to the posting of a bond or other financial security, as the power given to the competent international judicial body in that article comes close to the power to order interim measures of protection.



as both tend to create a situation that is new in respect of the situation created by the breach.<sup>108</sup> As such, satisfaction may be a convenient substitute to other legal consequences which are considered "impossible" in fact or in law, including cases where there is no (material) damage to repair.<sup>109</sup>

148. The Commission noted, in its report on the work of its twenty-eighth session:

In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions . . . the idea that they [international wrongful acts other than international crimes] always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out.<sup>110</sup>

149. Throughout his preliminary report, and in particular in paragraph 100,<sup>111</sup> the Special Rapporteur indicated his tentative view that it would not be possible to lay down in a limited number of draft articles a hard and fast, quasi-automatic correlation between breaches and responses thereto. The analysis in the present report seems to confirm that tentative view.

150. It is only natural that, in the case of a breach of an international obligation, the new legal relationships created by this situation tend, on the one hand, towards a belated fulfilment of the original obligation, and on the other hand, and cumulatively, towards imposing substitute obligations. In the foregoing paragraphs these two tendencies have been analysed, insofar as the first parameter (the "new" obligations of the author State) is concerned. Obviously, these new obligations may, in fact, not be fulfilled, and then the question arises what the legal consequences of such a situation are. Partly, this is a matter of the second and third parameters (and a matter of "implementation"). But even within the first parameter it seems clear that, for example, a non-fulfilment of the obligation to stop the breach *stricto sensu* aggravates the responsibility of the author State for the original breach, and so forth.

151. On the other hand, the situation created by the breach and the determination of the legal consequences of this situation, may well involve other (primary) rules of international law, even within the framework of the first parameter. Thus, what we have called "stopping the

breach *lato sensu*", i.e. the application of remedies compatible with the internal law of the author State, may raise the question whether these remedies are or are not falling short of international standards relating to the exercise of national jurisdiction. Furthermore, an obligation of the author State to effect a *restitutio in integrum stricto sensu* may be incompatible with its right of domestic jurisdiction.

152. The relevance of these other primary rules of international law is dependent on the character of the breach, in other words, on the right infringed. Thus, in principle the other rules just mentioned are irrelevant in the case of an infringement of a direct right of another State.

153. On the other hand, even in the case of infringement of an international right which another State has in the person of his nationals, the situation may involve still other primary rules of international law. Thus, the intention of the author State may have been to harm the other State as such, or it may have infringed such "intermediate" rights of another State as its jurisdiction over ships flying its flag. All these circumstances cannot but have an impact on the degree and content of the international responsibility of the author State, including the quantum of the required reparation in pecuniary terms and, possibly, the required giving of "satisfaction" and its content.

154. The dividing line between the requirement of belated performance and the requirement of substitute performance is obviously determined in the first place by the material possibility (the possibility in fact) of the belated performance. As already noted in paragraph 29 of the preliminary report,<sup>112</sup> there is, in a sense, always an element of material impossibility, since the breach is a fact which cannot itself be "wiped out".

155. But it would seem that, apart from material impossibility (in a sense comparable to the situation dealt with in article 31 in part 1 of the draft), other cases of what might be called "legal impossibility" cannot be ruled out *a priori* as irrelevant for the determination of the content of the new obligation of the author State—at least not in relation with "lesser" breaches (see below, para. 156).

156. Thus, there may a legal impossibility, under the national legal system of the author State, to arrive at a belated performance of the original obligation. While this circumstance can certainly not justify the breach, it may nevertheless effect a shift from a new obligation of belated performance to a new obligation of reparation (substitute performance). Relevant in this respect are, on the one hand, the character of the right of the other State that was infringed by the breach and, on the other hand, the character of the conduct constituting the breach, including the possibly "substandard" state of the national legal system, both as regards the procedure and as regards the

<sup>108</sup> *Restitutio in integrum stricto sensu* re-establishes the situation existing before the breach: satisfaction adds something to the performance of the original obligation.

<sup>109</sup> Or in cases where it cannot be established that, without the breach, the factual situation would have been different; compare the Judgment of the European Court of Human Rights in the *De Wilde, Ooms and Versyp* cases cited above (footnote 100), where an obligation to provide for the possibility of appeal was held to have been violated, but it was also held that the existence of an appeal procedure would not in all probability have resulted in a different situation of the persons concerned.

<sup>110</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 117, para. (53) of the commentary to art. 19.

<sup>111</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 129, document A/CN.4/330.

<sup>112</sup> *Ibid.*, pp. 112–113.

content of the "remedies" provided by it (see paras. 138 and 151 above).<sup>113</sup>

157. Furthermore, there may be a legal impossibility under a rule of international law. Thus, as we have noted before, a new obligation to perform a *restitutio in integrum stricto sensu* may be incompatible with the right of domestic jurisdiction of the author State. Again, the rule of domestic jurisdiction can certainly not be invoked to justify the breach, but it may nevertheless effect a shift from a new obligation of belated performance to a new obligation of substitute performance through reparation. Here again, the character of the right infringed and the character of the conduct constituting the breach are relevant.<sup>114</sup>

158. All that has been stated above is no more than an attempt of "approximation"<sup>115</sup> to a (third) rule of proportionality linking the actual response to the actual breach, as far as the first parameter is concerned. Indeed, it should be recalled that at present only the first parameter is involved, i.e. the new obligations of the author State, and that this parameter is only one stage in the (gradual) transition from a primary rule of international law, determining the legal consequences of certain facts in respect of the relationship between States, towards the second and third parameters, and towards the "implementation" of State liability and responsibility.<sup>116</sup>

159. Even within the framework of the first parameter alone, it would seem inevitable, in the approximation of proportionality, to categorize actual breaches of international obligation along the lines indicated above (paras. 137–138). Obviously, in practice it will not always be easy to fit into such categorization the manifold primary rules of international law actually infringed and the various circumstances under which the actual breach has been committed.

160. Furthermore, there is the possible impact (which the Special Rapporteur would like to reserve for treatment in a later report) on the new obligations of the author State of the (mere) contribution of the author State, of the injured State, or of a third State, to a situation not in conformity with the situation required by a rule of international law.<sup>117</sup>

<sup>113</sup> In a certain sense, one might compare this situation with the one dealt with in article 32 of part 1 of the draft, inasmuch as in both cases there is a material possibility of performance of the international obligation and in both cases there are considerations outside the field of State-to-State relations that affect those relations.

<sup>114</sup> This may correspond to a certain extent, with the "exceptions" to an obligation of *restitutio in integrum stricto sensu*, on the ground of "irreversibility" of the situation or otherwise (see para. 124 above). In a sense, a comparison can be made with article 33 of part 1 of the draft, dealing with the "state of necessity".

<sup>115</sup> See the preliminary report, para. 99 (*Yearbook* . . . 1980, vol. II (Part One), p. 129, document A/CN.4/330).

<sup>116</sup> In connection with "implementation", it should be noted that the specific legal consequences of the non-performance of a binding judicial determination of responsibility for an internationally wrongful act require special treatment.

<sup>117</sup> It would seem preferable to treat these "abnormal" situations separately in view of their even closer relationship with primary rules.

161. Three types of situations are involved:

(a) The situations referred to in articles 11, 12, 14 and 15 of part 1 of the draft: the contribution of the author State;<sup>118</sup>

(b) The situations referred to in article 29 of part 1 (see also the reference in art. 35 to art. 29) and (other) cases of "contributory negligence" of the injured State;

(c) The situations referred to in articles 27 and 28 of part 1: the contribution of a third State.

162. In connection with these types of situation, reference should also be made to (a) the case in which a "state of necessity" under article 33 was "contributed" to by the injured State; and (b) the cases referred to in paragraph 101 of the preliminary report.<sup>119</sup>

163. All this requires a flexible formulation of any draft articles to be inserted in part 2.

### E. Draft articles

164. On the basis of the foregoing, the following draft articles are submitted:

#### *The content, forms and degrees of international responsibility (part 2 of the draft articles)*

### CHAPTER I

### GENERAL PRINCIPLES

#### *Article 1*

**A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.**

*Reference.* See paragraphs 50–57 of the present report. See also article 16 (as well as article 18) of part 1 of the draft articles on State responsibility.

#### *Article 2*

**A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.**

*Reference.* See paragraphs 50, 51, 58 and 59 of the present report. See also article 17 of part 1 of the draft articles on State responsibility.

#### *Article 3*

**A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.**

*Reference.* See paragraphs 50, 51 and 60–65 of the present report.

<sup>118</sup> See the preliminary report, paras. 20–26 (*ibid.*, pp. 111–112).

<sup>119</sup> *Ibid.*, p. 127.

## CHAPTER II

OBLIGATIONS OF THE STATE WHICH HAS  
COMMITTED AN INTERNATIONALLY  
WRONGFUL ACT*Article 4*

Without prejudice to the provisions of article 5,

1. A State which has committed an internationally wrongful act shall:

(a) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(b) subject to article 22 of part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

(c) re-establish the situation as it existed before the breach.

2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.

*Article 5*

1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be

accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (c), or to act in accordance with article 4, paragraph 2.

2. However, if, in the case mentioned in paragraph 1 of the present article,

(a) the wrongful act was committed with the intent to cause direct damage to the injured State, or

(b) the remedies, referred to in article 4, paragraph 1, under (b), are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply.

*Reference.* See paragraphs 99, 137, 145 and 150–157 of the present report. *Article 4*, paragraph 1, refers to the obligations tending towards a belated performance of the original primary obligation: stop the breach *stricto sensu* subpara. 1(a)); stop the breach *lato sensu* (subpara. 1(b)), and *restitutio in integrum, stricto sensu* (subpara. 1(c)). *Article 4*, paragraphs 2 and 3, refers to the obligations tending towards a substitute performance (reparation *ex nunc*, reparation *ex tunc*, reparation *ex ante*); it uses the terminology of the *Chorzów Factory* standard. *Article 5* singles out a particular type of primary obligations as entailing a lesser obligation of the author State.<sup>120</sup>

<sup>120</sup> To a certain extent, this attempt at categorization of primary international obligations is comparable to the three categories of Gräfrath and Steiniger, cited in *Yearbook* ... 1976, vol. II (Part Two), p. 115, footnote 546.



# INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

[Agenda item 5]

DOCUMENT A/CN.4/346 and Add.1 and 2

## Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur

[Original: English]  
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## CHAPTER I

## Relationship with the regime of State responsibility

## A. Introduction

1. Most topics on the agenda of the International Law Commission have a title that clearly establishes their outermost boundaries and essential content, so that an examination of State practice and doctrine may be conducted within predetermined limits. It has, however, been generally recognized that the treatment of the present topic—like that of State responsibility more than a decade earlier—should begin with an unusually careful and deliberate provisional estimate of scope and content. In the Sixth Committee of the General Assembly, as in the Commission itself, the Special Rapporteur has been encouraged to take time for a patient exploration of basic principle—though without losing sight of the priority which the topic has been assigned.

2. These instructions accord well with the actual circumstances of the Commission's work programme in this, the last year of the quinquennial term. At the present juncture, the Commission can spare only a few meetings for consideration of a topic so far from completion; but in those few meetings it must aim to round out the preliminary phase of enquiry, so that, with the General Assembly's agreement, the new Commission may inherit a coherent, though tentative, approach to the topic. Accordingly, this second report is an extension of the preliminary report submitted in 1980<sup>1</sup> and the caveats entered in paragraph 1 of that report are renewed. It is intended, as was foreshadowed in paragraph 62 of the preliminary report, that the whole of the present report should lead towards an initial assessment of the scope and content of the topic.

3. The elements displayed in the preliminary report have first to be reviewed and reassembled, taking account of the observations made in the Commission and in the Sixth Committee of the General Assembly. In neither body was there much support for an option canvassed by the Special Rapporteur in the last paragraphs of the preliminary report<sup>2</sup>—that is, a drastic reduction in the breadth and abstractness of the topic, so that it might be centred concretely in the area of the use and management of the physical environment. It was, indeed, acknowledged that the latter area was already very large, embracing the field of industrial and technological hazard, as well as other ecological or environmental issues. It was, moreover, recognized that the topic had attracted wide interest because of developments in the management and use of the physical environment, and that State practice in that area provided the staple materials upon which the Special Rapporteur should mainly rely.

4. Even so, it was thought by nearly all that the topic was aptly named,<sup>3</sup> asserting a principle which should not be restricted, on any *a priori* ground, to a particular subject area.<sup>4</sup> Some who took this view nevertheless doubted that the principle could at the present time be elaborated in a manner acceptable to States.<sup>5</sup> Some considered, on the other hand, that the principle was self-limiting, being perpetually overtaken by the formation of rules of wrongfulness,<sup>6</sup> or being squeezed into small, anomalous areas upon the fringes of wrongfulness.<sup>7</sup> Whatever the view taken, it was common ground that there was much work yet to be done to establish the line of distinction between the present topic and obligations arising from wrongfulness.

5. Without underestimating the doctrinal difficulties, the majority of those who expressed an opinion believed that the topic was adequately founded in a fast-developing State practice.<sup>8</sup> There was also wide agreement about the policy aims which the law should reflect; as one

<sup>3</sup> See, however, comments as to "liability" (*ibid.*, p. 250, paras 10–12) and as to "acts not prohibited" (*ibid.*, p. 251, para. 14), and the comments of the representative of Israel in the Sixth Committee of the General Assembly during its thirty-fifth session (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 50th meeting, para. 18).

<sup>4</sup> See para. 139 of the Commission's report on its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), p. 160), and the comments made in relation to that paragraph at the time of its adoption by the Commission (*Yearbook ... 1980*, vol. I, p. 302, 1601st meeting, paras. 44–46).

<sup>5</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 160, para. 140; see also, for example, the comments of Mr. Reuter (*Yearbook ... 1980*, vol. I, p. 254, 1632nd meeting, para. 30), as well as comments in the Sixth Committee of the General Assembly at its thirty-fifth session of the representatives of Italy (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 49th meeting, para. 39) and of the United Kingdom (*ibid.*, 51st meeting, para. 14).

<sup>6</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 161, para. 143; see also, for example, the comments of Mr. Díaz González (*Yearbook ... 1980*, vol. I, p. 255, 1632nd meeting, paras. 37 *et seq.*).

<sup>7</sup> For indications of particular areas that may be thought to have special relevance, see the preliminary report, especially paras. 4–7 and para. 30 (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/334 and Add.1 and 2, pp. 248–249 and 256); and, for comment on the relevance of the topic in specific areas, see, for example, the observations in the Sixth Committee of the General Assembly during its thirty-fifth session of the representatives of the Netherlands (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 44th meeting, paras. 35–38), of Brazil (*ibid.*, 47th meeting, paras. 32–34), of Sweden (*ibid.*, 49th meeting, paras. 4–7), of Argentina (*ibid.*, 50th meeting, paras. 30–34), and of India (*ibid.*, paras. 50–52).

<sup>8</sup> See, for example, the observations, in the Sixth Committee of the General Assembly during its thirty-fifth session, of the representatives of Canada (*ibid.*, 48th meeting, paras. 9–11), of Sri Lanka (*ibid.*, 49th meeting, para. 11), of Czechoslovakia (*ibid.*, 54th meeting, para. 23) of Zaire (*ibid.*, paras. 68–71); of Spain (*ibid.*, 55th meeting, para. 22), of Algeria (*ibid.*, paras. 32–33), of Trinidad and Tobago (*ibid.*, 56th meeting, para. 29) and of Tunisia (*ibid.*, 58th meeting, para. 32).

<sup>1</sup> See *Yearbook ... 1980*, vol. II (Part One), pp. 247 *et seq.*, document A/CN.4/334 and Add.1 and 2.

<sup>2</sup> *Ibid.*, p. 265, paras. 62–65.

Commission member put it, when speaking as his country's representative in the Sixth Committee:

The Commission should attempt to minimize the possibility of injurious consequences and, in providing adequate redress for such consequences, should avoid as much as possible those measures which would prohibit or hamper the creative activities, including economic activities, of each State.<sup>9</sup>

6. The flexibility and breadth of these policy aims, which seek an optimal balance between competing rights or interests, and which range from the prime duty of preventing harm to the substituted duty of repairing harm when it occurs, are in bold contrast with the rigidity, and the exclusive focus upon compensation, which tend to be regarded as the hallmarks of a regime of strict liability. In the remainder of the present chapter, it is proposed to consider the part played by the seminal topic of State responsibility in providing a profile for the present topic. It will then be possible, in subsequent chapters, to see how well this profile matches the salient features of State practice and of doctrine.

### B. Connotations of the general approach

7. It is necessary, in the first place, to draw out the significance of the decision, taken deliberately and without notable dissent, to approach the present topic at a high level of generality. This decision brings to mind factors which prompted the Commission, more than ten years ago, to turn from the subject of State responsibility for the treatment of aliens to the universal aspects of State responsibility.<sup>10</sup> The latter approach cannot lead to any quick production of rules to cover all practical situations, and the usefulness of the approach is therefore sometimes doubted;<sup>11</sup> but, in the world at large, the demand for compendious rule-books is less pressing than the need to vindicate the integrity and even-handedness of legal policy and principle. The Commission's work in the field of State responsibility is, apart from all other uses, an invitation to a renewal and extension of international confidence in law as a common possession. The treatment of the present topic cannot succeed unless it performs, in a small way, a similar service for a new, but growing, area of law.

8. Moreover, in the quest for fairness, the imperfect analogy between the case of aliens who suffer harm within

the jurisdiction of a foreign State and the case of the victims of transnational harm compels attention. Victims of the latter class have an even stronger claim to international legal protection, because they have not chosen to expose themselves to whatever dangers may be generated within the jurisdiction of another State. If their cases have been less noticed in the past, that is because the perils that beset them are, for the most part, new. In respect of the treatment of aliens, the obligation to exhaust local remedies allows the receiving State repeated opportunities to avoid wrongfulness.<sup>12</sup> There can, in general, be no corresponding dispensation for the State in which transnational harm is generated; yet, whether or not this harm entails wrongfulness, there may be great advantage in giving the State concerned an inducement to make amends without a prior determination or acknowledgment of wrongdoing.

9. It is important to recognize—and it has often not been recognized—that the regime of responsibility for wrongful acts and the regime with which the present topic deals are not mutually exclusive. As the Commission last year observed at its thirty-second session, when adopting on first reading the final draft article in part 1 of the articles dealing with State responsibility (art. 35):

preclusion of the wrongfulness of the act of a State ... should be understood as not affecting the possibility that the State committing the act may, on grounds other than that of responsibility for a wrongful act, incur certain obligations, such as an obligation to make reparation for damage caused by the act in question.<sup>13</sup>

Equally, obligations arising independently of wrongfulness will not be obliterated by the occurrence of wrongfulness.<sup>14</sup> Agreement upon the existence and content of such obligations may sometimes afford complete satisfaction to States which would not so readily have agreed that a loss or injury in question had arisen from a wrongful act.

10. It must follow that the regime described in the title of the present topic is not, as has often been thought, an anomalous collection of limiting cases for which the regime of State responsibility for wrongfulness fails to provide. It is, of course, true that the latter regime does provide, at least in principle, for all except an assortment of fringe areas; and it is mainly in those fringe areas that obligations arising out of acts not prohibited obtrude themselves upon our notice. It is also true that the regime with which we are now dealing cannot and should not be in any sense a competitor with the regime of State responsibility for wrongful acts; for that regime is the very centre of the system of international law. On the contrary, it seems possible that the regime now under consideration

<sup>9</sup> Statement by Mr. Tsuruoka, representative of Japan at the Sixth Committee of the General Assembly during its thirty-fifth session (*ibid.*, 48th meeting, para. 45). For a similar emphasis on prevention, see, for example, the observations of the representatives of the Federal Republic of Germany (*ibid.*, 45th meeting, para. 18), of Ethiopia (*ibid.*, 51st meeting, para. 53), of Jamaica (*ibid.*, 54th meeting, para. 3), of Austria (*ibid.*, 57th meeting, para. 55) and of Indonesia (*ibid.*, 58th meeting, para. 27). The representative of Brazil, while agreeing that questions of prevention were of prime importance, doubted that they could be encompassed within this topic (*ibid.*, 47th meeting, para. 36).

See also the preliminary report, especially paras. 26–31 (*Yearbook ... 1980*, vol. II (Part One), pp. 254–256, document A/CN.4/334 and Add.1 and 2).

<sup>10</sup> For the history of this matter, see, in particular, *Yearbook ... 1969*, vol. II, pp. 229 *et seq.*, document A/7610/Rev.1, chap. IV.

<sup>11</sup> See, for example, the summarized remarks of R.B. Lillich, "The current status of the law of State responsibility for injuries to aliens", in American Society of International Law, *Proceedings of the 73rd Annual Meeting, Washington, D.C. April 26–28, 1979*, pp. 246–247.

<sup>12</sup> See the preliminary report, and especially para. 29 (*Yearbook ... 1980*, vol. II (Part One), pp. 255–256, document A/CN.4/334 and Add.1 and 2), and the observations of Mr. Verosta in relation to that paragraph (*Yearbook ... 1980*, vol. I, p. 251, 1632nd meeting, para. 7). Cf. also article 22 of the draft articles on State responsibility, part 1, and the Commission's commentary thereto (*Yearbook ... 1977*, vol. II (Part Two), pp. 30 *et seq.*).

<sup>13</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 61, para. (1) of the commentary to article 35.

<sup>14</sup> See the preliminary report, para. 14 (*Yearbook ... 1980*, vol. II (Part One), p. 251, document A/CN.4/334 and Add.1 and 2).

may have an auxiliary and supportive role in those situations in which rules as to wrongfulness are either in course of formation, or embody such complex tests that their application in disputed cases is not easily determined.

### C. Strict liability: some problems

11. If a sweeping metaphor may be permitted in regard to matters which must later be examined more closely, doctrine is a wave that breaks and scatters around the rocky outcrop of "strict" or "absolute" or "no-fault liability" or "liability for risk".<sup>15</sup> For some it represents a new and autonomous principle, more or less unrelated to the received rules of State responsibility, and more or less

<sup>15</sup> Although the following references are by no means complete, they offer a range of viewpoints bearing on the doctrinal issue described in paras. 11 and 12:

E. Jiménez de Aréchaga, "International law in the past third of a century", *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Alphen aan den Rijn, Sijthoff, 1979), vol. 159, pp. 267-273;

P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et nucléaire* (Paris, Pedone, 1976);

L. F. E. Goldie, "Liability for damage and the progressive development of international law", *International and Comparative Law Quarterly* (London), vol. 14 (October 1965), p. 1189;

—, "International principles of responsibility for pollution", *Columbia Journal of Transnational Law* (New York), vol. 9, No. 2 (Autumn 1970), p. 283;

—, "A general view of international environmental law: A survey of capabilities, trends and limits", *Académie de droit international de La Haye, 1973 Colloquium: The Protection of the Environment and International Law* (Leyden, Sijthoff, 1975), p. 26;

G. Handl, "Territorial sovereignty and the problem of transnational pollution", *American Journal of International Law* (Washington, D.C.), vol. 69, No. 1 (January 1975), p. 50;

—, "Balancing of interests and international liability for the pollution of international watercourses: Customary principles of law revisited", *The Canadian Yearbook of International Law, 1976* (Vancouver), p. 156;

—, "An international legal perspective on the conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", *Ecology Law Quarterly* (Berkeley, Calif.), vol. 7, No. 1 (1978), p. 1;

—, "State liability for accidental transnational environmental damage by private persons", *American Journal of International Law* (Washington, D.C.), vol. 74, No. 3 (July 1980), p. 525;

M. J. L. Hardy, "Nuclear liability: The general principles of law and further proposals", *The British Year Book of International Law, 1960* (London), vol. 36, p. 223;

—, "International protection against nuclear risks", *International and Comparative Law Quarterly* (London), vol. 10 (October 1961), p. 739;

C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours . . . , 1966-I* (Leyden, Sijthoff, 1967), vol. 117, p. 105;

J. M. Kelson, "State responsibility and the abnormally dangerous activity", *Harvard International Law Journal* (Cambridge, Mass.), vol. 13, No. 2 (Spring 1972), p. 197;

D. Lévy, "La responsabilité pour omission et la responsabilité pour risque en droit international public", *Revue générale de droit international public* (Paris), 65th year, vol. XXXII (October-December 1961), p. 744;

P. Reuter, "Principes de droit international public", *Recueil des cours . . . , 1961-II* (Leyden, Sijthoff, 1962), vol. 103, pp. 590-595;

J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (Toronto, University of Toronto Press, 1969), pp. 163-167.

in competition with those rules. Notwithstanding efforts to derive the principle from customary law, it tends to be justified by reference to the exceptional factual situations which have called it into being and to the developments in municipal law by which it has been inspired. Despite emphasis upon such open-ended concepts as "ultra-hazard" and "non-natural user", no very satisfactory way has been found to demonstrate that this onerous principle is self-limiting.

12. The cause of strict liability, therefore, generates and fuels its own opposition, which characteristically insists that strict liability regimes are always the product of convention, and that customary law obligations relevant to the avoidance and prevention of harm are always founded in responsibility for wrongfulness. There are two major consequential difficulties, which can be briefly stated, but must later be more thoroughly considered. First, the relationship between wrongfulness and the occurrence of harm is subtle, and does not lend itself to a universal formulation. Second, where there is wrongfulness, the precipitating factor is the occurrence of harm; and therefore the principle does not readily explain an obligation of prevention.

13. Apart altogether from their intrinsic difficulties, neither of the opposing positions outlined in the two preceding paragraphs is open to the Special Rapporteur. There has been general agreement within the Commission—and this view has been widely supported in the Sixth Committee of the General Assembly<sup>16</sup>—that the present topic is concerned with the elaboration of primary rules of obligation. These rules, therefore, cannot be in derogation of the universal system of secondary rules which comprise the subject-matter of the topic of State responsibility. Similarly, obligations arising from responsibility for wrongful acts cannot be allowed to become the focus of our attention, except in so far as this can help to fix the content and boundaries of the present topic, which is by definition concerned with obligations arising from acts not prohibited by international law.

14. On the other hand, by maintaining the objectives of the present topic, it should be possible to relieve the extreme discomfort associated with each of the opposing doctrinal positions already noted. If strict liability ceases to have the apparent character of an ungovernable encroachment upon the orthodox doctrine of State responsibility, it will be freed to take an appropriate place among measures that may be required when a beneficial activity entails substantial transnational dangers which are not entirely preventable. Again, there may be less artificiality in recognizing primary obligations of prevention, when substantial harm is in prospect, than in postulating that the shadow of wrongfulness reaches back to condemn a lack of prevention even before harm ensues.

<sup>16</sup> See, however, *contra*, the observations of the representative of Israel (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 50th meeting, para. 19*) and of Zaire (*ibid.*, 54th meeting, para. 69).



### D. Primary rules

15. Before considering further the dynamic principle that underlies the present topic, it seems necessary to review briefly the structural consequences of locating the topic in the field of primary rules, and the analytic advantages of doing so. The first advantage is to obtain a release from the nagging apprehension that the thrust of the topic is heterodox—that it challenges the integrity of international law by postulating a system of obligation which disobeys the universal rules of State responsibility. It is those rules which have been called “secondary”, in the sense that they become operative only when the breach of a “primary” rule of obligation occurs.<sup>17</sup> Therefore to place the new topic in the field of primary rules is to offer an iron-clad guarantee that the ordinary and orthodox application of the principles and rules of State responsibility is not imperilled.

16. There is a corresponding reduction in doctrinal involvements. For example, there is no longer a need or a temptation to invade the inner sanctum of the law of State responsibility by considering upon the same plane theories of “fault” and of “risk”, or by attaching pivotal importance to one or another reading of the nuanced term “objective responsibility”.<sup>18</sup> Equally, there are no longer

doctrinal compulsions to make sharp distinctions between obligations of prevention and reparation, presuming that the former are usually well-founded in existing law, and that the latter must fight for their right of existence, unless they can be derived from breaches of obligations of prevention. States may, indeed, have strong policy preferences for dissociating these two kinds of obligation;<sup>19</sup> but those preferences are more clearly seen and evaluated when freed from doctrinal overlay.

17. More generally, it is no longer necessary to map an intricate frontier between the domains of this topic and that of State responsibility. They are not competing sovereignties, and the aggrandisement of one is not at the expense of the other. Just as the Commission was careful to insist that its findings in the field of State responsibility have no direct bearing on the substance of the present topic,<sup>20</sup> so also the content of this topic will permit no inferences about the situation in the domain of responsibility for wrongful acts. Sometimes, but not always, conduct which gives rise to a duty of reparation under rules developed pursuant to this topic may also be characterized as a wrongful act.<sup>21</sup> Sometimes, but not always, the measure of reparation for material loss or injury will be the same under either rubric.<sup>22</sup> Sometimes, but by no means always, States will be more concerned to

<sup>17</sup> See the preliminary report, paras. 19–25 (*Yearbook . . . 1980*, vol. II (Part One), pp. 253–254, document A/CN.4/334 and Add.1 and 2).

<sup>18</sup> For initial guidance as to the usages of, and perceived comparisons or contrasts between, such concepts as “responsibility (or liability) for fault”, “objective responsibility (or liability)”, and “responsibility (or liability) for risk”—and, in so far as they directly concern international law, the concept of “abuse of rights” and “nuisance”—it is still helpful to consult E. Jiménez de Aréchaga, “International responsibility”, *Manual of Public International Law* (ed. M. Sørensen (London, Macmillan, repr. 1978), pp. 534–540); and Goldie, “Liability for damage and the progressive development of international law”, 14 (*loc. cit.*), p. 1189.

In general, “responsibility for fault” (or “subjective responsibility”) is contrasted with “objective responsibility” and both are aspects of responsibility for the breach of an international obligation (see Part I of the draft articles on State responsibility adopted by the Commission on first reading (*Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*)).

Alternatively, the term “fault” is used co-extensively with “responsibility for the breach of an international obligation”, and in that sense is contrasted with “no-fault” or “strict” or “absolute responsibility (or liability)” or “responsibility (or liability) for risk”.

In the latter context, the term “liability” is used in contrast with “responsibility”, to indicate that an obligation of the former kind arises without wrongfulness. Unfortunately, however, there is also an implication that the distinction is between different systems of secondary rules; and the initial preference of the Commission is to conclude that obligations which arise without wrongfulness are, by definition, a function of primary rules.

Finally, there is also a tendency in the literature (perhaps deriving from D. Lévy’s influential article, “La responsabilité pour omission et la responsabilité pour risque en droit international public” (*loc. cit.*) but more common in recent years) to minimize the distinction between obligations which arise out of wrongfulness and those which arise without wrongful conduct, by identifying “objective liability” with “no-fault liability”.

It is essential to distinguish clearly the two quite different senses in which the term “objective responsibility (or liability)” is used:

(a) In the first sense, it corresponds with the structure of the draft articles on State responsibility, part 1. There is an act or omission attributable to a State, and the consequence of that act or omission is not in conformity with an obligation of that State. By the conjunction of

these two circumstances, the “fault” of the State is considered to have been established.

(b) In the second sense, the element of attribution is absent, or is supplied in a manner not contemplated by the draft articles on State responsibility, part 1—for example, the mere fact that the act or omission took place within the territory or jurisdiction of a State is held to import the responsibility (or liability) of that State. In other words, the responsibility (or liability) of that State arises without “fault”—that is without the breach of an obligation of that State.

The Special Rapporteur did not in his preliminary report, and does not now, invoke a principle corresponding to paragraph (b) above; and it has not been suggested, either in the Commission or in the Sixth Committee of the General Assembly that such a principle should be invoked.

There is, however, no doubt at all that the principle of strict liability, well established in major systems of municipal law, is so much a part of the shared experience of States that it plays an indispensable role in the construction of a number of conventional regimes. In some cases, as Jenks foresaw in his 1965 lectures at the Hague Academy of International Law (see footnote 15 above), it provides the most appropriate—or even the only appropriate—means of discharging the obligations of States, in relation to activities occurring within their territories or jurisdictions, to afford protection to the legitimate rights and interests of other States. That general obligation of protection is explored in the present report.

<sup>19</sup> See, for example, the cases referred to in the preliminary report, para. 5, and in the footnotes to that paragraph (*Yearbook . . . 1980*, vol. II (Part Two), pp. 248–249, document A/CN.4/334 and Add.1 and 2.)

<sup>20</sup> *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, chap. II, paras. 37–39.

<sup>21</sup> For example, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 provides, in art. XVIII, that:

“This Convention shall not be construed as affecting the rights, if any, of a Contracting Party under the general rules of public international law in respect of nuclear damage.” (United Nations, *Juridical Yearbook 1963* (Sales No. 65.V.3), p. 155.)

<sup>22</sup> The range of factors which may affect the existence and extent of a duty of reparation under rules developed pursuant to this topic—for example, a general limitation of liability which takes into account the beneficial nature of the activity and its capacity to absorb increased

(Continued on next page.)

assert a right to prompt, adequate and effective reparation than to stipulate under which rubric the case falls or should be brought.<sup>23</sup>

18. The looseness of the relationship postulated in the previous paragraph should help to ensure that State practice is not interpreted in accordance with a pre-conceived pattern. Looseness, however, does not imply a lack of closeness. A conventional regime made, in accordance with rules developed under this topic, to regulate a certain kind of danger, will contain obligations which, in relations between the parties, may fix or supersede the incidence of more general obligations, and so affect the point at which conduct becomes wrongful. Moreover, the obligations contained in conventional regimes may, in the ordinary way, pass into customary law, or may at least provide evidence of concordant practice that influences the standards and content of customary law. In short, the new topic is not a competitor in the field of secondary rules, but a catalyst in the field of primary rules. This may offer an essential clue to the definition of the scope of the new topic; but the development of the question of scope must await the outcome of a survey of State practice.

19. There is a final point to be made in this chapter. As attention is redirected from secondary to primary rules, the question of attribution assumes a different form. Rules of attribution, set out in chapter II of the draft articles on

(Footnote 22 continued.)

overheads—is potentially wider than the range of factors which may be expected to affect the measure of reparation for breach of an international obligation. However, in the case of the Convention on International Liability for Damage caused by Space Objects (approved by the General Assembly in its resolution 2777 (XXVI) of 29 November 1971, and signed on 29 March 1972: United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 111), there is an obligation to compensate fully for damage caused by a space object.

<sup>23</sup> Obviously, much may depend, for example, upon the victim State's assessment of the acting State's will and capacity to insure that the incident giving rise to the loss or injury will not recur.

State responsibility (part 1)<sup>24</sup> will of course have their normal operation if there is a breach of any rule that may be established in pursuance of the present topic; but this topic is itself confined to situations in which the rules of State responsibility for wrongful acts have not been engaged—or, at any rate, have not been invoked. We are therefore concerned solely with the quality of the primary rules of obligation, their extent and their intensity.

20. Once again, the decision as to the placement of the topic does not dispose of any point of substance. It remains the cardinal question whether, and on what terms, States recognize—and expect other States to recognize—even in circumstances which do not disclose the breach of any rule of international law, obligations in relation to harm occurring outside their territory or jurisdiction, and resulting from things done or omitted within that territory or jurisdiction. At a later point in the development of the topic, it must be decided whether the topic should deal only with obligations arising when harm occurs, or whether provision should also be made for corresponding obligations arising when there is a potentiality of harm.

21. Clearly, the generic rules, whatever their exact ambit and formulation, are—like the analogous specific rules in the Convention on International Liability for Damage caused by Space Objects<sup>25</sup> and in other treaty regimes—correctly expressed as primary rules of obligation. That being done, it will, from a structural standpoint, become easier to accord a proper place to factors by which obligations may be conditioned. Due acknowledgement of such factors is essential; for, as State practice shows, obligations arising out of acts not prohibited by international law usually occur within a total context which plays a part in determining the incidence and the magnitude of the obligation. That is a theme to be taken up in chapter III of this report.

<sup>24</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 31.

<sup>25</sup> See footnote 22 above.

## CHAPTER II

### The intersection of harm and wrong

#### A. The *Trail Smelter* arbitration

22. In this chapter the Special Rapporteur proposes to use the circumstances of the *Trail Smelter*<sup>26</sup> case as a connecting theme, drawing upon other elements in State practice only to the extent that it seems useful to illustrate or reinforce a particular point. It should be said at once that the reason for reverting to this *locus classicus* is not its present popularity among scholars; for the *Trail Smelter* awards appear to be undergoing the same kind of eclipse

that attends the work of some artists of good reputation in the period after their deaths. The reason for returning to the *Trail Smelter* case is rather that this arbitration between the United States of America and Canada is at once unique and prototypical, and that it raises nearly every important issue. For forty years it has stood almost alone.

23. The first great merit of the *Trail Smelter* case is that the dispute arose out of a commonplace set of facts. Industrial pollution from the privately owned smelter affected wooded and arable land across an international boundary, causing damage (that is, loss in value of crops and trees) that was economically significant, though small in proportion to the value of the product of the smelter

<sup>26</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

industry.<sup>27</sup> The situation was unusual only in the circumstances that made possible the joint reference to arbitration. A combination of topography and prevailing weather intensified and localized the damaging effects of wind-borne pollution. Solutions at the level of municipal law were virtually ruled out, because the constitution of the American State of Washington did not allow the purchase of smoke easements by an alien;<sup>28</sup> and the Courts in the Canadian province of British Columbia were almost certainly without jurisdiction to offer effective relief for nuisances suffered in another country.<sup>29</sup>

24. A further circumstance in favour of the reference to arbitration was that Canada and the United States enjoyed a close relationship which allowed some recourse to shared values, and which favoured an orderly settlement of outstanding issues. Even so, it was a long and tortuous negotiation that led to the conclusion of the Convention for settlement of difficulties arising from operation of smelter at Trail, B.C., which was signed on behalf of the two Governments on 15 April 1935, and entered into force in August of that year.<sup>30</sup> The antecedent inter-governmental correspondence was available to the tribunal, forming, in effect, a body of *travaux préparatoires* to which the tribunal had extensive recourse.<sup>31</sup> The tribunal began its meetings in June 1937, and rendered a first award on 16 April 1938.<sup>32</sup> With the agreement of the two Governments, the tribunal was given extended time in which to decide upon the need for, and character of, a future regime. The tribunal's second and last award, exhausting its terms of reference, was made on 11 March 1941.<sup>33</sup>

25. It was not in dispute that, between 1926 and 1931, fumes from the smelter had caused damage in the State of Washington.<sup>34</sup> The Canadian authorities hoped, and the American authorities denied, that the nuisance had then ended, as a result of extensive modifications made to the smelter.<sup>35</sup> Following a recommendation of the Canadian/American International Joint Commission, the United States reluctantly agreed to accept a global sum of \$350,000 in full satisfaction of the damage that had

occurred up to the end of 1931.<sup>36</sup> In return, Canada agreed that other matters upon which the International Joint Commission had made recommendations should nevertheless be referred to arbitration.<sup>37</sup> Accordingly, the Tribunal was asked<sup>38</sup> to find whether there had been damage since 1931 and, if so, to assess compensation. If there had been damage, the tribunal was also asked—and this proved to be its major task—whether there was an obligation to refrain from causing further damage in the future, what measures or regime might be required to give effect to such an obligation, and whether provision should also be made for payment of compensation.

26. The tribunal, after careful enquiry, found as a fact that there had been further damage since 1931, and assessed that damage in its first award.<sup>39</sup> It went on to say that it could not answer the other questions reliably until scientific observations, conducted under a test regime which the tribunal then prescribed, had yielded new factual information.<sup>40</sup> A reason for this difference in treatment was that the tribunal's first task was non-principled: it was required by the parties merely to ascertain whether damage had been sustained and, if so, to quantify that damage. By contrast, the tribunal's remaining tasks called both for an elucidation of the general law, and for the application of that law to a factual situation which could be ascertained only by complex scientific enquiry.

27. It may at this stage be helpful to offer an interpretation of the logical sequence and manner in which the tribunal approached the issues for decision in its second and last award. It first decided that, if the transboundary harm which was still being caused by the Trail Smelter were shown to be wrongful in character, Canada, as the territorial sovereign, would have an

<sup>27</sup> *Ibid.*, pp. 1913–1917 and pp. 1941–1944.

<sup>28</sup> Note No. 13 of 17 February 1934, from the Prime Minister and Secretary of State for External Affairs of Canada, R. B. Bennett, to the American Minister in Canada, W. D. Robbins (United States of America, Department of State, *Foreign Relations of the United States*, 1934, vol. I (Washington, D.C., U.S. Government Printing Office, 1951), p. 898).

<sup>29</sup> J. E. Read, "The Trail Smelter dispute", *The Canadian Yearbook of International Law*, 1963 (Vancouver), vol. I, p. 222.

<sup>30</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1907–1910.

<sup>31</sup> The official correspondence between the two Governments is published in *Foreign Relations of the United States* (*op. cit.*), 1933, vol. II, pp. 52–67; 1934, vol. I, pp. 845–967; 1935, vol. II, pp. 32–35.

<sup>32</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1911 *et seq.*

<sup>33</sup> *Ibid.*, pp. 1938 *et seq.*

<sup>34</sup> *Ibid.*, p. 1917, and *Foreign Relations of the United States*, 1934, vol. I (*op. cit.*), especially pp. 874–880.

<sup>35</sup> *Foreign Relations of the United States*, 1934, vol. I (*op. cit.*), especially pp. 876, 881–883, 901, 925, 958–959.

<sup>36</sup> *Ibid.*, especially pp. 892, 925–927, 939–950 and 966, and Convention for settlement of difficulties arising from operation of smelter at Trail, B.C., art. I (see para. 24 above).

<sup>37</sup> The key question was whether or not to accept the International Joint Commission's definition of "damage" (see *Foreign Relations of the United States*, 1934, vol. I (*op. cit.*), especially pp. 879, 887, 906, 907, 958–962 and 966–973), and the interpretation which the Tribunal gave in its second award: United Nations, *Report of Arbitral Awards*, vol. III (*op. cit.*), pp. 1960–1962).

<sup>38</sup> Article III of the Convention (see footnote 36 above) provides as follows:

"The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

"(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

"(2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

"(3) In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

"(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?"

<sup>39</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1920–1933.

<sup>40</sup> *Ibid.*, pp. 1934 *et seq.*; Read, *loc. cit.*, pp. 215–216.

obligation to ensure that such harm did not occur in future.<sup>41</sup> Secondly, the question whether the transboundary harm was wrongful in character would—subject to any special factors—depend on a balance of interest test: in the present case the balance of interest was such that those responsible for the smelter should be required to take every reasonable step, compatible with the economic and actual survival of the industry, to provide a reasonably adequate degree of assurance that transboundary harm would cease.<sup>42</sup>

28. Thirdly, the scientific tests carried out under the tribunal's direction had established that a regime which satisfied the balance of interest test, applied in the manner indicated in the previous paragraph, would indeed provide reasonably adequate guarantees that harm would cease; and there was therefore no reason to include provision for compensation in the regime that Canada was under obligation to promote and sustain.<sup>43</sup> Finally, if Canada were to fulfil its obligations in relation to that regime, and harm should nevertheless occur, that would not in itself entail wrongfulness, but would attract an obligation to ensure that compensation was provided.<sup>44</sup>

#### B. Freedom of action and obedience to rules

29. In any developed municipal legal system—and in the universal law of human rights—it is a first principle that the liberty of the individual is limited by the obligation to respect the equal liberties of others. Within the international community, organization is less developed, and interdependence is still a watchword, rather than a principle that governs conduct. The collective memories of sovereign States know more about the struggle to live separately than the mutual sacrifices of living in society, though Governments make deliberate efforts to redress that balance. International law reflects the evolving standards of the community it serves; but the law is built upon respect for the territorial sovereignty of States. Therefore, if we wish to assess the authority of the *Trail Smelter* awards, it would be well to follow the tribunal's example, and to begin by studying the attitudes of the States parties.

30. For Canada it was a matter of unending surprise that the question had an international aspect at all. The Prime Minister, R.B. Bennett, echoing a view long held by his advisers, observed:

This is not a dispute between the two Governments, and it does not come within any of the ordinary well-known categories of international arbitration . . . I have pointed out that it would have been open to the Canadian Government to disclaim international responsibility . . .<sup>45</sup>

It was this aspect of the matter, as much as any other, which earned the case its wayward reputation. In one

characterization, the matter turned, not on an absence of right, but on an "abuse of rights". From another standpoint, it looked to be a long step towards a new principle of responsibility, based not on the conduct of the State, but on the mere creation of a transnational danger within the territorial jurisdiction of the State.<sup>46</sup> Neither view found support in the awards of the tribunal, which disposed of the issue in these words:

Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct [of the smelter] should be in conformity with the obligation of the Dominion under international law as herein determined.<sup>47</sup>

31. The initial standpoint of the United States is equally striking, because it reflected an absolute view of the international wrongfulness of transboundary harm. Wrote the Secretary of State, Cordell Hull,

The United States is entitled to insist that an isolated agency without its borders, which is admitted to be polluting the air within its territory, shall desist from so doing. The right so to insist can not be conditioned on the giving of aid in the form of advice by scientists as to ways and means of controlling the nuisance at its source.<sup>48</sup>

Five or six years later, the *Trail Smelter* tribunal, with the approval of the two Governments and the assistance of the scientists whom the Governments had placed at the tribunal's disposal, was directing its major effort to "ways and means of controlling the nuisance at its source"; and the balance of its findings depended as much upon the outcome of that enquiry as upon any other consideration.<sup>49</sup>

32. Except for the chaotic state of the law of international watercourses,<sup>50</sup> governments had until this time been able to believe that State sovereignty embraced an almost complete freedom to take or allow within national borders any action which was not directed against other States, and yet to be almost completely insulated from the unwanted side-effects of equally unfettered activities within the borders of other States. Even the language of the law, with its rigorous concept of "invasion of

<sup>46</sup> See footnote 18 above.

<sup>47</sup> United Nations, *Reports of International Arbitral Awards*, vol. III, (op. cit.), pp. 1965–1966.

<sup>48</sup> Despatch No. 194 of 27 January 1934 to the American Minister in Canada, W.D. Robbins, *Foreign Relations of the United States, 1934*, vol. I (op. cit.), p. 888.

<sup>49</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (op. cit.), pp. 1934–1936 and pp. 1966–1974.

<sup>50</sup> M.M. Whiteman, ed., *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1964), vol. 3, p. 1046, where the following two opinions are juxtaposed:

"Among writers on international law, H. Lauterpacht took the view that:

'... a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part.'" [L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. by H. Lauterpacht (London, Longmans, Green, 1955), vol. I.]

"Briggs, on the other hand, stated:

'No general principle of international law prevents a riparian State from excluding foreign ships from the navigation of such a river [not subjected to a special conventional regime] or from diverting or polluting its waters.'" [H.W. Briggs, *Law of Nations*, 2nd ed. (London, Stevens, 1953), p. 274.]

<sup>41</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (op. cit.), pp. 1963 and 1965–1966.

<sup>42</sup> *Ibid.*, pp. 1962–1965.

<sup>43</sup> *Ibid.*, pp. 1966–1974.

<sup>44</sup> *Ibid.*, pp. 1980–1981.

<sup>45</sup> Letter of 17 November 1934 to the United States Under Secretary of State, W. Phillips, *Foreign Relations of the United States, 1934*, vol. I (op. cit.), p. 961.

sovereignty", was hardly suited to an age in which national endeavours frequently spilled across international frontiers without being designed to do so. In the *Nuclear Tests* cases before the International Court of Justice, Judge Sir Humphrey Waldock asked the representatives of Australia and of New Zealand:

... do they draw a line and if so where between a deposit or dispersion of matter within another State which is unlawful and one which has to be tolerated as merely an incident of the industrialization or technological development of modern society.<sup>51</sup>

The representatives of both countries agreed that such a line must be drawn; but their further answers did not suggest that the exact position of the line could be plotted simply, or for all purposes.<sup>52</sup>

33. In the exchanges that preceded their joint reference to arbitration, the Canadian and United States authorities gradually came to terms with the ineluctable circumstance that conflicting interests, neither of which was intrinsically unworthy, had to be adjusted. Without conceding the superiority of their respective positions, or their right to contend for total victory before the prospective arbitral tribunal, the spokesmen of the two Governments moved a little towards middle ground. Canada, imbued with the sense that the question was really one of civil liability, and that smoke easements could ordinarily be bought, was very ready to contemplate that residual damage should be a charge on the operation<sup>53</sup>—an early manifestation of the now familiar principle that the polluter should pay.

34. Canada was not, however, willing to run a substantial risk that the outcome of the arbitration would entail the closure of the Trail Smelter. Lacking any applicable international precedents, which might tend to channel the line of reasoning of an arbitral panel yet unnamed, Canada found reassurance in the quasi-international jurisprudence of the Supreme Court of the United States in matters affecting the respective rights of the constituent States. With the acquiescence of the United States negotiators, it was therefore settled that the Convention establishing the arbitration would direct the tribunal to "apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice".<sup>54</sup>

35. For good measure—and to mark the firm belief of both Governments that damage must not go unrequited—the tribunal was also directed to "give consideration to the desire of the high contracting parties to reach a solution

just to all parties concerned".<sup>55</sup> The tribunal found that neither of these directives had impaired its authority to drink from the pure, but not brimming, well of international customary law. The tribunal stressed that "the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law".<sup>56</sup> As to the question of a solution just to all parties, the tribunal had this to say:

As Professor Eagleton puts it (in *Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." ... International decisions, in various matters, from the *Alabama* case<sup>57</sup> onward, are based on the same general principle ...<sup>58</sup>

36. In settling the terms of reference, the United States negotiators had perhaps gone a little further than they would have wished in assimilating their own country's sovereign discretions to those accorded their constituent States by a national Court of competent—though exceptional—jurisdiction.<sup>59</sup> They had, however, in no way compromised their essential stand that States are not required, against their wishes, to suffer substantial harm if compensation is tendered. They had not yielded to Canadian suggestions that the settlement in the *Trail Smelter* dispute would govern other boundary situations, where the tables might be turned: harm had always to be assessed within a particular context, and the Trail situation was in many ways distinguishable.<sup>60</sup> Yet they could not fail to see that the Canadian argument contained a kernel of truth. If there were an obligation to avoid all transboundary harm—at least at any level that the law might find appreciable—the restriction upon a State's freedom of action could be little less than paralysing.

37. Once again, the tribunal was careful both to give expression to the applicable legal rules and to project exactly the shared expectations of the States parties. The second and last award contained a ringing declaration, which is later paralleled in the judgement of the International Court of Justice in the *Corfu Channel* case<sup>61</sup> and

<sup>55</sup> Art. IV of the arbitral Convention.

<sup>56</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1963.

<sup>57</sup> J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. I, chap. XIV ("The Geneva Arbitration"), pp. 495–682.

<sup>58</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1963.

<sup>59</sup> They would at any rate have preferred to omit the reference to "practice", to the retention of which the Canadians attached importance—presumably because it was thought to favour solutions that accommodated both interests (see *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), especially p. 912, 916, 926 and 944). Moreover, the United States had pressed for terms of reference requiring the tribunal to fix levels of pollution that would automatically attract corresponding levels of compensation (*ibid.*, p. 913).

<sup>60</sup> *Ibid.*, especially pp. 923–924, 931–934 and 939–940.

<sup>61</sup> *I.C.J. Reports 1949* p. 22. Cf. preliminary report, chap. III, especially para. 36 (*Yearbook ... 1980*, vol. II (Part One), pp. 257–258, document A/CN.4/334 and Add.1 and 2).

<sup>51</sup> *I.C.J. Pleadings, Nuclear Tests* (1973), vol. I, p. 524, vol. II, p. 291.

<sup>52</sup> *Ibid.*, vol. I, pp. 525–527, and vol. II., pp. 429–431.

<sup>53</sup> Though, in general, Canada believed that the large sums already spent on smoke abatement and the lump sum of \$350,000 recommended by the International Joint Commission in respect of damage incurred before 1931 would be found to satisfy all Canadian obligations (*Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), pp. 874–967).

<sup>54</sup> Art. IV of the arbitral Convention (see footnote 50 above), and *Foreign Relations of the United States, 1934*, vol. I. (*op. cit.*), especially pp. 906, 912 and 942; see also Read, *loc. cit.*, pp. 226–227.

in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>62</sup> according to which:

... under the principles of international law, as well as of the law of the United States, no State has the right to use or to permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>63</sup>

If this dictum stood alone, it might lead towards recognition that States are absolutely liable for harm which arises within their territory or jurisdiction, and which produces harmful consequences outside that territory or jurisdiction.

38. In fact, however, the rule stated is not applied absolutely:

So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals.<sup>64</sup>

The tribunal had already established that, if there were no overriding factors, United States law and practice would not require all harm to be avoided:

... when the [Supreme Court of the United States] actually framed an injunction, in the case of the Ducktown company (237 U.S. 474, 477) ... they did not go beyond a decree "adequate to diminish materially the present probability of damage to its (Georgia's) citizens".<sup>65</sup>

39. The regime the tribunal prescribes is that which:

will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature ...<sup>66</sup>

<sup>62</sup> Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14), part one, chap. I. Cf. preliminary report, para. 42 (Yearbook ... 1980, vol. II (Part One), p. 259, document A/CN.4/334 and Add.1 and 2).

<sup>63</sup> United Nations, Reports of International Arbitral Awards, vol. III (op. cit.), p. 1965.

<sup>64</sup> Ibid., p. 1966.

<sup>65</sup> Ibid., p. 1965.

<sup>66</sup> Ibid., p. 1980.

Nevertheless,

if any damage ... shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage ...<sup>67</sup>

In other words, the exact measure of Canada's customary law obligation not to allow activities in its territory to harm other States is fixed, in the first instance, at the level of the regime prescribed; but if harm occurs without any breach of that obligation, it will still require Canada to provide an indemnity.

40. These findings furnish the themes of chapter III. Because the policy of the law is to minimize and repair transboundary harm, and yet to preserve the widest latitude for the freedom of action of sovereign States, the criteria of "harm" and of "wrong" are interlocked but not fused. Not all harm is wrongful but the law is never indifferent to the occurrence or potentiality of harm when it threatens the rights of other States. The measure of a State's obligations to ensure that other States' rights are not infringed by the harmful effects of things done or omitted within its territory or jurisdiction is still the duty of care, but that duty extends to making good any harm that is fairly attributable to the lawful conduct of a lawful activity. Prevention and reparation are part of a single scale, in which the priority accorded to prevention is tempered by the need to maintain safeguards at levels which a beneficial activity can sustain. States may, of course, modify their customary law obligations by agreement; but, if a State fails conscientiously to strive for such an agreement when it is needed, that State may be in breach, not only of a specific rule of obligation embodying a balance of interest test, but also of the concomitant general rule of obligation which, in Eagleton's words adopted by the tribunal, it "owes at all times ... to protect other States against injurious acts by individuals from within its jurisdiction".<sup>68</sup>

<sup>67</sup> Ibid.

<sup>68</sup> See para. 35 and footnote 58 above.

## CHAPTER III

### Rights and interests

#### A. The need to balance interests

41. In commenting upon the *Trail Smelter* awards, Goldie noted that the tribunal's reliance upon the case law of the United States of America Supreme Court gave a central place to the common law doctrine of nuisance, which he judged to be too idiosyncratic to be part of the doctrine of general international law.<sup>69</sup> The comment is no doubt well-founded, but there are several points that may be made. First, the branch of international law with which

we are dealing builds upon shared values and favours diverse solutions, because it is the policy of the law to allow the utmost freedom compatible with a reasonable regard for the protection of the freedoms of other States. Solutions reached in one context are not automatically transferable to other contexts.<sup>70</sup>

<sup>70</sup> Cf. Principle 23 of the Stockholm Declaration (see footnote 62 above):

"Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be

(Continued on next page.)

<sup>69</sup> Goldie, "Liability for damage ..." (loc cit.) (footnote 15 above), p. 1189 and pp. 1226-1229.

42. Secondly, the concept of nuisance performs a signal service because—unlike the concept of negligence—it does not dwell exclusively upon the causes of a loss or injury. In common law doctrine, nuisance always implies a balancing test—a weighing of the degree of deprivation or inconvenience suffered against the value of the activity which has caused the suffering and the reasonableness of the way in which that activity has been conducted. Equipped with this concept, the States parties in the *Trail Smelter* case were subliminally prepared for an adjustment of interests that neither had contemplated; for the United States looked only to the results of pollution, and Canada felt secure in the innocence of its causes.

43. Any tendency to insist that all transboundary harm is wrongful, or automatically compensable in accordance with optimal standards, causes justified alarm and impedes human progress.<sup>71</sup> The ECE 1979 Convention on Long-range Transboundary Air Pollution<sup>72</sup> is aimed initially at the reduction of sulphur dioxide, the same pollutant released by the Trail smelter; but the parties have felt compelled to stipulate that the goals they are now pledged to achieve are not necessarily the measure of their present liability for existing transboundary pollution.<sup>73</sup> In the same way, developing countries, though needing protection from industrial and technological processes that threaten to poison the biosphere, must also guard themselves against the imposition of standards that are incompatible with their own levels of economic and industrial development.<sup>74</sup>

(Footnote 70 continued.)

determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries."

<sup>71</sup> See, for example, the remarks of the Canadian Prime Minister:

"... A rule which would make the Company a guarantor that under no conditions would pockets of gas be carried across the border, under penalty of a shut-down of the plant, would be impossible. It would involve a far more rigid regime than has been imposed upon any smelter in either of the two Countries. It would be particularly unjust in the present instance, in which the Company has already expended more than ten millions of dollars upon projects designed to bring about a substantial and practical elimination of injury to United States interests. No Court in either country would impose such a harsh and oppressive rule. I have no doubt that your Government will agree that the practical elimination of damage is a satisfactory solution to the problem, and that no rule should be adopted which would involve the destruction of the industry. A principle should not be established in this case which would potentially involve a shutting down of existing industries of various types in industrial communities and sterilizing future development within a broad zone in the Dominion of Canada and the United States of America, stretching from coast to coast along the international boundary-line." (Note No. 13 of 17 February 1934, from the Prime Minister and Secretary of State for External Affairs of Canada, R. B. Bennett, to the American Minister in Canada, W. D. Robbins. *Foreign Relations of the United States, 1934*, vol. I (op. cit.), p. 906).

<sup>72</sup> See ECE/HLM.1/2, annex I.

<sup>73</sup> Cf. preliminary report, para. 5 (*Yearbook ... 1980*, vol. II (Part One), pp. 248–249, document A/CN.4/334 and Add.1 and 2).

<sup>74</sup> Cf. Principle 23 of the Stockholm Declaration (quoted in footnote 70 above). The same factors are evident in the activities of States toward UNEP's draft Principles of conduct in the field of the

44. On the other hand, an exclusive emphasis upon the causes of harm has equal disadvantages. In legal theory, as in any other area of principled debate, extreme positions tend to evoke their own antitheses. So Pierre-Marie Dupuy, in the course of an important study of State responsibility for industrial and technological damage,<sup>75</sup> reaches the conclusion that State responsibility for transboundary harm is limited to obligations of conduct, and does not extend to obligations of result.<sup>76</sup> There follows the argument *a contrario*: if it were not so, there would be no category of "lawful acts" with which the present topic could deal, because every act that caused harm would automatically give rise to State responsibility.

45. The limitation of State responsibility to obligations of conduct leads Dupuy inexorably to the conclusion that customary law offers no protection at all for harmful consequences that are unavoidable, even though of catastrophic proportions.<sup>77</sup> Accordingly, the gap in customary law cannot be filled except by concluding

environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States (UNEP/GC.6/17). See also the preliminary report, para. 5 and footnote 8 (*Yearbook ... 1980*, vol. II (Part One), pp. 248–249, document A/CN.4/334 and Add.1 and 2).

<sup>75</sup> P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (op. cit.) (footnote 15 above).

<sup>76</sup> As to obligations of conduct and result, see, in particular, arts. 20 and 21 of the draft articles on State responsibility (part I), adopted by the Commission on first reading (*Yearbook ... 1980*, vol. II (Part Two), p. 32).

<sup>77</sup> "As noted in the first part of this study, there is in general no doubt about the lawful nature of the activities dealt with in the international conventions considered earlier [i.e. those relating to liability for damage caused by space objects, for damage caused by the peaceful uses of atomic energy and for oil pollution].

"According to the principle of the sovereign jurisdiction of States, it is recognized that States may freely undertake the launching of space objects from their territories or arrange to replace conventional energy sources, such as petroleum and coal, by nuclear power stations erected in areas within their jurisdiction.

"The various limits usually placed on the legal exercise of their powers in these respects have the effect not of protecting third parties against any infringements of their subjective rights resulting from the conduct of these activities, but rather of making it an obligation for the States engaging in them to take the greatest care to prevent any possible damage.

"Because the principles of international law place no obligation of result on States in the exercise of their territorial jurisdiction, the conduct of "ultra-hazardous" activities in or from their national territories may be compatible with observance of the "principle of the non-harmful use of territory", exemplified by what is known as the law 'of good neighbourliness'.

"It must be repeated that acceptance of the view of those who wrongly consider (particularly in their commentaries on the *Trail Smelter Arbitration*) that this principle establishes a genuine obligation of result (or of guarantee), not an obligation of means, would mean that the category of 'lawful activities' itself would disappear as a result of an absolute presumption of responsibility—a possibility that is of course incompatible with the principle and practice of sovereignty.

"Exactly what determines the lawful nature of the activities in question (atomic and space activities, for the time being) is that despite the catastrophic damage they may cause, their conduct does not in itself constitute a breach of any obligation of international law, not even of the obligation of the non-harmful use of territory. For that to be true, however, one condition must be met: the conduct of these activities must actually be accompanied by a degree of preventive care

(Continued on next page.)



conventional regimes, or by the emergence of new and more precise primary rules of obligation.<sup>78</sup> Only very exceptionally—as perhaps in the case of the peaceful uses of atomic energy—may conventional obligations have the support of a rule derived from general principles of law, exemplified in the comparative uniformity of municipal legal systems, as well as in the conventional regime or regimes.<sup>79</sup>

46. This selective reference to some of Dupuy's conclusions does not sufficiently acknowledge the great value of his careful analysis of particular conventional regimes,<sup>80</sup> or his perception that the levels of the duty of care should rise in proportion to levels of potential danger. He describes persuasively the gains in precision and objectivity when obligations are quantified and made susceptible of scientific measurement.<sup>81</sup> He is always conscious that prevention is better than cure, so that a regime which articulates required standards of behaviour may be worth more than one that sets a tariff for loss or injury. It follows that regimes of strict liability—whether they bind Governments or operate, by agreement of Governments, at the level of municipal law—are only one, and not always the best, method of discharging obligations towards those who may be adversely affected by an activity that is predominantly beneficial.<sup>82</sup>

(Footnote 77 continued.)

commensurate with the risks the activities create. Although such care is powerless to eliminate all potential catastrophic dangers, it must nevertheless limit them as much as possible. This shows how close a link there is between the *harm* and the *activity* that are concerned in this type of responsibility.

"It is precisely because the harm is inevitable that it cannot engage the responsibility of the State except on the basis of the risk ...". (Dupuy, *op. cit.*, pp. 225–226).

<sup>78</sup> "The main consequence of the limitation of objective international responsibility is that, being doomed to function in a derogatory manner, usually as a result of a treaty provision, it lets international responsibility for wrongful acts play the primary role.

"Whereas this responsibility under the ordinary law was hitherto based on very general rules of conduct, such as the "principle of the non-harmful use of territory", it now tends to rest on a number of much more specific obligations, even in the context of customary international law alone." (*Ibid.*, p. 259)

But see, more generally, the conclusions set out in part II, Title I, chap. II (*ibid.*, p. 256) and part II, Title II, chap. I (*ibid.*, pp. 259–274).

<sup>79</sup> *Ibid.*, pp. 136–138.

<sup>80</sup> *Ibid.*, pp. 44–156, part I, Title I.

<sup>81</sup> *Ibid.*, pp. 259–274, part II, Title II, chap. I.

<sup>82</sup> "... States are, fortunately, leaning more towards increased prevention than towards a broader guarantee. Both institutions—liability for a breach of the law and responsibility for lawful acts—must remain true to their original purposes and spheres of operation if they are not to lose their specificity and *raison d'être*.

"A possible argument against this requirement of legal clarity is that it might, in the final analysis, work against victims by depriving them of guaranteed reparation in cases where the State which caused the damage had nevertheless observed the law.

"To forestall such criticism, it is necessary to consider the possibility of new solutions which will make the continuance of international liability for a breach of the law, in its own field of application, compatible with the guarantee of better protection for victims. The approach to this must be to adapt the procedures for the implementation of international responsibility under the ordinary law: as will be seen below, the development of evidential techniques and an expansion of the duty of care required of States are the two main elements of such a process." (*Ibid.*, p. 233.)

47. What must surprise some readers is the seeming disconnection between the goals that Dupuy considers desirable and his estimate of the present capacity of customary international law to encompass those goals. Can it really be true that States—unlike the United States in the case of the *Trail Smelter*—are content to regard the existing law as requiring them to endure the harmful consequences of activities conducted with due care within the territory or jurisdiction of other States? Can the duty of care ever be described as an obligation of conduct? Surely it is the least exacting measure of a duty to achieve a given result—even if that result must sometimes be stated rather generally? Can one ever speak of consequences that are "unavoidable", where the real question is that of liberty to pursue competing objectives? The regimes that Dupuy sees as desirable—whether they go to prevention or to reparation—are all constructed by determining a balance of interest; yet he does not identify a general duty to balance interests.<sup>83</sup>

48. In the result, therefore, Dupuy's regime is hardly less autonomous than the strict liability principle to which it is opposed. The evil he postulates is the rule of strict responsibility that any activity causing significant transboundary harm is wrongful. The solution he offers is that no activity causing transboundary harm is for that reason wrongful, provided that the activity is conducted with due care. To mitigate the obvious harshness of the latter rule, the relevance of the strict liability principle is admitted—but within limits that cannot be sharply defined—to deal with cases in which the harm is intolerable and the question of due care impenetrable.

49. In less extreme situations, Dupuy's concept that care should be proportionate to potential danger does provide the shadow of a balancing test; but the dice are still loaded in favour of the State within whose territory or jurisdiction the activity takes place. If, in the *Trail Smelter* situation, investigation had shown no way to mitigate the residual pollution problem of which the United States complained, under the rules Dupuy identifies, the United States would have been left to bear the loss. And if, in the actual circumstances of the *Trail Smelter* case, the United States had been gravely injured by an accidental departure from the agreed regime, once again under these rules the loss would lie with the United States, unless the accident was one which due care on the part of the Canadian Government could have avoided.

50. If Dupuy takes his stand upon the old orthodoxy and tries to carry its universal gospel into new areas, another contemporary writer, Günther Handl, sets out upon this work of unification from the opposite end. For him, no less than for Dupuy, the established standards of responsibility for wrongfulness are paramount, and do not yield easily or generally to an innovative standard of strict liability. But for Handl, the test of wrongfulness does not depend upon a simple conjunction between the occurrence of harm and a lack of due care on the part of the State within whose territory or jurisdiction that harm was caused. Rather, the first question is whether, in all the

<sup>83</sup> See para. 45 above and footnotes 77–79.



circumstances of the case, the occurrence of the harm establishes the objective element of wrongfulness, and that question turns upon a balance of interests, calculated with reference to all relevant factors.<sup>84</sup>

51. If, upon a balance of interests, the objective element of wrongfulness is established, and the State within whose territory or jurisdiction the harm arose had knowledge of the harm and time to act, the wrongfulness of the conduct giving rise to the harm is attributable to that State.<sup>85</sup> Thus, there is no difficulty in bringing within the rules of State responsibility for breach of an international obligation cases of chronic and notorious harm, entailing wrongfulness. The case which is difficult is that of sudden, accidental harm—harm caused, perhaps, by the human error of ship's navigator or an employee of a privately owned steel plant—harm which cannot reasonably, on any objective or subjective basis, be attributed to the State. In such cases Handl finds in State practice<sup>86</sup> the same tendency that the Commission had discerned in circumstances which preclude wrongfulness. That is to say, a situation not in conformity with an international obligation escapes the taint of wrongfulness because the test of attribution has not been satisfied; but the victim State is felt to be as much entitled to redress as it would have been, had attribution been established.<sup>87</sup>

52. In their different ways, therefore, Dupuy and Handl—two writers whose respect for the classic rules of State responsibility is not in question—reach the frontiers of the capacities of those rules, and are driven to contemplate the need for complementary systems of obligation.<sup>88</sup> The world of legal scholarship then divides. Some are tempted to consign the essential problem to the realm of politics, by holding that a complementary system—however necessary it may be—remains forever hypothetical until it has been captured in an international agreement: others believe that there is an onus upon

lawyers to describe, and assign to its proper place in general doctrine, a complementary system of obligation that is absolutely necessary in modern inter-State relationships, and already fitfully evidenced in non-conventional State practice.<sup>89</sup>

### B. Elements in striking a balance of interests

53. It would be, to say the least, a daunting problem to try to resolve the divergence of views and policies described in the previous paragraph, without drawing upon the massive record of continuing international effort to reach universal, regional and bilateral agreements, understandings and guide-lines, that do play some part in regulating obligations relating to transboundary harm. Moreover, one can expect only limited help from judicial and arbitral decisions, for reasons made clear by the International Court of Justice in its judgements, delivered 25 July 1974, in the *Fisheries Jurisdiction* cases:

The most appropriate method for the solution of the dispute is clearly that of negotiation. . . . It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights . . . . The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case.<sup>90</sup>

54. It is, however, a feature of the modern world—of which there is ample evidence in the jurisprudence of the Court—that the resolution of disputes between States may turn as much upon the adjustment of competing interests as upon the ascertainment and application of prohibitory rules.<sup>91</sup> General rules relating to transboundary harm are apt to contain both elements; and in this may lie a root cause of uncertainty and disagreement. No one doubts the essential message of the *Trail Smelter*<sup>92</sup> and *Corfu Channel*<sup>93</sup> cases and the Stockholm Declaration,<sup>94</sup> that transboundary harm, even if unintended, can be wrongful and therefore prohibited; but the problem of reconciling the rights of two or more sovereignties remains.<sup>95</sup>

<sup>84</sup> See, for example, Handl, "Balancing of Interests . . ." (*loc. cit.*) (footnote 15 above), p. 156.

<sup>85</sup> This, of course, is the principle enunciated by the I.C.J. in its Judgment of 9 April 1949 in the *Corfu Channel* case (Merits):

"Such obligations [i.e., to notify the existence of a minefield in territorial waters and to warn approaching ships] are based . . . on certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." (*I.C.J. Reports 1949*, p. 22.)

<sup>86</sup> "State liability for accidental transnational environmental damage by private persons" (*loc. cit.*) (footnote 15 above), pp. 540–553.

<sup>87</sup> See art. 35 (Reservation as to compensation for damage) in the draft articles on State responsibility (part I) and the Commission's commentary thereto (*Yearbook . . . 1980*, vol. II (Part Two), pp. 61–63).

<sup>88</sup> Both writers differ from the Special Rapporteur by attaching some importance to the criterion of "ultra-hazardous" as a justification for what they regard as a departure from the normal rules of State responsibility. As to this, see the preliminary report, para. 18 (*Yearbook . . . 1980*, vol. II (Part One), p. 252, document A/CN.4/334 and Add.1 and 2); but see also P. Cahier, "Le problème de la responsabilité pour risque en droit international", in *International Relations in a Changing World*, Institut Universitaire de Hautes Etudes Internationales (Geneva) (Leyden, Sijthoff, 1977), p. 411.

<sup>89</sup> This division of opinion was foreseen by Jenks, in relation to his own characterization of the subject:

"The concept of a general liability for ultra-hazardous activities, will, unless and until it is formulated by a generally accepted international convention, clearly be unacceptable to those for whom international law is still a limited body of specific rules deriving their authority from the explicit consent of States. Pending any such convention, the concept presupposes the view that international law is not a limited body of specific rules, but a body of living principle and developing precedent growing with the needs of international society." (*Loc. cit.* (footnote 15 above), p. 177).

<sup>90</sup> *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, *I.C.J. Reports 1974*, pp. 31–32, paras. 73–75 (excerpts); and *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, *ibid.*, p. 201, paras. 65–67 (excerpts).

<sup>91</sup> See for example, *Fisheries* (United Kingdom v. Norway), Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 116; and the *North Sea Continental Shelf* cases, Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

<sup>92</sup> See footnote 26 above.

<sup>93</sup> *I.C.J. Reports 1949*, p. 4.

<sup>94</sup> See footnote 62 above.

<sup>95</sup> See, in this connection, Reuter's observations:

" . . . the circumstances in which extremely serious damage may be caused as a result of modern-day technological developments pose problems which are only just beginning to come within the purview

(Continued on next page.)

55. There are at least very strong indications that, subject to the specific content of any particular obligation, and subject to the question of thresholds, the interests of the States whose sovereign rights are in question would be

(Footnote 95 continued.)

of national legal systems, but which public international law will be unable to ignore much longer. A lawful act of a State may cause incalculable damage; . . . we would thus have to lay down new rules. . . . It is doubtful whether we can stretch the limits of responsibility for wrongful acts indefinitely without attacking its very foundations . . .

"Do not the rules of territorial sovereignty lay down the principle of the prohibition of any physical activity that affects the territory of a State from a source located in the territory of another State (physical interference)? If such a rule exists, it makes any harmful act having its physical origin in the territory of another State a breach of international law; reference might be made in this respect to famous precedents such as the *Trail Smelter Arbitration*. However, this rule certainly does not exist in as general a form as has just been stated . . . Although there can be no responsibility for acts of nature, as soon as man is involved, either through an act or an omission, the problem of responsibility arises.

"Let us take the case of a dam that bursts. If we formulate a rule that States must ensure that all constructional work done in their territory is totally accident-proof, we shall definitely remain within the realm of traditional responsibility: the complainant State will have to furnish proof of negligence on the part of the State complained against, which will, where appropriate, be able to invoke one of the traditional grounds for exoneration, such as *force majeure* (if, for example, the dam burst because of an earthquake).

"We could, however, formulate a slightly different rule, as follows: a State is not entitled to perform acts in its territory that might be abnormally dangerous for other States, in particular neighbouring States. In such a case, it is not the materialization of the danger, namely, a disastrous accident, that entails responsibility, but simply the performance of the act, such as the construction of the dam. Strictly speaking, such a rule, assuming it exists, makes it possible for the matter to remain within the framework of traditional responsibility; it presupposes the existence of rather sensitive standards and guidelines for the definition of an abnormal danger. Although it cannot be asserted that such a rule exists, it might be possible to find some traces of it in regard to good neighbourliness or in areas such as space experiments and nuclear tests.

"Simply making a slight change in the hypothetical rule we have just formulated removes the subject from the province of traditional responsibility. We have only to consider that certain risks, which are normal enough for no prohibition to be placed on the enterprises that create them, entail an obligation to make reparation for damage if the risk materializes. In such a case, responsibility exists without any breach of a rule of international law. The act is lawful, but it entails an obligation of reparation. Responsibility is bound up with mere causality. No one can say at present that such a rule exists in international law; but since mankind has never shrunk from highly dangerous undertakings, the rule might be adopted at least in part. In any event, claims have already been made on the basis of mere causality; in cases of nuclear accidents, for example, compensation has been paid, but always *ex gratia*, thus precluding any conclusions about legal obligations.

"It has been pointed out that this practice could be fitted into the general framework of international responsibility by means of a presumption: the State would be required to make reparation because it would be presumed to have acted without taking all the necessary precautions. Such a solution would be possible, provided however the presumption was not absolute; otherwise, the explanation would simply be a verbal one and tantamount to saying that, in a given technology, people are aware of the risks involved and of ways of avoiding them effectively. The inference is that in a time of trial and error in the face of new technologies, it is difficult to establish responsibility, if responsibility is needed, on a basis other than causality." (*Op. cit.* (see footnote 15 above), pp. 591–594.)

weighed;<sup>96</sup> and the incidence of the prohibitory rule in the particular case would be the result of that weighing. In the *Nuclear Tests* case, the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Waldock, had this to say:

. . . we cannot fail to observe that, in alleging violations of its territorial sovereignty and of rights derived from the principle of the freedom of the high seas, the Applicant also rests its case on long-established—indeed elemental—rights, the character of which as *lex lata* is beyond question. In regard to these rights the task which the [International] Court [of Justice] is called upon to perform is that of determining their scope and limits vis-à-vis the rights of other States.<sup>97</sup>

56. Although the rules of obligation that determine the wrongfulness of transboundary harm lie outside the province of the present topic, we must understand their nature; for on this the *raison d'être* of the present topic depends. If all transboundary harm were wrongful—or if its wrongfulness always depended upon the breach of a rule which left no margin for appreciation, or which entailed no comparison between the value of the activity and the extent of its harmful transboundary consequences—rules yielded by the present topic might still be needed; but their scope would be comparatively small. They could, for example, cover situations in which there are circumstances precluding wrongfulness,<sup>98</sup> and some categories of accidental harm. If, however, the wrongfulness of transboundary harm commonly depends upon a balance of interests, the development of the present topic is essential to the efficacy of the rules that determine wrongfulness.

57. This point is so important that it justifies expansion. The hypothesis is that activities capable of causing substantial transboundary harm would be unduly hampered if they were circumscribed by rigid rules of the kind that regulate deliberate invasions of sovereignty, and that such activities would be oppressive, if they were under no effective legal constraint. As States are not obliged to

<sup>96</sup> "Though the position may soon change, general international law (or customary law) contains no rules or standards related to the protection of the environment as such. Three sets of rules have major relevance nonetheless. First, the rules relating to state responsibility have a logic and vitality not to be despised or taken for granted. Secondly, the territorial sovereignty of States has a double impact. It provides a basis for individualist use and enjoyment of resources without setting any high standards of environmental protection. However, it also provides a basis for imposition of State responsibility on a sovereign State causing, maintaining, or failing to control a source of nuisance to other States. Thirdly, the concept of the freedom of the seas (and its clear equivalent in the case of outer space and celestial bodies) contains elements of reasonable user and non-exhaustive enjoyment which approach standards for environmental protection, although they are primarily based upon the concept of successful sharing rather than conservation in itself." (I. Brownlie, "A survey of international customary rules of environmental protection", *Natural Resources Journal* (Albuquerque, N.M., vol. 13, No. 1 (January 1973), p. 179.) See also J. Andrassy, "Les relations internationales de voisinage", *Recueil des cours . . . 1951—II* (Paris, Sirey, 1952), vol. 79, especially pp. 105–112, and Handl, "Territorial sovereignty . . ." (*loc. cit.*) (see footnote 15 above).

<sup>97</sup> *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, *I.C.J. Reports* 1974, p. 367, para. 113. See also the identical passage in *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, *ibid.*, p. 519, para. 48.

<sup>98</sup> See footnote 87 above.

submit their differences to third party settlement, and as questions involving balances of interest entail large elements of policy choice, the practical application of rules containing a balance of interest test will ordinarily involve more than the fixing of the point of wrongfulness; for that is a system under which the winner would take all. Under such a system each State would be encouraged to rely upon its untested belief that the aggravation it was causing fell on the right side of the median line.

58. The rules as to wrongfulness therefore occupy a central place within a larger, equitable framework of obligations arising out of acts not prohibited by international law. The effect of the double regime is to leave a good deal of latitude for the accommodation of competing interests, and yet to insist that no State is required by customary international law to submit to unlimited deleterious intrusions upon its territory, or in areas that are the common heritage of mankind, even if compensation is offered. "Smoke easements" have their place in international, as in national, affairs; and, where there is chronic pollution and a rising environmental standard, groups of States may have to share the cost of eradicating a localized evil which affects group interests. States are, however, entitled to insist that some kinds and degrees of transboundary harm are intolerable, and must stop.

59. In summary, it is not within the province of the present topic to determine, in any given context, either the point of intersection of harm and wrong, or the proportions in which duties of prevention and promises of indemnification may contribute to the fixing of the point of wrongfulness. Nevertheless, the point of intersection of harm and wrong is always fixed on a scale that extends into the province of the present topic; and therefore it cannot be fixed without reference to the content of the present topic. Not all transboundary harm is wrongful; but substantial transboundary harm is never legally negligible. Conversely, it is the policy of the law to allow each sovereign State as much freedom, in matters arising within its territory or jurisdiction, as is compatible with the freedoms of other States; but no activity which generates or threatens substantial transboundary harm may be pursued in disregard of obligations that arise, *ipso facto*, in customary international law.

60. On the scale of harm, what lies on the far side of the point of wrongfulness is prohibited; and disobedience of that prohibition engages the rules of State responsibility. On the near side of the point of wrongfulness, activities which generate, or threaten to generate, substantial transboundary harm are carried on subject to the interests of other States. Those interests may be quantified, as in the case of the rights of compensation established by the Convention on International Liability for Space Objects<sup>99</sup> or they may be at large: they may have as much substance as a right arising in consequence of wrongful action; or, depending on the equities, they may amount to no more than a right to be informed and consulted and to have submissions considered in good faith.

### C. Reflections of the double system in State practice

61. One famous passage of the *Lake Lanoux* arbitral award of 16 November 1957 is so succinct that it has a faintly sibylline ring:

France is entitled to exercise her rights; she cannot ignore Spanish interests.

Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.<sup>100</sup>

"Spain", says the tribunal disapprovingly, "tends to put rights and simple interests on the same plane".<sup>101</sup> However, "Account must be taken of all interests, of whatsoever nature . . . even if they do not correspond to a right."<sup>102</sup> And if they do correspond to a right? Then, of course, they are no longer merely "interests", but "rights". One aspect of the duty which each State may owe to others is to protect them and their nationals from serious transboundary harm, arising within its territory or jurisdiction.<sup>103</sup> If such harm is wrongful, it breaches the right of the other State concerned, and engages the responsibility of the State within whose territory or jurisdiction the harm was generated.

62. But, even if such harm is not wrongful, it constitutes an interest that must be taken into consideration; and that, said the tribunal, is not a purely formal requirement. The State on which the obligation falls must give such interests every satisfaction compatible with the pursuit of its own interests, and . . . show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.<sup>104</sup>

And, as the tribunal observed in another context,

All negotiations tend to take on a global character; they bear at once upon rights—some recognized and some contested—and upon interests; it is normal that, when considering adverse interests, a Party does not show intransigence with respect to all of its rights. Only thus can it have some of its own interests taken into consideration.<sup>105</sup>

63. In chapter II of the present report the sequence and manner was noted in which the *Trail Smelter* tribunal approached the issues that remained for decision in its second and last award (see paras. 27 and 28 above). It is often supposed that this precedent is vitiated by the prior agreement of the parties to treat the occurrence of harm as wrongful, but there is no justification for this view. The United States of America certainly regarded the damage which had occurred as wrongful.<sup>106</sup> Equally certainly,

<sup>100</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 316, para. 23.

<sup>101</sup> *Ibid.*, p. 315, para. 23.

<sup>102</sup> *Ibid.*, para. 22. The Tribunal added:

"Only such a solution complies with the terms of Article 16 [of the Additional Act of 26 May 1866 concerning the use of the waters of Lake Lanoux], with the spirit of the Pyrenees Treaties, and with the tendencies which are manifested in instances of hydro-electric development in current international practice." (*Ibid.*)

<sup>103</sup> In the *Lake Lanoux* case, the arbitral tribunal did not have to consider whether there was indeed "a principle which prohibits the upstream State from altering the waters of a river in such a fashion as seriously to prejudice the downstream State" because it had earlier found that the French hydro-electric scheme would not alter the waters of the River Carol. (*Ibid.*, p. 308, para. 13.)

<sup>104</sup> *Ibid.*, p. 314, para. 22.

<sup>105</sup> *Ibid.*, p. 311, para. 18.

<sup>106</sup> " . . . It is believed to be proper for the Government of the United States to look to the Canadian Government to cause such action to be

<sup>99</sup> See footnote 22 above.

(Continued on next page.)

Canada believed—though incorrectly—that the matter complained of by the United States did not constitute a dispute between the two Governments.<sup>107</sup> The Canadian Government went to considerable lengths to ensure both that the question of international wrongfulness was not prejudged and that the tribunal had full discretion to adjust the interests of all concerned without a prior finding of wrongfulness.<sup>108</sup>

64. It should now be pointed out that the *Trail Smelter* tribunal had at its disposal, and used, not only the legal techniques which determine the existence and breach of a primary rule of obligation, but also the complementary techniques that assign responsibilities (or liabilities) in relation to conduct not prohibited by international law. For, quite exceptionally, this tribunal was asked to do for the interested parties something that they would ordinarily

(Footnote 106 continued.)

taken as will prevent the pollution of the air in the State of Washington by smelter fumes . . .

"Canadian interests have for a number of years been trespassing on the territory of the United States and on personal and property rights in the State of Washington. The Canadian interests seem to desire to continue so to trespass. . . . The discharge of sulphur dioxide from the smelter at Trail . . . in such quantities and at such rates as to cause pollution of the air in the State of Washington has been at all times and is now wrongful. It ought of right to cease." (Extracts from Note No. 194 of 27 January 1934, from the Secretary of State of the United States, Cordell Hull, to the American Minister in Canada, W.D. Robbins, *Foreign Relations of the United States*, 1934, vol. I (*op. cit.*, pp. 875 and 896.) See also para. 31 above.

<sup>107</sup> " . . . When similar problems arise in the case of other smelters in Canada and the United States, a permanent and satisfactory solution is normally to be found in the acquisition, by purchase or otherwise, of smoke easements. . . .

"When the matter was brought to the attention of the Canadian Government, . . . The simplest course would have been to point out that the alleged facts complained of were civil and not international wrongs. The complainants, if they were unable to obtain satisfactory settlements by agreement, could always seek redress in the manner appropriate to a civil dispute between individuals in one country claiming to be injured by a corporate enterprise operating in another country." (Extracts from Note 13, paras. 4, 6 and 7, of 17 February 1934, from the Prime Minister and Secretary of State for External Affairs of Canada, R.B. Bennett, to the American Minister in Canada, W.D. Robbins, *ibid.*, p. 899.) See also para. 30 above.

<sup>108</sup> The questions put to the tribunal were framed in terms, not of Canadian obligation, but of the *Trail Smelter's* obligations (see footnote 38 above, art. III of the arbitral convention; see also Read, *loc. cit.*, pp. 223–227, and paras. 34 and 35 above).

Canada asked for, and obtained a categorical assurance from the United States that nothing had been prejudged (see Note No. 194 of 27 January 1934, from the Secretary of State of the United States, Cordell Hull, to the American Minister in Canada, W.D. Robbins, *Foreign Relations of the United States*, 1934, vol. I (*op. cit.*), pp. 874–885; and Note No. 259 of 14 March 1934 between the same parties, *ibid.*, pp. 915–918). The exchange of correspondence between the two Governments on this point was part of the *travaux préparatoires* of which the tribunal had cognizance (see para. 23 above).

The tribunal itself, in its first award, noted that its findings as to damage incurred after 1931 and the amount of the indemnity payable in respect of that damage did not depend upon a prior determination of wrongfulness: "the Tribunal finds it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States", because the arbitral convention was a sufficient authority for payment of losses found to have been incurred (United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1932).

do for themselves—that is, to construct a regime which, while paying full regard to the primary rule which determines the wrongfulness of harm, also fixes the conditions which the parties will regard as compliance with that rule. The negotiation between the parties, and the reasoning by which the tribunal arrived at its decisions, have been traversed above in chapter II, and could reasonably be regarded as a working model of basic themes in this report.

65. Occasionally, in bilateral State practice, one may discover the same preference that Canada exhibited in the *Trail Smelter* case to seek a settlement that does not turn upon the acknowledged breach of an international obligation. For example, in the well-known case of damage caused to Japanese fishermen by United States atmospheric nuclear tests in the Pacific, in 1954, compensation was asked and paid on the basis of harm done.<sup>109</sup> Doubtless it was in the minds of Japanese and United States negotiators that a lack of care in the conduct of the tests might have been alleged. Doubtless also Japan's desire for satisfaction stopped short of raising a legal obstacle to the continuance of testing. Even so, such a case fits well enough into the framework outlined in the present chapter. There were no factors which might have been held to reduce Japan's entitlement to full compensation for material damage sustained, even if the incident were placed outside the zone of wrongfulness in the scale of harm.

66. Very occasionally in treaty practice—as in the well-known article 22 of the 1958 Convention of the High Seas, dealing with the right of visit<sup>110</sup>—an activity is expressly conditioned by the liability to pay compensation for any loss or damage sustained by an innocent suspect; this is a liability without fault. In general, such a provision serves much the same purpose as the equally strict

<sup>109</sup> The "*Fukuryu Maru*" incident. See M.M. Whiteman, ed., *Digest of International Law*, vol. 8, (Washington, D.C., U.S. Government Printing Office, 1967), pp. 764–768.

<sup>110</sup>

"Article 22

"1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is a reasonable ground for suspecting:

"(a) That the ship is engaged in piracy; or

"(b) That the ship is engaged in the slave trade; or

"(c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

"2. In the cases provided for in subparagraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

"3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained." (United Nations, *Treaty Series*, vol. 450, pp. 92 and 94.)

I. Brownlie cites article 22 as an example of a rule which provides for compensation for the consequences of acts which are not unlawful in the sense of being prohibited, in *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), p. 443. See also article 110 of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr. 3 and 8).

obligations contained in the Convention on International Liability for Damage caused by Space Objects, 1971, and in the second and last award of the *Trail Smelter* tribunal (see paras. 37–39 above). If one begins from the position of principle that the State should not be the guarantor of good behaviour within its territory and jurisdiction, these liabilities<sup>111</sup> are burdens assumed voluntarily—or, in view, perhaps, of the “abnormal” dangers that the activities in question entail. If, however, one begins from the standpoint that the world cannot afford a gap between the authority and the responsibility that international law reposes in States, these liabilities are prudent measures to move the point of intersection between harm and wrong, so that the State accepting the commitment gains additional freedom to act lawfully, but does not charge the cost to other States.

67. It would be pointless to attempt to marshal the general evidence of State practice upon so large a question: it is more appropriate that the Commission should develop and clarify the issues, so that Governments will in due course have the opportunity to make deliberate choices. The Special Rapporteur does, however, see a reflection of the will of Governments in the

<sup>111</sup> In this paragraph no distinction has been made between cases of State activity and private activity. Despite the doctrinal importance of the question, it is rarely, if ever, that an actual dispute has turned upon the distinction.

Principles of the Stockholm Declaration<sup>112</sup> and in other legislative references to the need for the orderly development of international law in the areas with which the present topic must deal. The equipoise of the two halves of Stockholm Principle 21 evokes a balancing of interests that cannot be attained in terms of the simple dichotomy between right and wrong. The repeated references, in the text of the draft Convention on the law of the sea and in other international instruments, to the “further development of international law relating to responsibility and liability”<sup>113</sup> is a further indication that solutions are not expected within a two-dimensional frame.

<sup>112</sup>

“Principle 21

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

“Principle 22

“States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.” (See footnote 62 above.)

<sup>113</sup> A/CONF.62/L.78 and Corr.3 and 8, art.235; also arts. 139 and 263. See also, for example, art.17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974) (*International Legal Materials* (Washington, D.C.), vol. XIII, No. 3 (May 1974), p. 546).

## CHAPTER IV

### The nature and scope of the topic

#### A. The duty of care

68. This report proceeds on the view that the entrance to the present topic is guarded by two large questions, rather than one. The first—which has been given pride of place and was posed again in the last paragraphs of the preceding chapter—is whether or not activities capable of causing substantial transboundary harm are, in general, regulated by a balance of interest test, rather than by an overriding emphasis either upon the way they arose or upon their actual or potential harmful effects. The second question is more vexed, and may be intrinsically less important, but it has dominated doctrinal discussion: that is, should the responsibility or liability of the State, in relation to transboundary harm generated within its territory or jurisdiction, extend to accidental consequences which the State could not have foreseen? The two questions are better treated separately.

69. The first of these two questions has been sufficiently traversed, but needs to be related to the duty of care or due diligence. There is no lack of authority for the proposition that substantive obligations are supported by

a further obligation to ensure their effectiveness. The *Lake Lanoux* tribunal commented:

In fact, States are today perfectly aware of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements, on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements . . .<sup>114</sup>

The duties to provide information, to afford consultation, and to consider in good faith representations made by another interested party are too well-established to need elaboration.

70. It is, however, instructive to consider the patterns of obligation found in treaty regimes that deal with dangerous, though beneficial, activities; for here we are in the heartland of the present topic—the area in which activities that cause actual or potential harm are saved from

<sup>114</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), p. 308, para. 13.

wrongfulness and permitted to continue, on conditions that safeguard the interests of other States. One general conclusion is that conventions dealing with liability seldom stand in isolation: much more usually they are a link in a chain of obligations, which in turn form part of a larger international effort designed to prevent or minimize loss or damage arising from the particular activity.<sup>115</sup> Obligations of reparation, therefore, are not allowed to take the place of obligations of prevention.

<sup>115</sup> (a) The International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) (IMCO publication, Sales No. 77.16.E) and the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1 May 1977) (United Kingdom, *Final Act of the Intergovernmental Conference on the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations*, Cmd. 6791 (London, H.M. Stationery Office, 1977), p. 7), must be seen in the wider context of the generalized duty of regulation to prevent pollution of the seas in Article 24 of the 1958 Convention on the High Seas (United Nations, *Treaty Series*, vol. 450, p. 96)—of the International Convention for the Prevention of Pollution of the Sea by Oil, (London, 12 May 1954) (*ibid.*, vol. 327, p. 3), subsequently amended several times to provide for ever-higher standards (amendments of 1962, 1969 and 1971: see IMCO publication, Sales No. 78.01.E), and the general and detailed provisions designed to combat marine pollution contained in a large number of universal and regional conventions, and the recommendations of international bodies. See, for example, the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil (Bonn, 9 June 1969) (United Nations, *Treaty Series*, vol. 704, p. 4); the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969) IMCO publication, Sales No. 77.15.E; the Agreement between Denmark, Finland, Norway and Sweden concerning Co-operation in Measures to Deal with Pollution of the Sea by Oil (Copenhagen, 16 September 1971) (United Nations, *Treaty Series*, vol. 822, p. 324); the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo, 15 February 1972) (*International Legal Materials* (Washington, D.C.), vol. XI, No. 2 (March 1972), p. 262); the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 29 December 1972) (IMCO publication, Sales No. 76.14.E); the International Convention for the Prevention of Pollution from Ships (London, 2 November 1973) (IMCO publication, Sales No. 74.01.E); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974) (see footnote 113 above); the convention for the Prevention of Pollution from Land-based Sources (Paris, 4 June 1974) (*Official Journal of the European Communities* (Luxembourg), vol. 18, No. L 194 (25 July 1975), p. 6); and the draft recommendations of the UNEP Working Party on Experts on Environmental Law on safety measures to prevent pollution from off-shore mining and drilling carried out within the limits of national jurisdiction (UNEP/GC.9/5/Add.5, annex III). Part XII of the draft convention on the law of the sea is devoted to "Protection and preservation of the marine environment" and contains a very elaborate set of provisions on preventive measures and also on responsibility and liability (A/CONF.62/L.78 and Corr.3 and 8).

(b) Similarly, the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) (IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 22); the Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962) (*ibid.*, p. 34); the Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) (*ibid.*, p. 7); the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Brussels, 17 December 1971) (*ibid.*, p. 55), were concluded against the background of regulatory measures designed to ensure that, in taking advantage of nuclear energy for peaceful purposes, mankind's exposure to the accompanying dangers is kept to a minimum. See, for example, the International Atomic Energy Safety Standards to protect health, ensure nuclear safety and minimize danger to life and to the environment, in

71. It is also a constant feature of these clusters of conventions that governments retain ultimate supervisory functions, even when they pass on to private operators the duty to provide compensation and to guarantee its payment.<sup>116</sup> Moreover, it can be stated, almost as an invariable rule, that the conventional regimes do not distinguish the cases in which the conduct of activities is in private hands from those in which it is carried on by agencies of the State.<sup>117</sup> The strictness of the standard of care tends to increase with the degree of danger inherent in the enterprise; and this standard is, of course, related primarily to obligations of prevention.

IAEA, *Experience and Trends in Nuclear Law*, Legal Series No. 8 (Vienna, 1972), pp. 3 *et seq.*; the safeguards on all fissionable material required in connection with the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 (United Nations, *Treaty Series*, vol. 729, p. 169); the Convention on the Physical Protection of Nuclear Material of 3 March 1980 (NPT/CONF.II/6/Add.1); the International Convention for Safety of Life at Sea (London, 1 November 1974), especially chapter VIII on Nuclear Ships (IMCO publication, Sales No. 75.01.E); ILO Convention 115, concerning the Protection of Workers against Ionising Radiations (Geneva, 22 June 1960); and numerous other multilateral and bilateral agreements and other initiatives concerning nuclear safety.

(c) The Convention on International Liability for Damage caused by Space Objects, signed on 29 March 1972 (see footnote 22 above), is expressly based on the consideration that "notwithstanding the precautionary measures to be taken by States and international intergovernmental organizations involved in the launching of space objects, damage may on occasion be caused by such objects". The Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, of 27 January 1967, requires, in article III, that States Parties "carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law", and in article IV, that "The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes" (United Nations, *Treaty Series*, vol. 610, p. 208). These provisions and those of the Space Objects Convention have been filled out by the other substantive obligations of the Treaty and by other agreements on space activities, including the Convention on the Registration of Objects Launched into Outer Space (General Assembly resolution 3235 (XXIX) of 12 November 1974, annex) and the Agreement Governing Activities on the Moon and the other Celestial Bodies which, in article 7, requires States Parties to take measures to prevent the disruption of the existing balance of its environment, and also to take measures "to avoid harmfully affecting the environment of the earth through the introduction of extra-terrestrial matter or otherwise" (General Assembly resolution 34/68 of 5 December 1979, annex).

<sup>116</sup> See, for example, the provisions of the following conventions concerning civil liability for nuclear damage: the Paris Convention of 29 July 1960 (see footnote 115 (b) above), arts. 3, 7, 10, 12 and 13; the Brussels Convention of 25 May 1962 (*ibid.*), arts. III, XI, XV and XVI; the Vienna Convention of 21 May 1963 (*ibid.*), arts. IV, V, VII, XII and XV; the Convention supplementary to the Paris Convention of 29 July 1960 (Brussels, 31 January 1963) (IAEA, *International Conventions ... (op. cit.)*, p. 43, arts. 3, 5 and 13; and of the conventions on civil liability for oil pollution damage: the Brussels Convention of 29 November 1969 (see footnote 115(a) above), arts. VII and X; the London Convention of 1 May 1977, arts. 8 and 13. See also Dupuy, *op. cit.*, pp. 151-153.

<sup>117</sup> Under article II of the Convention on International Liability for Damage caused by Space Objects (see footnote 22 above), the "launching State" is absolutely liable. The term "launching State" means:

- "(i) A State which launches or procures the launching of a space object;
- "(ii) A State from whose territory or facility a space object is launched" (art. I, para. (c)).

(Continued on next page.)

72. In short, once an activity which generates or threatens transboundary harm has been made the subject of a regime to which other States affected have agreed, there is little left for rules developed pursuant to the present topic to regulate—except, perhaps, the question of liability for unforeseen accidents, discussed in the next section. However, until such a regime has been established, the same obligation which governs the duties to provide information and to consider representations remains in play. The duty of care, operating as a function of this obligation, requires the State within whose territory or jurisdiction the danger arises to work in good faith for a just solution, taking due account of all the interests involved.

### B. Unforeseen accidents

73. Can the duty of care, placed in the wide perspectives of the preceding paragraph, account also for a customary law obligation to make good losses sustained through unforeseen accidents? It is as well, first, to consider the other hypothesis. If one takes the view that a State's responsibility or liability for transboundary harm is limited to ensuring that legitimate activities are conducted as safely as possible, there is an acknowledged gap that has to be filled in an exceptional way (see paras. 48 and 51 above). As the proliferation of treaty regimes has shown, strict liability does have a part to play; but its admission

(Footnote 117 continued.)

The Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (see footnote 115(c) above) provides that:

#### "Article VI

"States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State party to the Treaty. . . ."

The Paris Convention of 29 July 1960 and the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage (see footnote 115(b) above) each define, in article 1, the term "operator" of a nuclear installation as the person designated by the Contracting Party as the operator of that installation; such an operator may either have a private character or be an agency of the State. The Brussels Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships (*ibid.*) applies to nuclear incidents involving a nuclear ship flying the flag of a Contracting State (art. XIII); the Contracting States are required to waive any immunity which they may otherwise have, but nothing in the Convention shall make warships or other State-owned or State-operated ships on non-commercial service liable to arrest, attachment or seizure, or confer jurisdiction in respect of warships on the courts of any foreign State (art. X, para. 3). There is a similar provision as to waiver of immunity in the Brussels Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage (see footnote 115(a)) the provisions of the Convention do not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service (art. XI). Similarly, the London Convention of 1 May 1977 on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (*ibid.*) requires State party operators of installations to waive all defences based on their status as a sovereign State (art. 13). The conventions and other instruments designed to prevent nuclear damage and damage from oil pollution have broadly corresponding fields of application.

on sufferance is sometimes justified only because the situation is one in which a failure of care is very difficult to prove.

74. It is submitted that this explanation does not fit the facts. In the case, for example, of damage caused by space objects, the least likely eventuality is a failure of care in launching or control; and, if it did occur, media interest might well ensure that the failure became known. The real reason for strict liability in this case is the opposite one: human skills and knowledge are not yet equal to the task of eliminating all dangers. The *Trail Smelter* award provides a counterpoint. The regime constructed by the tribunal is a fully adequate safeguard; but due diligence on the part of Canada cannot avoid the possibility of the human error of a smelter employee (see paras. 38 and 64 above). In each case, the real question is whether the innocent victim should be left to bear a loss which was known to be "on the cards".

75. The same parallels can be drawn in the cases in which circumstances preclude wrongfulness.<sup>118</sup> In some such cases, there is still an element of choice. If in emergency, an air force pilot crash-lands in a neighbouring country to minimize damage, distress may be pleaded to preclude wrongfulness, but there seems a tendency in State practice to believe that compensation should be paid. If the same air force pilot is misled by faulty navigational equipment to cross an international frontier in ignorance of his true position, there is no element of choice. Fortuitous event may be pleaded to preclude wrongfulness; but again there is perhaps a perceptible tendency in State practice to feel that costs incurred should be repaid. Here the analogy with damage caused by space objects is very close. If it is necessary to deploy military aircraft in poor weather and visibility near an international frontier, the possibility of a stray aircraft is at least as great as the possibility in other circumstances of a stray space object.

76. In terms of the analysis offered in the present report, the law of State responsibility relating to circumstances precluding wrongfulness does for the parties something which in other circumstances they must do for themselves: it pushes away the point of intersection of harm and wrong. The stray military aircraft is saved from engaging wrongfulness by operation of law; and presumably the stray space object would be similarly exonerated. Yet the States concerned in space exploration have thought it right not to rely upon a preclusion of wrongfulness, if an accident should occur. They have instead assumed that the activity should be appraised in terms of its predictable capacity to cause an occasional, unforeseeable accident. One that basis a duty of care is owed, either to provide an insurance scheme, or to act as the insurer.

77. This is not a field in which a consistent State practice can be expected to develop in advance of efforts to develop the law. A government which believes, *de lege ferenda*, that there should in all such cases be full reparation, may yet refuse to act upon such a belief in advance of others—especially if it feels itself to have been

<sup>118</sup> See para. 51 above and footnote 87.



the victim of similar situations in the past. And yet, the small indications that caused the Commission to include article 35 in the draft articles on State responsibility, part 1, are corroborated by vestiges of State practice in other cases of unforeseen accident. These stirrings, in the areas furthest removed from the plain case of State responsibility for wrongful acts, are evidence that, in the context of the present topic, "reasonable care" can have the enlarged meaning assigned to it in this chapter. The interests that this topic protects, and the rights that this topic upholds, are equitable interests, and therefore subject to all equities.

### C. Nature of the topic

78. At the end of this survey, one must again recall the present state of legal needs and of legal development. Apart from questions affecting the flow of water, there was until the twentieth century little need to strike a balance between a State's freedom within its own borders and its obligation of non-interference within the borders of other States. Similarly, it was not until the present century that pressures upon the oceans and upon other common resources created an imperative need to regulate, in the interests of each State, the resources common to all States. Although that need is most apparent in relation to the growth of science and technology, and its impact upon the physical environment, similar issues may arise in relation to every aspect of human affairs in the present age of interdependence.

79. It is often regretted by lawyers that the community of States still lacks the solidarity to respond to the logic of its crowded and disordered situation. To the extent that the charge is true, the problem is beyond the reach of lawyers, acting alone; for international lawyers are not moralists, and they know no higher law than the collective will of sovereign States. It is, however, the immediate responsibility of lawyers to ensure that their own science assists, and does not obfuscate, the cause of progress. When, for example, the lay representatives of governments feel unable to adopt guidelines that they have commissioned, and find acceptable on economic and social grounds, because they have been conditioned to regard international law as an irrational force which may entrap their governments, it is time for lawyers to set their own house in order.

80. At the root of the present topic there lurks some such danger—a pull between contemporary economic, social and scientific values, on the one hand, and traditional legal values, on the other. On the surface, there has never been such fast progress: treaty regimes multiply and conferences abound. Below the surface, there are uncomfortably wide margins of disagreement about the bases of negotiation. Do we take our stand upon the right of sovereign States not to be exposed to harmful intrusions? Or do we insist upon the right to do, within the territory or jurisdiction of a sovereign State, anything that is not actually forbidden, provided that we cause other States and their nationals no greater injury than was necessary? Or do we develop the means to adjust competing claims in areas that could once be adequately regulated by applying the simple rule of right and wrong?

81. The outline contained in the present report assumes that the balance of interest test has come to stay, and that ways must be found to make it work, within the traditional structure of mandatory rules. States and their nationals need elbow-room in which to exercise their freedom, but they must not by their actions diminish the elbow-room of other States. No one challenges the authority of the great, undifferentiated principle that it is wrongful to cause harm to other States. Nearly everyone agrees that it is not possible to give an absolute value to so broad a principle. It has to be broken down into networks of little rules to accommodate the requirements of specific activities, and to reconcile those activities with the interests of others. And, except to the extent that that final breakdown has been achieved, the building materials are rules, not of prohibition, but of conditional authorization.

82. The topic has, then, a predominantly procedural character. It is at the service of any principle or rule of law so broadly conceived that its application requires margins of appreciation entailing a balancing of interests. The topic is founded in the substantive obligation to develop the law by making existing law work. This is the same obligation that founds the duty to negotiate, which plays so large a part in modern jurisprudence. The development of the topic will not supplant any existing rule of law, or supply any new one; but it will provide a catalyst, so that rules may be crystallized and be made more effective.

83. For this dependence upon other rules, there are two clear reasons. First, by no means all relationships between States are governed by balance of interest tests. Even in the field of the environment, this is true: for example, State practice suggests that a mere balance of economic advantage, and a willingness to furnish compensating benefits, could not justify unilateral action that flooded, or drained water from, the territory of a neighbouring State. Similarly, rules that do embody a balance of interest test may not always give an equal weighting to the different interests involved.

84. Secondly, a mere conflict of interest cannot engage these rules. Where competition is legitimate—as, for example, in high seas fishing—it is not a ground of complaint that other countries' fishermen have harvested most of the crop. But when there is perceived to be a need to regulate competition, and a rule of some generality emerges, the matters dealt with in this topic should assist in articulating and applying that rule.

85. If all transboundary harm were wrongful, there would be no need for this topic. Every activity that caused or threatened such harm would be prohibited, except with the consent of the States whose interest was affected. Conversely, if it were possible to speak of "lawful activities"—in the sense of activities that are permitted, whatever their transboundary consequences—there would still be no need for this topic. The topic is the product of interdependence among States and peoples. They have to regulate their affairs with minimum resort to prohibition, but also without lawlessness. They need rules that persuade compliance because observance will correspond with interest.

86. From the separation of "harm" and "wrong", this topic derives its basic mechanism. Once it has been



decided that not all harm is wrongful, the single test of "right" and "wrong" can no longer do substantial justice—and, without the prospect of substantial justice, there is insufficient motivation to evolve rules or to observe them. From the proposition that not all harm is wrongful, follows the corollary that substantial harm is never legally negligible.

87. Within the parameters of harm and non-wrongfulness exists the world in which acts not prohibited by international law yet give rise to responsibility or liability. It is not a shadowy world, existing in dark corners, for which the regime of State responsibility does not provide. It is the substantial, everyday world, in which people go about their affairs with a general sense of what the law requires of them, but with no feeling that the law is a mysterious and arbitrary presence, waiting to enmesh them in its toils.

88. It is, above all, the world of international negotiation, in which an evaluation of every interest goes towards the formulation of a treaty rule. In this report, almost no account has been taken of the treaty regimes, the recommendations, understandings and guidelines, universal and regional, that regulate particular dangers—except in the one, limited context of obligations of prevention and reparation. The reason for this abstention is to avoid a risk of circularity: it is hard to establish, by reference to the pragmatic process of treaty-making, that it is also a response to broader rules that exist in customary law independently of treaties. In fact, a great deal of State practice that has been passed as "non-principled" is principled in relation to the double criteria of harm and wrong.

89. Within the primary obligation to make other obligations effective there is ample room for all the equitable interests and factors by which liabilities arising out of acts not prohibited by international law are affected. By agreeing within what limits, and under what conditions, an activity capable of causing transboundary harm may be conducted, States attach their own assessments of the relevant equities. In all but a few cases, States will prefer to settle their affairs by this method. Even when—exceptionally—they choose to stand upon a definition of their rights, a tribunal may find that the rights on which they rely entails policy choices, best pursued in negotiation.

90. The admission of equitable factors sharply distinguishes the obligations that arise under this topic from those engendered by State responsibility; but both kinds of obligation may be conditioned by a duty of care. In fact, obligations arising under the present topic, because of their equitable content, cannot fail to be so conditioned. It is therefore theoretically important to recall that wrongfulness arises through the branch of a duty of care, whereas in the present topic the duty of care is a function of the primary obligation. The duty of care, within the setting of the present topic, is very well illustrated by the

conventional obligation to compensate for damage caused by space objects and by the discernible international stirrings of opinion that damage likely to arise from a pattern of activity should be compensable, even if, in the particular case, State responsibility is precluded or is not established.

91. The present topic is also a direct response to the call, in Principle 22 of the Stockholm Declaration<sup>119</sup> and elsewhere, to develop the law of liability and compensation for the victims of transboundary harm. At the same time, it is important, as a matter of legal policy, that duties of reparation should not be separated from, or substituted for, duties of prevention. Treaty regimes provide ample evidence that compensation is a less adequate form of prevention—prevention after the event. It is a justified way of filling gaps when full prevention is not possible—either in absolute terms or in terms of the economic viability of a beneficial activity; but it should not be allowed to become a tariff for causing avoidable harm.

92. Finally, at the end of the journey, the monster of strict liability should be domesticated. In an conventional regime, strict liability is a commutation of an obligation of prevention, and usually—as with the Trail Smelter company—it represents a cost that the enterprise would gladly underwrite in perpetuity, rather than embark upon major schemes of prevention. In customary law, when wrongfulness is precluded or responsibility is not engaged, the acceptance in principle of a rule that does not penalize the innocent victim is a matter about which governments could form a view when this topic is a few years advanced. In any case, such a liability would be subject to equities; so the victim—as Mr. Schwobel remarked in the debate at the thirty-second session of the Commission<sup>120</sup>—must really be an innocent victim.

#### D. Scope of the topic

93. Accordingly, it is proposed that the Commission adopt provisionally the following draft article:

##### *Article 1. Scope of these articles*

**These articles apply when:**

**(a) activities undertaken within the territory or jurisdiction of a State give rise, beyond the territory of that State, to actual or potential loss or injury to another State or its nationals; and**

**(b) independently of these articles, the State within whose territory or jurisdiction the activities are undertaken has, in relation to those activities, obligations which correspond to legally protected interests of that other State.**

<sup>119</sup> See footnote 62 above.

<sup>120</sup> *Yearbook . . . 1980*, vol. I, p. 253, 1632nd meeting, para. 16.



# JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 7]

DOCUMENT A/CN.4/340 and Add.1\*

## Third report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

[Original: English/French]  
[27 March and 18 May 1981]

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### Introductory note

1. The present report is the third in a series of reports on the topic of jurisdictional immunities of States and their property, prepared by the Special Rapporteur and submitted for consideration by the International Law Commission. The series of reports was preceded by a study submitted to the Commission in July 1978, in the form of an exploratory report, by the Working Group on jurisdictional immunities of States and their property.<sup>1</sup> The Special Rapporteur submitted his first report, of preliminary nature, in June 1979<sup>2</sup> and his second report in June 1980.<sup>3</sup>

2. The preliminary report identified the types of source materials to be examined, outlined international efforts towards codification, projected a rough analytical skeleton of possible contents of the law of State immunity, and underlined the possibility and practicability of draft

articles on the topic. It was discussed by the Commission during its thirty-first session.<sup>4</sup> The Special Rapporteur was asked to clarify the general principles and the content of the basic rules governing the subject and to endeavour with utmost caution to define the limits of immunities and determine the exceptions to them. Emphasis was placed on the need for detailed analysis of the practice and legislation of all States, and particularly those with different social systems and the developing States.<sup>5</sup> The topic was further discussed in the Sixth Committee of the General Assembly, which recommended that the Commission:

continue its work on jurisdictional immunities of States and their property, taking into account information furnished by Governments and replies to the questionnaire addressed to them, as well as views expressed on the topic in debates in the General Assembly.<sup>6</sup>

<sup>4</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 186, paras. 177–183.

<sup>1</sup> A/CN.4/L.279/Rev.1, reproduced in part in *Yearbook* . . . 1978, vol. II (Part Two), pp. 153–155.

<sup>2</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323.

<sup>3</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

<sup>5</sup> See the statement at the Sixth Committee, in 1979, by the Chairman of the thirty-first session of the Commission, Mr. Šahović (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee, 38th meeting, para. 30*).

<sup>6</sup> Draft resolution A/C.6/34/L.21, adopted by consensus by the Sixth Committee and adopted without a vote on 17 December 1979 by the General Assembly as resolution 34/141.

3. Pursuant to the recommendation by the General Assembly, the Special Rapporteur continued his study and examination of the source materials on the topic, including information furnished by Governments and replies to the questionnaire circulated by the Secretariat on 2 October 1979.<sup>7</sup> The second report was prepared on the basis of available source materials, in the light of the debates which had taken place in the Sixth Committee and the views expressed by various representatives as well as the direction of emerging trends indicated by the Commission. In the second report, the Special Rapporteur proposed six draft articles, with an appropriate analysis of source materials leading to the formulation of the provision of each article. Articles 1 to 5 formed part I of the draft, entitled "Introduction", and article 6 was the first article of part II, entitled "General Principles".

4. The second report was discussed by the Commission in the course of its thirty-second session. At the close of a considerable debate, the Commission provisionally adopted articles 1 and 6, entitled, respectively, "Scope of the present articles" and "State immunity".<sup>8</sup> In that report four other draft articles were also tentatively proposed, namely, article 2 (Use of terms)<sup>9</sup> article 3 (Interpretative provisions),<sup>10</sup> article 4 (Jurisdictional immunities not

within the scope of the present articles),<sup>11</sup> and article 5 (Non-retroactivity of the present articles).<sup>12</sup> These four draft articles were submitted on a purely tentative basis as indications to the Commission of the current thinking as regards the framework of the topic, including possible definitional problems relating to it. The Commission was asked to suspend substantive consideration of these four articles until such time as it would approach the final stages of its work on the draft articles.

To facilitate consideration of draft articles to be proposed in the present report, it would seem useful to reproduce below for ready reference the texts of draft articles 1 and 6, which have been provisionally adopted,

<sup>7</sup> Two circular notes were sent out to Governments of Member States, the first note of 18 January 1979 requesting information on legislation and practice on the subject, and the second, of 2 October 1979, seeking replies to a questionnaire on various aspects of the topic.

<sup>8</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 138 *et seq.*, chap. VI, paras. 11–113 and sect. B.

<sup>9</sup> "Article 2. Use of terms

"1. For the purposes of the present articles:

"(a) 'immunity' means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

"(b) 'jurisdictional immunities' means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

"(c) 'territorial State' means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

"(d) 'foreign State' means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

"(e) 'State property' means property, rights and interests which are owned by a State according to its internal law;

"(f) 'trading or commercial activity' means:

"(i) a regular course of commercial conduct, or

"(ii) a particular commercial transaction or act;

"(g) 'jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

"2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization."

<sup>10</sup> "Article 3. Interpretative provisions

"1. In the context of the present articles, unless otherwise provided,

"(a) The expression 'foreign State', as defined in article 2, paragraph 1(d) above, includes:

"(i) the sovereign or head of State,

"(ii) the central government and its various organs or departments,

"(iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and

"(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government;

"(b) The expression 'jurisdiction', as defined in article 2, paragraph 1(g) above, includes:

"(i) the power to adjudicate,

"(ii) the power to determine questions of law and of fact,

"(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and

"(iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

"2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1(f) above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose."

<sup>11</sup> "Article 4. Jurisdictional immunities  
not within the scope  
of the present articles

"The fact that the present articles do not apply to jurisdictional immunities accorded or extended to

"(i) diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations,

"(ii) consular missions under the 1963 Vienna Convention on Consular Relations,

"(iii) special missions under the 1969 Convention on Special Missions,

"(iv) the representation of States under the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,

"(v) permanent missions or delegations of States to international organizations in general,

shall not affect:

"(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

"(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

"(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles."

<sup>12</sup> "Article 5. Non-retroactivity of  
the present articles

"Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby."

and to set out in footnotes the texts of the remaining four draft articles in part I, which will be considered at a later stage of the Commission's work.

#### Draft articles on jurisdictional immunities of States and their property

##### PART I INTRODUCTION

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

The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State.

...

##### PART II GENERAL PRINCIPLES

###### *Article 6. State immunity*

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

2. Effect shall be given to State immunity in accordance with the provisions of the present articles.

5. The topic was further discussed by representatives in the Sixth Committee during the thirty-fifth session of the General Assembly, with mixed reactions to some of the draft articles, including those on which the Commission had been asked to defer consideration. The debates that took place in the Sixth Committee generated further thoughts, reflecting a rich variety of views and theories, which are broadly divergent and inviting unending comments and observations in diverse directions.<sup>13</sup> The Special Rapporteur was asked to clarify and identify further general principles or rules of State immunity, bearing in mind the special nature of the topic as noted by

<sup>13</sup> See "Topical summary, prepared by the Secretariat, of the discussion of the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 311–326.

the Commission, which, more than other topics hitherto studied by it, touches on the realm of internal law as well as that of private international law, and heeding the note of caution sounded to the effect that the primary task of the Special Rapporteur was the search for rules of public international law on State immunities. As evidence of such rules, the judicial and other practice of States continue to be examined as further source materials, information and replies to the questionnaire continue to be supplied by Governments. The Sixth Committee proposed a draft resolution which was adopted by the General Assembly as resolution 35/163 on 15 December 1980, and read in part as follows:

*The General Assembly,*

*Having considered the report of the International Law Commission on the work of its thirty-second session,*

...

*Noting further with appreciation the progress made by the International Law Commission in the preparation of draft articles ... on jurisdictional immunities of States and their property ...*

...

4. *Recommends* that, taking into account the written comments of Governments and views expressed in debates in the General Assembly, the International Law Commission should, at its thirty-third session:

...

(e) *Proceed with the preparation of draft articles ... on jurisdictional immunities of States and their property, taking into account the replies to the questionnaires addressed to Governments as well as information furnished by them;*

...

6. Encouraged by the urgent need to clarify the general rules of State immunity and inspired by the instructive resolution of the General Assembly, the Special Rapporteur has continued, along the lines indicated in his second report,<sup>14</sup> the study and preparation of further draft articles in part II (General principles) with subsequent adjustments and readjustments as guided by the deliberations of the Commission, the Sixth Committee and comments of Governments.

<sup>14</sup> *Yearbook ... 1980*, vol. II (Part One), p. 214, document A/CN.4/331 and Add.1, paras. 60–64.

## Draft articles on jurisdictional immunities of States and their property (*continued*)

### PART II. GENERAL PRINCIPLES

#### *Article 6. State immunity*

[Provisionally adopted by the Commission at its thirty-second session]<sup>15</sup>

#### ARTICLE 7 (Rules of competence and jurisdictional immunity)

##### A. Relationship between competence and immunity

7. In draft article 6, the rule of State immunity has been formulated from the standpoint of the State receiving or

benefiting from State immunity. A State is said to be "immune from the jurisdiction of another State". This formulation restates jurisdictional immunity as a general rule or general principle, rather than an exception to a more basic norm or fundamental principle of territorial sovereignty or territoriality. It is to be recalled that the discussions within the Commission and the Sixth Committee have revealed the existence of several theories and differing views regarding the concept of State immunity.<sup>16</sup>

<sup>15</sup> For the text and commentary thereto, see *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.* See also para. 4 above.

<sup>16</sup> See footnote 13 above. See also an article by S. M. Schwebel on the work of the thirty-second session of the Commission in *American Journal of International Law* (Washington, D.C.), vol. 74, No. 4 (October 1980), pp. 961 and 967.

Adherence to a more fundamental and original concept of sovereignty is not uncommon among developing States and socialist States hinging on a more absolute notion of sovereignty, and hence of State immunity. Sharing a notion of absolute sovereignty, one view regards State immunity as an inevitable exception to the territorial sovereignty of a State exercising its normal competence, while another view considers jurisdictional immunity to be a direct application of the very principle of absolute sovereignty of the State claiming to be immune. *Par in parem imperium non habet*. The two views are not necessarily irreconcilable. The Commission, in fact, adopted an objective concept or a more orthodox formulation of draft article 6 restating a general rule of State immunity,<sup>17</sup> as confirmed in the practice of States, following in a sense an inductive method of approach to the question of jurisdictional immunity.<sup>18</sup>

8. It would seem pointless for all practical purposes to have to make reference to a more basic principle of sovereignty each time a new study is made of any topic of international law. The same could likewise be said of perfunctory reference to a more fundamental norm such as *pacta sunt servanda*, or indeed "the principle of consent of States", to which practically all subsidiary rules of international law may be traceable. Such retrospective investigation appears to be neither salutary nor helpful. It might on analysis even prove to be less than accurate, if not altogether misleading. The question is where to begin and where to stop in the process of retrogression.<sup>19</sup>

9. In draft article 7, an attempt is made to turn the statement of the rule of State immunity the other way round, or to reformulate the same rule from the opposite standpoint, namely, from the point of view of the State giving or granting jurisdictional immunity. To switch the proposition around, a new point of departure is warranted. Emphasis is placed not so much on the sovereignty of the State claiming immunity, but more precisely on the independence and sovereignty of the State that is required by international law to recognize and accord jurisdictional immunity to another State. Since immunity under draft article 6 is expressly *from* the "jurisdiction of another

State", there is a clear and unmistakable presupposition of the existence of "jurisdiction" of that other State over the matter under consideration, as otherwise, it would be totally unnecessary to invoke the rule of State immunity. There is, as such, an indispensable and inseparable link between State immunity and the existence of jurisdiction of another State, as defined by its rules of competence.

10. The same initial proposition could well be formulated in reverse, taking the jurisdiction or competence of a State as a starting-point and, after having established the firmness of existing competence or soundness of jurisdiction, the new formulation could stipulate an obligation to refrain from exercising such competence or jurisdiction in so far as it involves, concerns or otherwise affects another State unwilling to submit to its jurisdiction. This restraint on the competence is prescribed as a proposition of international law and should be exercised in accordance with detailed rules to be examined and clarified in subsequent draft articles.<sup>20</sup> From the point of view of the absolute sovereignty of the State exercising its competence in accordance with its own internal law, any restraint or suspension of that exercise based on a requirement of international law could be viewed as a limitation of its absolute competence, which, in most cases, places restriction on its territorial supremacy or otherwise constitutes an exception to its general rules of State competence. The first prerequisite to any question involving jurisdictional immunity is therefore the existence of a valid competence primarily under its own internal law rules of competence and, in the ultimate analysis, the assumption and exercise of such competence not conflicting with any basic norms of public international law. It is then and only then that the applicability of State immunity may come into play.<sup>21</sup> There appears to be a close relationship between the existence of State competence on the matter under consideration and the consequential possibility of a claim of jurisdictional immunity. Without competence, there is no necessity to proceed to initiate, let alone substantiate, the claim of State immunity.<sup>22</sup>

#### 1. THE RELEVANCE OF THE RULES OF COMPETENCE UNDER INTERNAL LAW

11. The first and primary question to be examined and clarified is evidently the competence of the State authority

<sup>17</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 142 *et seq.*, paras. (1), (2), (55)–(60) of the commentary to article 6, and particularly para. (17). See also the statement of Mr. Pinto, Chairman of the thirty-second session of the Commission, introducing the Commission's report at the Sixth Committee (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, twenty-fifth meeting, paras. 60–65).

<sup>18</sup> See the statement by Mr. Tsuruoka, representative of Japan in the Sixth Committee, on 13 November 1980:

"The Commission should attempt to formulate the principles through an inductive approach, after analysing trends which would be found in the practice of States, in national legislation [as exemplified by the recent laws of the United Kingdom and the United States], and in such international conventions as the European Convention on State Immunity." (*Ibid.*, 48th meeting, para. 40).

<sup>19</sup> As the topic is entitled "Jurisdictional immunities of States and their property", the Special Rapporteur has suggested that the rule of State immunity affords a convenient starting-point without tracing back too far into history to search for the more fundamental principles of international law from which the concept of State immunity may be said to have evolved.

<sup>20</sup> This obligation to refrain from exercising jurisdiction against a foreign State is regarded as a general rule, but not as unqualified. Its application should be in accordance with "the provisions of the present articles".

<sup>21</sup> It is suggested that in normal circumstances the court should be satisfied that it is competent before proceeding to examine the plea of jurisdictional immunity. In actual practice, there is no established order of priority for the court in its examination of jurisdictional questions raised by parties. There is often no rule requiring the court to exhaust its consideration of other pleas or objections to jurisdiction before deciding the question of jurisdictional immunity. See below, para. 21: The "act of State" doctrine.

<sup>22</sup> Questions of competence are governed by internal law, although in practice the court is generally competent to determine the extent and limits of its own jurisdiction. It is easy to overlook questions of competence and to decide the question of immunity without ascertaining the existence of a sound foundation for jurisdiction if uncontested on other grounds.

called upon to pronounce judgement in a given case or to take measures affecting the sovereignty or sovereign authority of another State by thus exercising competence against its sovereign will. Under the internal law of each country—be it constitutional law or basic law or law on the organization of the courts of justice, such as a Judicature Act or a Code of Civil Procedure—the competence or jurisdiction of a court of law or a tribunal is established or defined; each court, being master of its own procedure, is also judge of the extent or limits of its own jurisdiction, which is ordinarily regulated by its own rules of competence.<sup>23</sup>

12. Jurisdiction or competence of a State authority in judicial or administrative matters is generally limited by the territorial confines of that State.<sup>24</sup> State competence is generally territorial, in the sense that every object, or person or property physically present within or connected with the territory of a State is subject to its territorial jurisdiction. Competence of a State within its territorial confines may be regarded as largely absolute and practically supreme, recognizing no superior power other than the rules of public international law.<sup>25</sup> But State competence is not always exclusively founded on physical presence within the territory or association with the territory. Jurisdiction is not exclusively territorial.<sup>26</sup> There are other foundations of jurisdiction or State authority, based on other links or connections, such as public policies,<sup>27</sup> fiscal considerations,<sup>28</sup> the artificial concept of nationality of persons,<sup>29</sup> natural and juridical, of

vessels,<sup>30</sup> aircraft,<sup>31</sup> and space craft<sup>32</sup> and even of multinational corporations.<sup>33</sup> The concept of a State authority being a *forum prorogatum* is also not unreal<sup>34</sup> in the field of contract or international agreement, where the choice of law and of jurisdiction could be predetermined by the parties<sup>35</sup> or left for subsequent selection by mutual agreement,<sup>36</sup> not necessarily tied to any conceptual notion of territory or propriety of the *forum* or the law chosen by litigants, freely but not always deliberately.

13. Inasmuch as jurisdiction of a national authority or competence of a State organ may not be exclusively territorial, that is to say, not founded exclusively upon territorial sovereignty, but may extend beyond the territorial limits, being extraterritorial<sup>37</sup> or otherwise based on the subject-matter of vital interests to the State concerned,<sup>38</sup> or on the express volition of the parties involved,<sup>39</sup> with or without calculated deliberations, State immunity is not necessarily an exception to the principle

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jurisdiction other than territorial. The term "national" generally includes individuals as well as corporate bodies or juristic personalities such as corporations and limited companies.

<sup>30</sup> A State has jurisdiction over vessels flying its flags, wherever they may find themselves. See, for instance, arts. 92 and 94 of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8).

<sup>31</sup> A State has jurisdiction over the aircraft registered under its own legal system, regardless of their location, whether on the ground or in flight.

<sup>32</sup> A State has sovereign authority over its own spacecraft even when in flight in the outer space or in orbit. Its jurisdiction is extraterritorial when the spacecraft physically leaves the atmosphere within its national jurisdiction.

<sup>33</sup> The question of nationality of claim is relevant to the possible exercise of certain rights or power in regard to transnational or multinational corporations. In fact, several States could share the duty of protection.

<sup>34</sup> Without any territorial or other dimensional links, the court of a State may have jurisdiction to entertain a case involving aliens as a preferred court, or a *forum contractus* or a *forum prorogatum*.

<sup>35</sup> Most legal systems allow the parties to grant jurisdiction to any court by agreement, either before or after the dispute has arisen.

<sup>36</sup> Such agreement could be implied in some jurisdictions when the defendant submits to proceedings in a court which would otherwise have no jurisdiction to deal with them. See, for instance, *The "Gemma"* (1899) (United Kingdom, *The Law Reports, Probate Division* (1899), p. 285) and *The "Duplex"* (*ibid.* (1912), p. 8).

<sup>37</sup> As the fiction of territory applies to vessels, the jurisdiction of the flag State is not entirely extraterritorial, since a floating territory is clearly under a State's territorial jurisdiction even though on the high seas or within the territorial sea of another State. The fiction of territoriality does not apply to other types of craft such as hovercraft, aircraft and spacecraft. It is not inaccurate to describe jurisdiction over such craft as extraterritorial when outside the limits of the national jurisdiction of its registry.

<sup>38</sup> Nationality has been alluded to as a possible point of contact in the foundation of State jurisdiction. The notion of *forum connexitatis* or substantial connection of actions is a further illustration of jurisdiction without territorial connection, such for instance as the case of joint debtors under a contract or joint-tortfeasors where only one is present within the territory. Jurisdiction over an air carrier in a case of international transport of goods or persons by air furnishes another example of jurisdiction based on grounds other than territorial.

<sup>39</sup> Freedom of contract to a large extent allows the parties to choose the applicable law as being the proper law of the contract as well as the court of law to which the dispute is to be submitted, provided always that the rules of competence of the chosen forum permit such a choice (*prorogatio fori*). Most legal systems recognize an agreement of the

(Continued on next page.)

<sup>23</sup> This practice is logical and inevitable, but it does not mean that the court is thereby empowered to enlarge or expand its own jurisdiction beyond the limits set by its rules of competence.

<sup>24</sup> "Jurisdiction" and "competence" are aptly distinguished in some juridical systems. Italian authors use the term "*giurisdizione*" in the international sense, as between different States, while "*competenza*" refers to the intraterritorial competence, in the geographical sense as well as in the matters or amount of money or seriousness of issues involved. In France, it is not unusual to oppose the *compétence générale*, the jurisdiction of a country as a whole, to the intraterritorial *compétence spéciale*. The principle of territoriality or territorial sovereignty recognizes the validity of national jurisdiction or *compétence générale* over the entire length and breadth of the territory of a State.

<sup>25</sup> For instance, in the case of the *S.S. "Lotus"* (*P.C.I.J., Series A, No. 10*, Judgment No. 9, 1927, pp. 68–69), Bassett Moore said:

"It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied (*Schooner "Exchange"* v. *McFaddon* (1812), 7 Cranch 116, 136)."

See G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1941), vol. II, chap. VI: "National jurisdiction—supremacy of territorial sovereign", pp. 1–2.

<sup>26</sup> One of the bases for jurisdiction is the supreme authority of the territorial sovereign. The clearest dimension of State jurisdiction is territorial.

<sup>27</sup> "Public policies", "public interests", "*ordre public*" and similar expressions have been used to describe another dimension of State jurisdiction which could be extraterritorial or non-territorial.

<sup>28</sup> Fiscal considerations, tax policies, development or investment incentives could provide further grounds for a State to exercise jurisdiction to preserve and protect its national existence.

<sup>29</sup> A State has the right as well as the duty to protect the interests of its nationals wherever they may be. Nationality is a distinct basis for



of territorial sovereignty. Admittedly, in most cases, jurisdictional immunity is the consequence of a direct confrontation between the two aspects of sovereignty, territorial and national; but when the competence to be exercised is not based on territory but is extraterritorial, or founded on the will of the contractors or the parties concerned, then it is with greater accuracy to express State immunity in terms of a rule of international law rather than an exception to the principle of territorial sovereignty. It becomes more clearly visible as a manifestation of the sovereignty of the foreign State and a direct application of that principle of absolute and indivisible sovereignty or equality of States.<sup>40</sup>

14. As States are free and sovereign not only within their own territorial limits but also in regard to the creation of their own constitutive elements, including the definition and delimitation of the powers to be ascribed or attributed to their organs, instrumentalities or agencies in the field of adjudication or administration of justice,<sup>41</sup> it occurs not infrequently that conflicts can and do arise, not only in the sphere of substantive laws on any topic, but also in the physical and material scope of their jurisdictions and competence.<sup>42</sup> Under its rules of competence, a State is competent to determine and define the extent and geographical limits of its own jurisdiction in matters of adjudication and legal proceedings. Its definition and determination within the territorial confines is absolute and unchallenged by another State except as otherwise dictated by principles of international law.<sup>43</sup> A State also

has exclusive competence over marine and submarine areas within national jurisdiction, although not an absolute authority as over other areas under territorial sovereignty.<sup>44</sup> Areas beyond national jurisdiction can be under shared jurisdiction or the competence of an international authority by international law or international agreement.<sup>45</sup> In addition to the territory or the areas within its territorial jurisdiction, a State has sovereign power and authority over its own nationals, natural and juridical, and exercises sovereignty over vessels flying its flag as well as aircraft and spacecraft of its nationality, wherever they may be—on the high seas, in the territory of another State, in the lower or upper atmosphere, in space and outer space or in orbit, or on the surface of any celestial bodies.<sup>46</sup> The advance of science and technology is making room for further progress in the regulation of concurrence and conflicts of jurisdiction in all these areas over countless matters of common interest to States.<sup>47</sup> For this purpose, States individually and together have endeavoured to harmonize or regularize, if not to adjust, this concurrence of jurisdiction and potential areas of conflicts of competence, through their own rules of competence and with the assistance of unification efforts such as the Hague Conference on questions of private international law.<sup>48</sup> Over and above regulations by State internal law and uniform rules of private international law, international legal order must be sustained and maintained on the sound legal basis of applicable rules of public international law.<sup>49</sup>

15. Without attempting to enquire in depth into the intricacies of international law over and above the

(Footnote 39 continued.)

parties as to the competence of the court (cf. R. Graupner, "Contractual stipulations conferring exclusive jurisdiction upon foreign courts in the law of England and Scotland", *The Law Quarterly Review* (London), vol. 59, No. 235 (July 1943), p. 227. This is particularly true if the cause of action arises from a contract. For practically all non-contractual cases, voluntary submission to the jurisdiction by the defendant precludes him from raising subsequent objection to it.

<sup>40</sup> As has been seen, in private international law, jurisdictional immunities of foreign States have been viewed as exceptions to the rules of competence. (See for instance M. Wolff, *Private International Law*, 2nd ed. (Oxford, Clarendon Press, 1950), pp. 52–63, chap. IV: "Delimitation of the jurisdiction", and in particular, pp. 60–63, "Principles governing the competence of the courts". In public international law, they are but applications of general rules of State immunity.

<sup>41</sup> The composition or organization of the judiciary within a legal system is a matter within the national authority or exclusive sovereignty of the State. Each State has its own laws or statutes to regulate the administration of justice within its boundary, and even beyond in certain classes of cases.

<sup>42</sup> Owing to the fact that each State has its own rules of competence which are designed to respond adequately to its political, economic and social needs, disputes of a transnational nature with several foreign components or elements have arisen. The danger of lack of a competent authority to adjudicate has been negated by an increase in the competence with widening scope of national jurisdiction, with the result that such transnational disputes or cases with foreign elements come under or fall within the concurrent competence of more than one legal system. The problem is one of concurrence or conflict of jurisdiction which has to be solved primarily within a legal system in accordance with its own conflict rules.

<sup>43</sup> The question of nationality, for instance, is determined in the first instance by the State whose nationality is in question. A State has the power to legislate and decide on its own nationality in so far as it does not infringe upon an accepted norm of international law.

<sup>44</sup> National jurisdiction could extend beyond the territorial boundaries of a State, although not necessarily exclusive sovereignty.

<sup>45</sup> As far as the notion of sovereignty could extend from the landed territory into submarine areas and the ocean floors, there appears to be a diminishing scope of sovereign authority, from absolute sovereignty to exclusive sovereignty, exclusive fisheries rights, and jurisdiction other than territorial sovereignty. Beyond the limits of national jurisdiction, the concept of common heritage of mankind applies. The exploration and exploitation of resources beyond national jurisdiction is subject to international regulation, without which a lawless state of chaos would almost certainly prevail.

<sup>46</sup> See, for instance, arts. 92 and 94 of the draft convention on the law of the sea (see footnote 30 above); art. 17 of the Chicago Convention on International Civil Aviation of 7 December 1944 (United Nations, *Treaty Series*, vol. 15, p. 308); art. 3 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention of 14 September 1963 (*ibid.*, vol. 704, pp. 222–223).

<sup>47</sup> There are still countless areas of conflicts of jurisdiction as yet unregulated by general conventions of universal character.

<sup>48</sup> See, for instance, *Actes et documents de la Conférence de La Haye de droit international privé* (The Hague, Printing Office, series published since 1893); Max-Planck Institut (Hamburg), *Sources of International Uniform Law* (Alphen aan den Rijn, Sijthoff & Noordhoff), vols. I–IV (published since 1971); UNIDROIT, *Uniform Law Cases* (Milan—to 1971), then *Uniform Law Review* (Rome—biannual).

<sup>49</sup> See, for instance, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (General Assembly resolution 2222 (XXI) of 19 December 1966, annex) and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68 of 5 December 1979, annex).

differing sets of rules of competence within each State, or indeed, examining in any detail the rules of private international law regulating such conflict or concurrence of jurisdiction, suffice it for present purposes to rest the proposition squarely on this solid but hazy ground, and clearly to confirm the statement of the rule that the question of jurisdictional immunity of a State presupposes the establishment of a firm legal foundation of competence or jurisdiction of the authority of another State to entertain the legal proceedings in question or to consider the dispute under litigation. Reference is to be made to the rules of competence of the State authority in order to determine the legal basis of its jurisdiction. This is a condition precedent to the determination of the question of State immunity in any given situation. The rules of competence under internal law are therefore directly relevant to the applicability of the rule of State immunity in international law and practice.<sup>50</sup>

## 2. RELATIVITY OF COMPETENCE AND IMMUNITY

### (a) "Competence" before "immunity"

16. The foregoing analysis of legal thinking suggests a certain relativity between the established competence of State authority and an obligation on the part of the State to withhold or suspend the exercise of competence by its authority; in other words, the duty to grant jurisdictional immunity to another State. Competence and immunity are two closely related notions. Competence is relative to immunity. Absence of competence produces the same effect as an application of the rule of State immunity. But the two cases are distinguishable. As has been observed,<sup>51</sup> competence is a *sine qua non* of jurisdictional immunity. Lack of competence, non-competence or absence of competence eliminates the need to claim or establish a claim of jurisdictional immunity. While it is desirable for the purpose of the current study to distinguish absence of competence or lack of jurisdiction on the part of the authoritative State from recognition by that State of the existence of immunity of another State, the distinction is often hard to draw and is sometimes blurred. There may even be a small gap in between.

<sup>50</sup> The question of choice of law and choice of jurisdiction is also relevant as part of the conflict rules within the scope of the rules of competence or principles of judicial jurisdiction. See, for instance, R. H. Graveson, *Comparative Conflict of Laws* (Amsterdam, North-Holland Publishing Company, 1977), vol. I; W. Reese, "General course on private international law", *Recueil des cours de l'Académie de droit international de La Haye, 1976-II* (Leyden, Sijthoff, 1977), p. 9; J. P. Niboyet, *Traité de droit international privé français*, vol. IV: "La territorialité", and vol. V: "La territorialité" (*fin*) and "L'extra-territorialité" (Paris, Sirey, 1947 and 1948). It should be observed that, in actual practice, a court does not always direct its attention to the question of its competence or jurisdiction when a claim of jurisdictional immunity has been raised without advancing other grounds for objecting to the jurisdiction. Unquestionably, an act of State of a foreign Government could be more than procedural.

<sup>51</sup> See above, paras. 11-15: "The relevance of the rules of competence under internal law".

### (b) "Competence" or "jurisdiction"

17. When a municipal court declares itself incompetent in a legal proceeding, it can do so on the ground that the court lacks the necessary power or competence to try the case. In several jurisdictions, it is possible for a different court in the same system to have the power or competence to examine the question under consideration, but it could also well be that the judicial authority of that country has no authority or that the matter lies beyond or outside the scope altogether of the jurisdiction of the territory in which the cause of action is brought or the legal proceeding instituted. Thus, the expression "jurisdiction", when used in the sense of the power or authority to administer justice or to lay down the law "*juris-dictio*", is closely identified with the term "competence", although it should be observed that in some legal systems both expressions are commonly used but not always with the same implication, as they may serve to identify two slightly and technically different scopes or layers of judicial authority or spheres of power to administer justice. The term "jurisdiction" is ordinarily wider than "competence", but for the purpose of this study, the two are used interchangeably. When the authority is incompetent or lacks the necessary competence, it follows in all cases that it has no jurisdiction or is without jurisdiction. When, conversely, in a given case the authority in question does not have jurisdiction to entertain the motion submitted, it clearly has no competence. It is in this larger sense and not in any finer sense of attribution or distribution of judicial power within a particular legal system that the two expressions "jurisdiction" and "competence" are used here, without drawing a line of technical or legal distinction between them. It is well understood that the term "conflict or concurrence of jurisdiction" is more widely used with reference to conflict in an international domain, while the expression "conflict or concurrence of competence" is more often used to denote intranational or interdepartmental division or allocation of authority. The use in such circumstances is by no means uniform in all jurisdictions. In fact, no fundamental difference could be attributed to the two terms which have been in use in the practice of States. "Jurisdiction" is common in common law systems, where "competence" is rare but not unknown, while in civil law systems, both expressions are in current use, sometimes having essentially the same notion of authority, whereas at other times a thin distinction is drawn, but with little or no significance for present purposes in an international context.

### (c) "Immunity" and "no-power"

18. The analysis of jural relationship has presented a difficult but not insoluble problem. An analyst once described "right" as being correlative with the corresponding "duty", whatever the content of the right or the duty.<sup>52</sup> In the same pattern of correlativity, "power"

<sup>52</sup> See J. Stone, *The Province and Function of Law* (Cambridge, Mass., Harvard University Press, 1950), chap. V: "Hohfeld's fundamental legal conceptions", where jural correlatives and jural opposites

(Continued on next page.)

has been correlated to "liability"; and the opposite of "liability", which is "immunity", is correlative to "no-power" or "disability". Thus, in a theory of jural relationship, if "a State has immunity from the jurisdiction from another State", the same expression could be stated correlatively from the standpoint of the other State as: "Another State has 'no-power' to exercise its jurisdiction over a State". This is an accurate reconstruction of the sentence in so far as it does not indicate lack of jurisdiction itself but rather "disability" or "no-power" to exercise the jurisdiction it ordinarily has over that other State.

### 3. LACK OF COMPETENCE ON GROUNDS OTHER THAN JURISDICTIONAL IMMUNITY

19. As has been predicated (para. 17 above), the existence of competence or jurisdiction precedes the question of jurisdictional immunity. Immunity follows the existence of jurisdiction or competence, but with "no-power" to exercise that competence or jurisdiction. Lack of competence is relative to immunity in that both produce the same result of no decision in substance, but the former, while comprehending the latter, is not necessarily identified with it. The gap between lack of competence of the local authority and immunity of a foreign State from local jurisdiction is represented by a host of varying grounds on which a State authority may find itself incompetent or without jurisdiction to deal with the matter submitted to it for consideration and judgement. It is beyond the scope of the present study to enquire into the various grounds under every internal legal system for the judicial authority to decline jurisdiction or to consider itself without competence or jurisdiction to decide the question before it. The practice of States varies from jurisdiction to jurisdiction regarding the grounds to justify non-exercise of power to decide the case, or to determine that the authority in question has no competence or is without jurisdiction. Suffice it to give a few illustrations for some of the less well-known grounds relating to absence of competence or unwillingness of the authority to exercise the judicial discretion, which are notionally close to jurisdictional immunity and yet conceptually dissociated from immunity.

#### (a) Lack of legal personality or capacity to litigate

20. A case of non-exercise of jurisdiction sometimes confused with immunity, although far removed from it, is the anomalous situation in a legal system where the Government *eo nomine* cannot be sued *qua* Government, not because it is entitled to any measure of jurisdictional immunity but simply because the court does not recognize the capacity of bringing the defendant to trial before it, lacking as it does the juridical personality of capacity to litigate under the internal law of the State in which the

proceeding is instituted.<sup>53</sup> Recognition of juridical personality or capacity to sue and be sued before national authority is a matter strictly and exclusively within the province and function of the authority concerned. In the case of a law court or judicial authority, it is a question of application of the internal law on which the trial court is competent. In a number of instances, the judiciary of a State still jealously guards its autonomy and independence. This is sometimes demonstrated by the unwillingness or refusal of the court to follow the lead of the executive in matters involving the recognition of a legal status of a foreign entity claiming immunity, regardless of the fact that the executive power or the Government of the State has or has not extended *de facto* or *de jure* recognition of the foreign State or foreign Government concerned.<sup>54</sup>

#### (b) The "act of State" doctrine

21. In the practice of some States, notably the United States of America, another ground has developed on the basis of which courts decline jurisdiction or declare themselves powerless to decide the case before them. The courts tend to be shy when called upon to adjudicate or decide upon questions involving the legal validity or lawfulness or legality of an act of a foreign State in a domain which is clearly within its sovereign authority, whether or not it is within the limit or extent permissible by international law. American courts have in some instances refused to decide or determine the claim by one party because the decision or determination of that claim inevitably includes a judgement on the lawfulness or propriety of a sovereign act of another State.<sup>55</sup> This so-called "act of State" doctrine in United States practice should not be confused or identified with the "act of State" under the English constitutional law, under which an act of the sovereign Power or its agent, if acting *intra vires*,

<sup>53</sup> See, for instance, *Phya Preeda Narubate v. H.M. Government* (1947); the Dika (Supreme) Court of Thailand rejected a claim against the Government not for any immunity but for lack of legal personality and capacity to sue and be sued under internal law. Compare the disability or lack of capacity of an enemy alien to institute legal proceedings in some legal systems. An action can, however, be brought against such person who could thereupon counter-claim to the extent of a set-off. (Thailand, *Supreme Court Decisions*, No. 724/2490 (1947).

<sup>54</sup> See, for instance, the judgement of the Court of Appeal of Amsterdam of 30 April 1942 in the case *Weber v. Union of Soviet Socialist Republics* (*Annual Digest and Reports of Public International Law Cases, 1919-1942* (London), vol. 11, case No. 74, p. 140), holding that non-recognition of the USSR on the part of the Netherlands Government does not affect the position of the USSR as a recognized State under the immunity rule.

<sup>55</sup> See, for example, *Banco Nacional de Cuba v. Sabbatino, Receiver, et al.* (1964) *United States Reports*, vol. 376, p. 398) concerning Cuban nationalizations alleged to be in violation of international law, and *Banco Nacional de Cuba v. First National City Bank of New York* (1970) (United States of America, *The Federal Reporter*, 2nd series, vol. 431, p. 394). See also *Bernstein v. N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij* (1954) (*ibid.*, vol. 210, p. 375). For an interesting article on the subject, see J. Combacau, "La doctrine de 'l'act of State' aux Etats-Unis, développements récents", *Revue générale de droit international public* (Paris), vol. LXXVII, No. 1 (January-March 1973), p. 35.

(Footnote 52 continued.)

are discussed with interesting commentary on W.N. Hohfeld's *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (see footnote 61 below).

cannot by its very nature be questioned by any court of law in the realm. The American doctrine of "act of State" is to be distinguished from the English original version, which is purely English constitutional practice.<sup>56</sup> The United States doctrine refers to non-actionability of a sovereign act of a foreign Government under international law, a matter which lies essentially outside the competence or jurisdiction of a local or municipal court. It will be seen that this defect of competence goes more deeply to the merits of the case than the defect resulting from the rule of State immunity, which is merely suspensive and is curable by a number of measures indicating the willingness or agreement of the foreign State to submit to the local jurisdiction. Jurisdictional immunity is in this sense far more relative—and even subjective—than the American "act of State" doctrine.

(c) *The rules of competence in private international law*

22. To state at the outset<sup>57</sup> that the examination of any question of jurisdictional immunity should be preceded by a positive confirmation of the existence of a valid jurisdiction or competence of the trial court or the State authority dealing with the case under its own internal law is to admit that under its own conflict rules or rules of competence in private international law the decision of a court not to proceed with the trial could be a direct result of the finding or consideration by the court that there is a defect in the jurisdiction or the competence. Several grounds have been recognized, which may differ from jurisdiction to jurisdiction and vary from jurisprudence to jurisprudence, for the court's reluctance or refusal to proceed with further consideration of a case which, with the presence of a foreign element, has entered the realm of private international law. In a case involving another State or its property, the matter could fall within the competence of the court only if its rules of competence are satisfied. Otherwise, there could be lack of competence on the part of the local or municipal court on one of the grounds provided by its set of rules of competence under its conflict rules or rules of private international law.

23. Thus, it is not unnatural that in some of the replies to the questionnaire circulated to Governments,<sup>58</sup> in regard

to States which have no specific legislation on jurisdictional immunities, an answer could be found, in any event partially, in the assimilation of the position of a foreign State to that of a foreign entity in an action in similar circumstances. This is a practical test, first and foremost, to verify the existence of jurisdiction or soundness of competence under internal law before proceeding to establish State immunity because the foreign entity or alien in question happens to be a foreign sovereign or State. The rules of competence in private international law, largely internal law, contain many clear grounds on which the court is required to decline jurisdiction for lack of competence. Some of these grounds have been mentioned above (paras. 20–21). It would be neither practical nor desirable even to enumerate or quickly to glance through all of the various grounds on which a court of law could base its determination that it lacks jurisdiction or competence to adjudicate the matter in question. Defects in competence may relate to the subject-matter being essentially beyond the court's scope of competence; to the physical presence of an object or person being outside the territorial limit of the competence, or its absence from the territorial domain; to lack of the most significant contact; to the rule regarding the chosen forum (*forum prorogatum*); or the most convenient forum (*forum conveniens*); or to such other rules relating to priority of concurrent jurisdictions that would induce the court to be reluctant to exercise jurisdiction or pass judgement in a case before it.

24. It should be observed at this point that the present study does not seek to give an exhaustive list of the various grounds that have been used by municipal courts to base their lack of jurisdiction or competence under their own conflict rules. State immunity or jurisdictional immunity of a foreign State could be listed among such grounds, whether the reasoning behind it may be found in a principle of public international law, such as dignity, independence, sovereignty and equality of States, or on grounds of internal law or private international law limitations inherent in the rules of competence, or a combination of both. It is not impossible in the light of State practice to view State immunity as a rule of public international law as well as a private international law limitation of jurisdiction according to the rules of competence under internal law. The difference in most cases could be academic, except in the common law jurisdictions where the doctrine of precedent could play a determinative part. For instance, according to the theory of incorporation, an English court could follow the development of an international law rule; but if the transformation theory is adopted, the doctrine of *stare decisis* would require the court to adhere more strictly to precedent, regardless of the change that may have occurred in the evolution of rules of international law.<sup>59</sup> To a large extent, this potential difference has been minimized

<sup>56</sup> The "act of State" doctrine in English practice refers to the unquestionability of an act performed by a government agent, acting within its delegated power, and represents absence of judicial control over the executive in certain domains where constitutional and conventional practice allows large discretion to be exercised by the executive. See, for instance, *Buron v. Denman* (1848) (United Kingdom. *The Exchequer Reports*, vol. II (1849), p. 167), describing an "act of State" as an act done by the sovereign power of a country or its agent either previously authorized or subsequently ratified. Such an act cannot be questioned or made the subject of legal proceeding in any court of law. See *Sobhuza II v. Miller* (1926) (United Kingdom. *The Law Reports, House of Lords, Judicial Committee of the Privy Council* (1926), p. 518).

<sup>57</sup> A cross reference could usefully be made to paras. 11–15 above: "The relevance of the rules of competence under internal law".

<sup>58</sup> See, for instance, the reply of the Government of Tunisia with selected provisions of national legislation (February 1981) (United Nations Legislative Series, *Materials on Jurisdictional Immunities and their Property* (Sales No. E/F.81.V.10), pp. 614–616).

<sup>59</sup> The incorporation theory, deriving from *Barbuit's case* (1737) (*British International Law Cases* (London), vol. 6 (1967), p. 261) holds that rules of general international law are incorporated into English law automatically and considered to be part of English law

(Continued on next page.)

in this context by the adoption of an English act of Parliament in 1978.<sup>60</sup>

## B. Absence of power to compel a State to submit to the jurisdiction of another State

### 1. NO COMPULSORY JURISDICTION OVER FOREIGN STATES

25. The general relationship between "immunity" of a State and the correlative "no-power" of another State (see para. 18 above) is further explained by a more precise formulation of another consequential proposition.<sup>61</sup> As "A State is immune from the jurisdiction of another State", it follows that no State has the power to make another State submit to its jurisdiction. This absence of power could also be expressed in terms of an obligation on the part of a State not to exercise sovereign authority or a duty to suspend its jurisdiction over another State against its will. In other words, the courts of a State should not compel another unwilling State to submit to its jurisdiction. This absence of compulsory jurisdiction over a foreign State or the lack of power to compel submission of another State to its jurisdiction is sometimes rendered in English as "an obligation not to implead a foreign sovereign" or a duty to refrain from exercising jurisdiction in a proceeding which impleads a foreign State or requires a foreign State to submit to local jurisdiction against its will.

26. The relativity of State immunity is thus further intensified by the subjective element inherent in the willingness of a State over which jurisdiction is otherwise exercisable within the norms of competence. It will be seen in subsequent draft articles how this relativity of jurisdictional immunity is highlighted by a search for clearer rules on the ultimate expression of consent<sup>62</sup> or voluntary submission to the jurisdiction<sup>63</sup> or waiver of immunity<sup>64</sup> or counter-claims.<sup>65</sup>

(Footnote 59 continued.)

unless they are in conflict with an act of Parliament. The transformation theory, deriving its authority from the cases *The Queen v. Keyn* (1876) (United Kingdom, *The Law Reports, Exchequer Division*, vol. II (1877), p. 63) and *Chung Chi Cheung v. The King* (1938) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1939, p. 160), requires that rules of general international law should not be considered to be part of English law except insofar as they have already been adopted by judicial decisions, or acts of Parliament, or long-established custom. See Lord Denning in *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (1977) (*International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471):

"I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognize a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: 'But it does move'." (*Ibid.*, p. 479.)

<sup>60</sup> *State Immunity Act 1978* (United Kingdom, *The Public General Acts*, 1978, part 1, chap. 33, p. 715).

<sup>61</sup> "Immunity" and "disability" are jural correlatives. Disability is the equivalent of a "no-power" to impose liability on the other party. See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Yale University Press, 1923).

<sup>62</sup> See draft article 8, para. 58 below.

<sup>63</sup> See draft article 9, para. 71 below.

<sup>64</sup> See draft article 11, para. 92 below.

<sup>65</sup> See draft article 10, para. 81 below.

## 2. INADMISSIBILITY OF ACTIONS IMPLEADING A FOREIGN STATE

27. A State is said to be impleaded when an attempt is made to compel it against its will to submit to the jurisdiction of another State. There are various ways in which a State can be thus impleaded or implicated in a litigation or a legal proceeding before the court of another State.

### (a) Institution of proceedings against a foreign State

28. A State is indubitably impleaded if, against its will, a legal proceeding is instituted against it in its own name and the State does not wish to become party to that proceeding. A State is not impleaded if it is willing to have the dispute litigated or the matter judicially settled by the competent authority of another State. The act of impleading presupposes the absence of consent on the part of the State against which the proceeding is instituted. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. There will be no impleading if the State agrees to become party to the proceeding. The element of the will or intent is determinative of the question of compulsion. Without the power to compel submission to the jurisdiction, the State of the forum is obliged to refrain from exercising its competence or jurisdiction.

29. Although, in the practice of States, jurisdictional immunity has been granted more frequently in cases where no State has been named as party to the proceeding, in reality there is a surprising collection of instances of direct implication in proceedings in which States are actually named as defendants.<sup>66</sup> For the purpose of State immunity, a definition of "State" may be needed. Whatever the definition, it is clear from the practice of States that the expression "State" for the purposes of the present articles includes, in the first place, fully sovereign and independent foreign States, but by extension also entities that are sometimes not completely foreign and at other times are not fully independent or are only partially sovereign.<sup>67</sup> Certainly the cloak of State immunity covers all foreign

<sup>66</sup> See, for instance, *F. Advocaat v. I. Schuddinck & den Belgischen Staat* (1923) (*Annual Digest . . . 1923-1924* (London), vol. 2, case No. 69, p. 133); *United States of America v. Republic of China* (1950) (*International Law Reports*, 1950 (London), vol. 17, case No. 43, p. 168); *The "Hai Hsuan"*—*United States of America v. Yong Soon Fe and another* (1950) (*ibid.*, case No. 44, p. 170); *Stato di Grecia v. Di Capone* (1926) (*Rivista di diritto internazionale* (Rome), series III, vol. VI (1927), p. 103); *Pauer v. Hungarian People's Republic* (1956) (*International Law Reports*, 1957 (London), vol. 24 (1961), p. 211); *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 4 (July 1976), p. 735).

<sup>67</sup> The practice of some States appears to support the view that semi-sovereign States or even colonial dependencies are treated within the same constitutional units as foreign sovereign States. British courts, for instance, have consistently declined jurisdiction in actions against member States within the Commonwealth and semi-sovereign States dependent on the United Kingdom. Thus, the Maharaja of Baroda was regarded as "a sovereign prince over whom British courts have no jurisdiction": *Gaekwar of Baroda State Railways v. Hafiz Habib-ul-Haq* (1938) (*Annual Digest . . . 1938-1940* (London), vol. 9, case

(Continued on next page.)

States regardless of their form of government, whether a kingdom, empire or republic, a federal union, a confederation of States or otherwise.<sup>68</sup>

(b) *Proceedings against the central Government or head of a foreign State*

30. A State need not be expressly named as party to a litigation to be directly impleaded. For instance, an action against the Government of a State clearly impleads the State itself as, for all practical purposes, the central Government is identified or identifiable with it. A State is generally represented by the Government in most if not all of its international relations and transactions. The central Government is therefore the State itself, and a proceeding against the Government *eo nomine* is not distinguishable from a direct action against the State.<sup>69</sup> State practice has long recognized the practical effect of a suit against a foreign Government as identical with a proceeding against the State.<sup>70</sup>

(Footnote 67 continued.)

No. 78, p. 233). United States courts have adopted the same view with regard to their own dependencies: *Kawananakoa v. Polyblank* (1907) (*United States Reports*, vol. 205 (1921), p. 349), wherein the territory of Hawaii was granted sovereign immunity; and also, by virtue of their federal Constitution, with respect to member States of the Union: *Principality of Monaco v. Mississippi* (1934) (*Annual Digest* . . ., 1933–1934 (London), vol. 7, case No. 61, p. 166; cf. Hackworth (*op. cit.*), vol. II, p. 402). French courts have similarly upheld immunity in cases concerning semi-sovereign States and member States within the French Union: *Bey of Tunis et consorts v. Ahmed-ben-Aïad* (1893) (*Dalloz, Recueil périodique et critique de jurisprudence*, 1894 (Paris), part 2, p. 421); and other cases concerning the “Gouvernement chérifien”, for instance, *Laurans v. Gouvernement impérial chérifien et Société marseillaise de crédit* (1934) (*Revue critique de droit international* (Darras) (Paris), vol. 30, No. 4 (October–December 1935), p. 795, and a note by Mme S. Basdevant-Bastid, pp. 796 et seq.). See also *Duff Development Company Ltd. v. Government of Kelantan and another* (1924) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1924, p. 797).

<sup>68</sup> See, for instance, *Dralle v. Republic of Czechoslovakia* (1950) (*International Law Reports*, 1950 (London), vol. 17, case No. 41, p. 155); *Etat espagnol v. Canal* (1951) (*Clunet, Journal du droit international* (Paris), 79th year, No. 1 (January–March 1952), p. 220); *Patterson-MacDonald Shipbuilding Co. v. McLean v. Commonwealth of Australia* (1923) (United States of America, *The Federal Reporter*, vol. 293 (1924), p. 192); *De Froe v. The Russian State*, now styled “*The Union of Soviet Socialist Republics*” (1932) (*Annual Digest* . . ., 1931–1932 (London), vol. 6, case No. 87, p. 170); *Irish Free State v. Guaranty Safe Deposit Company* (1927) (*Annual Digest* . . ., 1925–1926 (London), vol. 3, case No. 77, p. 100); *Kingdom of Norway v. Federal Sugar Refining Co.* (1923) (United States of America, *The Federal Reporter*, vol. 286 (1923), p. 188); *Iptrade International S.A. v. Federal Republic of Nigeria* (1978) (*id.*, *Federal Supplement*, vol. 465 (1979), p. 824); 40 D 6262 *Realty Corporation* and 40 E 6262 *Realty Corporation v. United Arab Emirates Government* (1978) (*ibid.*, vol. 447 (1978), p. 710); *Kahan v. Pakistan Federation* (1951) (United Kingdom, *The Law Reports, King’s Bench Division*, 1951, vol. II, p. 1003); *Venne v. Democratic Republic of the Congo* (1969) (Canada, *The Dominion Law Reports, Third series*, vol. 5, p. 128).

<sup>69</sup> See, for example, *Lakhowsky v. Swiss Federal Government and Colonel de Reynier* (1921) (*Annual Digest* . . ., 1919–1922 (London), vol. 1, case No. 83, p. 122); *U Kyaw Din v. His Britannic Majesty’s Government of the United Kingdom and the Union of Burma* (1948) (*Annual Digest* . . ., 1948 (London), vol. 15, case No. 42, p. 137); *Etienne v. Government of the Netherlands* (1947) (*Annual Digest* . . ., 1947 (London), vol. 14, case No. 30, p. 83).

<sup>70</sup> Sovereign immunity has sometimes been accorded to colonial dependencies of foreign States on the ground that the actions in effect

31. A foreign sovereign or a head of a foreign State is also entitled to State immunity on the ground that, like the central Government, the crown, the reigning monarch, the sovereign head of State or indeed a head of State is covered by the cloak of State immunity. In point of fact, it is not accurate to state that in some countries the practice of allowing immunities in favour of foreign sovereigns or foreign potentates had developed well before that in respect of a foreign State or Government.<sup>71</sup> State immunity, as it is understood today, may be said in some jurisdictions to have been an extension of sovereign immunity. States have come to be identified with their reigning sovereigns, who were in their own right entitled to immunity; or to put it in reverse, the sovereign heads of State have been identified with the States they represent.<sup>72</sup>

(c) *Proceedings against political subdivisions of a foreign State*

(i) *Absence of uniform State practice*

32. It is important to note that there is neither uniformity nor consistency in the practice of States on the precise legal status of political subdivisions of a foreign State before national authority. On the whole, State practice seems to suggest a trend in favour of local jurisdiction. Political subdivisions of a foreign State, such as member States of a federal union, and part-sovereign States, such as protected States which lack full external sovereignty, are apparently in danger of not being clothed with State immunity, being neither sovereign States nor one of the recognized agencies of the central Government. An action against a political subdivision of a foreign State is therefore not automatically regarded as an action against the State itself. Such action does not necessarily implead the foreign State of which the political subdivision forms part. Such autonomous entities, lacking international personality and external sovereignty, and not being identified with the federal union or the federation, may be

impleaded the foreign Governments, States being identifiable with their Governments. See, for instance, *The “Martin Behrman”—Isbrandtsen Co. v. Netherlands East Indies Government* (1947) (*Annual Digest* . . ., 1947 (London), vol. 14, case No. 26, p. 75); *Van Heyningen v. Netherlands Indies Government* (1948) (*Annual Digest* . . ., 1948 (London), vol. 15, case No. 43, p. 138).

<sup>71</sup> See, for instance, Lord Campbell in *Wadsworth v. Queen of Spain* and *De Haber v. Queen of Portugal* (1851) (United Kingdom, *Queen’s Bench Reports*, vol. XVII (1855), p. 171, p. 206; cf. *Hullett v. King of Spain* (1828) (R. Bligh, *New Reports of Cases Heard in the House of Lords* (London), vol. II (1828), p. 31); and *Duke of Brunswick v. King of Hanover* (1844) (C. Clark and W. Finnelly, *House of Lords Cases*, vol. II (1848–1850) (London), p. 1); *Mighell v. Sultan of Johore* (1893) (United Kingdom, *The Law Reports, Queen’s Bench Division*, 1894, vol. I, p. 149).

<sup>72</sup> Common law judges are inclined to refer to foreign States as foreign sovereigns for purposes of State immunities. See for instance, Lord Justice Jenkins in *Kahan v. Pakistan Federation* (1951) (see footnote 68 above); Lord Denning in *Rahimtoola v. Nizam of Hyderabad* (1957) (*International Law Reports*, 1957 (London), vol. 24 (1961), p. 175). See also article 1, para (a) of part I of the Harvard Draft Convention Prepared for the Codification of International Law under the Auspices of the Harvard Law School, in *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 475.

proceeded against in their own name without implicating the foreign State concerned.

## (ii) *Actions not impleading a sovereign State*

33. A judgement of the French Cour de cassation in 1933, in a case concerning the state of Ceará of the Republic of Brazil, is illustrative of the general attitude of municipal courts in regard to autonomous entities such as political subdivisions of a foreign State.<sup>73</sup> The practice of American, French, Italian and Belgian courts generally supports the view that such political subdivisions are subject to local jurisdiction for lack of external sovereignty and international personality, being distinguishable from the central Government.<sup>74</sup> It should be observed, on the other hand, that on occasions which are not infrequent, political subdivisions of a State or even colonial dependencies are treated, as a mark of courtesy, with a privileged status within the same federal union by fictitiously assimilating the position of the domestic entities to that of a foreign sovereign State.<sup>75</sup>

<sup>73</sup> *Etat de Ceará v. Dorr et autres* (1932) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1933 (Paris), part 1, p. 196). The Court said:

"Whereas this rule [of incompetence] is to be applied only when it is invoked by an entity which shows itself to have a personality of its own in its relations with other countries, considered from the point of view of public international law; whereas such is not the case of the state of Ceará, which, according to the provisions of the Brazilian Constitution, legitimately relied upon by the lower courts, and whatever its internal status in the sovereign confederation of the United States of Brazil of which it is a part, and is deprived of diplomatic representation abroad, does not enjoy from the point of view of international political relations a personality of its own..." (*ibid.*, p. 197).

<sup>74</sup> For the practice of the United States of America, see, for instance, *Molina v. Comisión Reguladora del Mercado de Henequén* (1918) (Hackworth (*op. cit.*), vol. II, pp. 402–403), where Yucatán, a member State of the United States of Mexico, was held amenable to the jurisdiction of the United States courts; *Schneider v. City of Rome* (1948) (*Annual Digest* ..., 1948 (London), vol. 15, case No. 40, p. 131), where jurisdiction was assumed against the defendant, a political subdivision of the Italian Government exercising substantial governmental powers. See, however, *Sullivan v. State of São Paulo* (1941) (*Annual Digest* ..., 1941–1942 (London), vol. 10, case No. 50, p. 178), where the State Department had recognized the claim of immunity.

For France, see, for instance, *Ville de Genève v. Consorts de Civry* (1894), (Sirey, *Recueil général des lois et des arrêts*, 1896 (Paris), part 1, p. 225); *Crédit foncier d'Algérie et de Tunisie v. Restrepo et département d'Antioquia* (Clunet, *Journal du droit international*, 50th year (January–February 1923), p. 857); *Dumont v. State of Amazonas* (1948) (*Annual Digest* ..., 1948 (London), vol. 15, case No. 44, p. 140).

For Italy, see, for instance, *Somigli v. Etat de São Paulo du Brésil* (1910) (Darras, *Revue de droit international privé et de droit pénal international* (Paris), vol. VI, p. 527), where São Paulo was held amenable to Italian jurisdiction in respect of a contract to promote immigration to Brazil.

For Belgium, see, for instance, *Feldman v. Etat de Bahia* (1907) (*Pasicrisie belge 1908* (Brussels), vol. II, p. 55 (see also *Supplement to The American Journal of International Law*, vol. 26, No. 3 (July 1932), p. 484)), where Bahia was denied immunity although under the Brazilian Constitution it was regarded as a sovereign State.

<sup>75</sup> See, for instance, *Kawananakao v. Polybank* (1907) (see footnote 67 above), where the territory of Hawaii was considered to be sovereign for the purpose of State immunity. The Court said:

"The doctrine [of sovereign immunity] is not confined to powers that are sovereign in the full sense of judicial theory, but normally is

## (iii) *Actions impleading a foreign State*

34. It is not difficult to envisage circumstances in which political subdivisions of a foreign State may in fact be exercising the sovereign authority assigned to them by the federal union, and actions may be brought against them for acts performed by them on behalf of the foreign State. Such proceedings could be regarded as in effect impleading a foreign State. There are cases where, dictated by expediency or otherwise,<sup>76</sup> the courts have refrained from entertaining suits against such autonomous entities, holding them to be an integral part of the foreign Government.<sup>77</sup>

35. Whatever the status of political subdivisions of a foreign State, there is nothing to preclude the possibility of such autonomous entities being constituted, or acting as organs of the central Government, or as State agencies performing sovereign acts of the foreign State.<sup>78</sup> Despite

extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights." (*Op. cit.*, p. 349.)

See also a series of cases concerning the Philippine Islands: *Bradford v. Chase National City Bank of New York* (1938) (*Annual Digest* ..., 1938–1940 (London), vol. 9, case No. 17, p. 35). See also *Hans v. Louisiana* (1890) (*United States Reports*, vol. 134 (1910), p. 1), *South Dakota v. North Carolina* (1904) (*ibid.*, vol. 192, p. 286); *United States v. North Carolina* (1890) (*ibid.*, vol. 136, p. 211); *Rhode Island v. Massachusetts* (1846) (B.C. Howard, *Reports of Cases argued and adjudged in the Supreme Court of the United States*, 1846, 2nd ed., vol. IV (1909), p. 591); and cases cited above in footnotes 67 and 69. See, however, *Commonwealth of Australia v. New South Wales* (1923) (*Annual Digest* ..., 1923–1924 (London), vol. 2, case No. 67, p. 131):

"The appellation 'sovereign State' as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning."

<sup>76</sup> For instance, in the case *Sullivan v. State of São Paulo* (1941) (see footnote 74 above), Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States; Judge Learned Hand expressed his doubts whether every political subdivision of a foreign State was immune which exercised substantial governmental power. See also *Yale Law Journal* (New Haven, Conn.), vol. 50, No. 6 (April 1941), pp. 1088 *et seq.*; *Cornell Law Quarterly Review* (Ithaca, N.Y.), vol. 26 (1940–1941), pp. 72 *et seq.*; *Harvard Law Review* (Cambridge, Mass.), vol. LV, No. 1 (November 1941), p. 149; *Michigan Law Review* (Ann Arbor, Mich.), vol. 40, No. 6 (April 1942), pp. 911 *et seq.*; *Southern California Law Review* (Los Angeles, Calif.), vol. 15 (1941–1942), p. 258. This was the most commented case of that time.

<sup>77</sup> In *Van Heyningen v. Netherlands Indies Government* (1948) (see footnote 70 above), the Supreme Court of Queensland (Australia) granted immunity to the Netherlands Indies Government. Judge Philip said:

"In my view, an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court." (*Op. cit.*, p. 140.)

<sup>78</sup> This possibility was pointed out by Pillet, commenting on a French case denying immunity, *Ville de Genève v. Consorts de Civry* (1894) (Sirey, *Recueil* ... 1896 (see footnote 74 above), pp. 225 *et seq.*). See also *Rousse et Maber v. Banque d'Espagne* (1937) (Sirey, *Recueil général des lois et des arrêts*, 1938 (Paris), part 2, p. 17), where the Court of Appeal of Poitiers envisaged the same possibility; Rousseau, in his note (*ibid.*, pp. 17–23), thought that provincial autonomies such as the Basque Government might at the same time be "an executive organ

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the rarity of such cases, it should be permissive, and to some extent obligatory, for States to withhold jurisdiction in actions against foreign State agencies which happen to be political subdivisions forming part of the central Government. A constituent State of a federal union normally enjoys no immunity as a sovereign State, unless it can establish that the action brought against it in fact impleads the foreign State. This uncertain status of political subdivisions of States is further preserved by regional agreements such as the 1972 European Convention on State Immunity.<sup>79</sup>

(d) *Proceedings against organs, agencies or instrumentalities of a foreign State*

36. Proceedings against organs, agencies or instrumentalities of a foreign State may, as indeed they often do, implead the foreign State concerned, especially in regard to the activities performed by them in the exercise of the sovereign authority of the State. Organs, agencies or instrumentalities of a foreign State may vary in their formation, constituent components, functions and activities, depending on the political, economic and social structures of the State and their ideological considerations. It is not possible to examine every variety or variation of the organs, agencies and instrumentalities of a State. It is nevertheless useful to illustrate some of the more usual denominations and practical examples which, for convenience's sake, may be grouped under two headings: subsidiary organs and departments of government, and agencies or instrumentalities of State.

(i) *Subsidiary organs and departments of government*

37. Just as the State is represented by its Government, which is identified with it for most practical purposes, the Government is often composed of subsidiary organs and departments or ministries to act on its behalf. Such organs of State and departments of government can be and often are constituted as separate legal entities within the internal legal system of the State. Lacking as they do international legal personalities as a sovereign entity, they could nevertheless represent the State of act on behalf of the central Government of the State, which they in fact compose as integral parts. Such State organs or departments of government comprise the various ministries of a Government,<sup>80</sup> including the armed forces,<sup>81</sup> the subordinate divisions or departments within each ministry, such as

embassies,<sup>82</sup> special missions<sup>83</sup> and consular posts,<sup>84</sup> and offices, commissions, or councils<sup>85</sup> which need not form part of any ministry but are themselves autonomous State organs answerable to the central Government or to one of its departments, or are administered by it. Other principal organs of the State such as the legislative and the judiciary of a foreign State would be equally identifiable with the State itself if an action is instituted against either of them in their sovereign capacity.

(ii) *Agencies or instrumentalities of State*

38. There is in practice no hard and fast line to be drawn between agencies or instrumentalities of State and State organs and departments of Government under the previous heading. The expression "agencies or instrumentalities" indicates the interchangeability of the two terms.<sup>86</sup> Proceedings against an agency of a foreign Government<sup>87</sup>

(1947) (*Annual Digest* . . . , 1947 (London), vol. 14, case No. 28, p. 78); *Triandafilou v. Ministère public* (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 39, No. 2 (April 1945), p. 345); *Piascik v. British Ministry of War Transport* (1943) (*Annual Digest* . . . , 1943-1945 (London), vol. 12, case No. 22, p. 87); and *Turkish Purchases Commission case* (1920) (*Annual Digest* . . . , 1919-1922 (London), vol. 1, case No. 77, p. 114).

<sup>81</sup> See, for example, in *The Schooner "Exchange" v. McFaddon* (1812) the opinion of Chief Justice Marshall (W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII, 3rd ed., pp. 135-137). See also various "Status of Forces Agreements" and "Foreign Visiting Forces Acts".

<sup>82</sup> Embassies are subsidiary organs of the State, being part of the Ministry of Foreign Affairs or the Foreign Office of the sending State. Their status is governed by the 1961 Vienna Convention on Diplomatic Relations. (United Nations, *Treaty Series*, vol. 500, p. 95).

<sup>83</sup> Special missions are also covered by State immunity as contained in the 1969 Convention on Special Missions (General Assembly resolution 2530 (XXIV) of 8 December 1969, annex). See also the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (*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).

<sup>84</sup> See the 1963 Vienna Convention on Consular Relations (United Nations, *Treaty Series*, vol. 596, p. 261).

<sup>85</sup> See, for instance, *Mackenzie-Kennedy v. Air Council* (1927) (United Kingdom, *The Law Reports, King's Bench Division*, 1927, vol. II, p. 517); *Graham and others v. His Majesty's Commissioners of Public Works and Buildings* (1901) (*ibid.*, 1901, vol. II, p. 781); *Société Viajes v. Office national du tourisme espagnol* (1936) (*Annual Digest* . . . , 1935-1937 (London), vol. 8, case No. 87, p. 227); *Telkes v. Hungarian National Museum* (1942), No. II (*Annual Digest* . . . , 1941-1942 (London), vol. 10, case No. 169, p. 576).

<sup>86</sup> See, for instance, the United States of America's Foreign Sovereign Immunities Act of 1976 (*United States Code, 1976 Edition*, vol. 8, title 28, chap. 97), which, in section 1603 (b), defines "agency or instrumentality of a foreign state" as an entity "(1) which is a separate legal person, (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title nor created under the laws of any third country."

<sup>87</sup> See, for example, *Krajina v. The Tass Agency and another* (1949) (*Annual Digest* . . . , 1949 (London), vol. 16, case No. 37, p. 129) compare *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (*Annual Digest* . . . , 1923-1924 (London), vol. 2, case

(Footnote 78 continued.)

of a decentralized administrative unit". Compare the English Court of Appeal in *Kahan v. Pakistan Federation* (see footnote 68 above). See also *Huttinger v. Upper Congo-Great African Lakes Railways Co. et al.* (1934) (*Annual Digest* . . . , 1933-1934 (London), vol. 7, case No. 65, pp. 172-173), and the cases cited in footnote 70 above.

<sup>79</sup> Council of Europe, *European Convention on State Immunity*, European Treaty Series No. 74 (Strasbourg, 1972). The Convention came into force on 11 June 1976, as between Austria, Belgium and Cyprus. Article 28 (1) confirms non-enjoyment of immunity by the Constituent States of a Federal State, but paragraph (2) permits the Federal State to make a declaration that its constituent States may invoke the provisions of the Convention.

<sup>80</sup> See, for instance, *Bainbridge v. The Postmaster-General* (1905) (United Kingdom, *The Law Reports, King's Bench Division*, 1906, vol. I, p. 178); *Henon v. Egyptian Government and British Admiralty*

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or an instrumentality of a foreign State, whether or not incorporated as a separate entity,<sup>88</sup> could be considered as impleading the foreign State, particularly when the cause of action relates to the activities conducted by the agency or instrumentality of State in the exercise of the sovereign authority of that State.<sup>89</sup>

(e) *Proceedings against State agents or representatives of a foreign Government*

39. It is not likely that the types of beneficiaries or categories of recipients of State immunities so far listed in this study are exhaustive or in any way comprehensive of the growing list of persons and institutions to which State immunity applies. Another important group of persons who, for want of a better terminology, will be called agents of State or representatives of Government should also be mentioned. Proceedings against such persons in their official or representative capacity, such as personal sovereigns, ambassadors and other diplomatic agents, consular officers and other representatives of Government, may be said to implead the foreign State they represent, particularly in respect of an act performed by such representatives on behalf of the foreign Government in the exercise of their official functions.<sup>90</sup>

(Footnote 87 continued.)

No. 73, p. 138), and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division*, 1957, vol. 1, p. 438), in which Lord Justice Jenkin observed:

"Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery." (*Ibid.*, p. 466)

<sup>88</sup> For a different view, see the opinions of Lord Justices Cohen and Tucker in *Krajina v. The Tass Agency* (1949) (see footnote 87 above), and in *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 87 above), where Lord Justice Parker said:

"I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State." (*Op. cit.*, p. 472.)

See also *Emergency Fleet Corporation, United States Shipping Board v. Western Union Telegraph Company* (1928) (United States Reports, vol. 275, p. 415):

"Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." (*Ibid.*, pp. 425-426) See, however, the certificate of the United States Ambassador regarding the status of the U.S. Shipping Board in the case *Compañía Mercantil Argentina* (1924) (cited in footnote 87 above).

<sup>89</sup> See *Dollfus Mieg et Cie v. Bank of England* (1950) and *United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England—Gold bars case* (1952) (*Annual Digest* . . . , 1949 (London), vol. 16 (1955), case No. 36, p. 103), and *Monopole des tabacs de Turquie et al. v. Régie co-intéressée des tabacs de Turquie* (1930) (*Annual Digest* . . . , 1929-1930 (London), vol. 5 (1935), case No. 79, p. 123).

<sup>90</sup> The fact that the immunities enjoyed by representatives of Government, whatever their specialized qualifications as diplomatic or consular officials or otherwise, are in the ultimate analysis State immunities has never been doubted. Rather, it has been unduly overlooked. Recently, however, evidence of their connection is reflected in some of the replies and information furnished by Governments. The Jamaican legislation and Moroccan decision on diplomatic immunities and Mauritian law on consular immunities are outstanding reminders of the closeness of identities between State immunities and other types of immunities traceable to the State.

(i) *Immunities ratione materiae*

40. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity. State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State but is also based on the sovereign nature or official character of the activities, being an immunity *ratione materiae*.<sup>91</sup>

(ii) *Immunities ratione personae*

41. Two types of beneficiaries of the State immunities enjoyed by representatives of Government and State agents deserve special attention, namely, personal sovereigns and ambassadors and diplomatic agents.<sup>92</sup> Apart from immunities *ratione materiae* by reason of the activities or the official functions of the representatives, personal sovereigns and ambassadors are entitled, to some extent in their own right, to immunities *ratione personae* in respect of their persons or of activities that are personal to them and unconnected with their official functions. The immunities *ratione personae*, unlike immunities *ratione materiae*, which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated. All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts.<sup>93</sup> Indeed, even such immunities

<sup>91</sup> Immunities *ratione materiae* may outlive the tenure of office of the representatives of a foreign State. They are nevertheless subject to the qualifications and exceptions to which State immunities are ordinarily subject in the practice of States. See, for instance, *Carlo d'Austria v. Nobili* (1921) (*Annual Digest* . . . , 1919-1922 (London), vol. 1, case No. 90, p. 136) and *La Mercantile v. Regno de Grecia* (1955) (*International Law Reports*, 1955 (London), vol. 22, p. 240), where the contract concluded by the Greek Ambassador for the delivery of raw materials was imputable to the State, and therefore subject to the local jurisdiction.

<sup>92</sup> Historically speaking, immunities of sovereigns and ambassadors have developed even prior to State immunities. They are in State practice regulated by different sets of principles of international law. It is submitted, in strict theory, that all jurisdictional immunities are traceable to the basic norm of State sovereignty. See S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), chaps. 1 and 2; E. Suy, "Les bénéficiaires de l'immunité de l'Etat", *L'immunité de juridiction et d'exécution des Etats* (Brussels, Actes de colloques des Centres de droit international de l'Institut de Sociologie de l'Université de Bruxelles, 1971), pp. 257 et seq.

<sup>93</sup> Thus in *The Empire v. Chang and others* (1921) (*Annual Digest* . . . , 1919-1922 (London), vol. 1, case No. 205, p. 288), the Supreme Court of Japan confirmed the conviction of former employees of the Chinese Legation in respect of offences committed during their

(Continued on next page.)

inure not for the personal benefit of sovereigns and ambassadors but for the benefit of the States they represent, to enable them to fulfil their representative functions or for the effective performance of their official duties.<sup>94</sup> This proposition is further reflected, in the case of diplomatic agents, in the rule that diplomatic immunities can only be waived by an authorized representative of the sending State and with proper governmental authorization.<sup>95</sup>

(f) *Proceedings affecting State property or property in the possession or control of a foreign State*

42. Without closing the list of beneficiaries of State immunities, it is necessary to note that actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered, in the practice of States, to be proceedings which implead the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions *in rem* or in admiralty against State-owned or State-operated vessels for defence purposes and other peaceful uses,<sup>96</sup> but

also measures of prejudgement attachment or seizure (*saisie conservatoire*) as well as execution or measures in satisfaction of judgement (*saisie exécutoire*). The post-judgement or execution order will not be considered in the present part of the report, since it concerns not only immunity from jurisdiction but, beyond that, also immunity from execution, a further stage in the process of jurisdictional immunities.<sup>97</sup>

43. As has been seen, the law of State immunities has developed in the practice of States, not from proceedings directly instituted against foreign States or Governments in their name, but more indirectly through a long line of actions for the seizure or attachment of vessels for maritime liens or collision damages or salvage services.<sup>98</sup> State practice has been rich in instances of State immunities in respect of their men-of-war,<sup>99</sup> visiting forces,<sup>100</sup> armaments and weapons,<sup>101</sup> and aircraft.<sup>102</sup> The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government,<sup>103</sup> but clearly encompasses cases of properties in actual possession or control of a foreign State.<sup>104</sup> The Court should not so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property, or else submitting to the jurisdiction of the Court.<sup>105</sup>

(Footnote 93 continued.)

employment as attendants there, but unconnected with their official duties. See also *Léon v. Díaz* (1892) (Clunet, *Journal du droit international privé* (Paris), vol. 19, p. 1137), concerning a former Minister of Uruguay in France, and *Laperdrix et Penquer v. Kouzouboff et Belin* (1926) (*ibid.*, vol. 53 (January–February 1926), pp. 64–65), where an ex-secretary of the United States Embassy was ordered to pay an indemnity for injury in a car accident.

<sup>94</sup> See, for example, the judgment of the Court of Geneva in the case *V... et Dicker v. D...* (1927) (*ibid.*, vol. 54 (January–February 1927), p. 1179), where an action by the mother and newly-born child was allowed to proceed against an ex-diplomat. Commenting on the decision, Noël-Henry said:

“the real basis of immunity is the necessity of the function. Consequently, the principle is that the diplomat is covered by immunity only when he is fulfilling his functions... When he has relinquished his post, he can be sued, except in connexion with acts performed by him in the fulfilment of his functions; moreover, it is not so much the immunity of the diplomat that is involved as the immunity of the Government which he represents.” (*Ibid.*, p. 1184.)

See also M. Brandon, “Report on diplomatic immunity by an Inter-departmental Committee on State immunities”, *International and Comparative Law Quarterly* (London), vol. 1 (July 1952), p. 358; P. Fiore, *Trattato di diritto internazionale pubblico*, 3rd ed. rev. (Turin, Unione tipografico-editrice, 1887–1891), p. 331, para. 491.

<sup>95</sup> See, for instance, *Dessus v. Ricoy* (1907) (Clunet, *Journal du droit international privé* (Paris), vol. 34 (1907), p. 1086), where the Court said:

“... since the immunity of diplomatic agents is not personal to them, but is an attribute and a guarantee of the State they represent... the agent cannot waive his immunity, especially when he cannot produce in support of a waiver of immunity any permission to do so issued by his Government.”

See also *Reichenbach et Cie v. Mme Ricoy* (1906) (*ibid.*, p. 111; *Cottenet et Cie v. dame Raffalovich* (1908) (*ibid.*, vol. 36 (1909), p. 150); the *Grey case* (*ibid.*, vol. 80 (1953), p. 887); and *Procureur général près de la Cour de cassation v. S. E. le Docteur Franco-Franco* (1954) (*ibid.*, vol. 81, No. 1 (1954), p. 786). See also the provisions of the 1961 Vienna Convention on Diplomatic Relations (see footnote 82 above).

<sup>96</sup> See in this connection the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) (League of Nations, *Treaty Series*, vol. CLXXVI, p. 199); the Convention on the Territorial Sea and the

Contiguous Zone (Geneva, 1958) (United Nations, *Treaty Series*, vol. 516, p. 205), the Convention on the High Seas (Geneva, 1958) (*ibid.*, vol. 450, p. 11) and the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8).

<sup>97</sup> Immunities from execution will form the subject of another study which the Special Rapporteur expects to submit later.

<sup>98</sup> See, for example, *The Schooner “Exchange” v. McFaddon* (1812) (see footnote 81 above); *The “Prins Frederik”* (1820) (J. Dodson, *Reports of Cases argued and determined in the High Court of Admiralty* (1815–1822) (London), vol. II (1828), p. 451); *The “Charkieh”* (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 97).

<sup>99</sup> See, for example, *The “Constitution”* (1879) (United Kingdom, *The Law Reports, Probate Division*, vol. IV, p. 39); *The “Ville de Victoria”* and *The “Sultan”* (1887) (cf. G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. II, p. 303); *“El Presidente Pinto”* (1891) and *“Assari Tewfik”* (1901) (cf. C. Baldoni, “Les navires de guerre dans les eaux territoriales étrangères”, *Recueil des cours de l’Académie de droit international de la Haye*, 1938—III (Paris, Sirey, 1938), pp. 247 et seq.

<sup>100</sup> See, for example, *The Schooner “Exchange” case* (1812) and the Status of Forces Agreements, mentioned in footnote 81 above.

<sup>101</sup> See, for example, *Vavasour v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (1878), p. 351).

<sup>102</sup> See, for example, the case *Hong Kong Aircraft—Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1953, p. 70).

<sup>103</sup> See, for example, *Juan Ysmal & Co. v. Government of the Republic of Indonesia* (1954) (*International Law Reports*, 1954 (London), vol. 21 (1957), p. 95), and also cases involving bank accounts of a foreign Government, such as *Trendtex* (1977) (see footnote 59 above).

<sup>104</sup> See, for example, *The “Philippine Admiral”* (1975) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 1 (January 1976), p. 133).

<sup>105</sup> *Dollfus Mieg et Cie v. Bank of England* (1950) (see footnote 89 above).

### C. Text of article 7

44. Article 7 could read as follows:

**Article 7. Rules of competence and jurisdictional immunity**

1. A State shall give effect to State immunity under article 6 by refraining from submitting another State to its jurisdiction, notwithstanding its authority under its rules of competence to conduct the proceedings in a given case.

ALTERNATIVE A

2. A legal proceeding is considered to be one against another State, whether or not named as a party, so long as the proceeding in fact impleads that other State.

ALTERNATIVE B

2. In particular, a State shall not allow a legal action to proceed against another State, or against any of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions, or permit a proceeding which seeks to deprive another State of its property or of the use of property in its possession or control.

### ARTICLE 8 (Consent of State)

#### A. The relevance of consent and its consequences

45. In part II of the draft articles, on general principles, article 6 enunciates the rule of State immunity, while article 7 sets out the contents of its correlative, or the corresponding obligation of restraint on the part of another State endowed with jurisdiction under its own internal law and in accordance with its own rules of competence as generally recognized and internationally accepted. Following from these two propositions, a third logical element in the general concept of State immunity to be examined is the notion of "consent".<sup>106</sup> Consent of the State against which jurisdiction is to be exercised or is being exercised, or the lack of such consent or absence thereof, is vitally relevant, if not indeed determinative in the consideration of any questions relating to jurisdictional immunity.

#### I. ABSENCE OF CONSENT AS AN ESSENTIAL ELEMENT OF STATE IMMUNITY

46. As has been intimated in article 6 on State immunity and more clearly indicated in article 7 on the obligation to

refrain from submitting another State to its jurisdiction, the absence or lack of consent on the part of the State against which the court of another State has been asked to exercise jurisdiction is presumed. State immunity under Article 6 does not apply if the State in question has consented to the exercise of jurisdiction by the court of another State. There will be no obligation under article 7 on the part of a State in compliance with its rules of competence to refrain from exercising jurisdiction over or against another State which has consented to such exercise. The obligation to refrain from submitting another State to its jurisdiction is not an absolute obligation. It is distinctively qualified by the phrase "without its consent", or is conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought.

47. Consent, the absence of which has thus become an essential element of State immunity is worthy of the closest attention. The obligation to refrain from exercising jurisdiction against another State or to implead another sovereign government is based on the assertion or presumption that such exercise is *without consent*. Lack of consent appears to be presumed rather than asserted in every case. State immunity applies, on the understanding that the State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction. This unwillingness or absence of consent is generally assumed, unless the contrary is indicated. The court exercising jurisdiction against an absent foreign State cannot and does not generally assume or presume that there is consent or willingness to submit to its jurisdiction. There must be proof or evidence of consent to satisfy the exercise of existing jurisdiction or competence against another State. Any formulation of the doctrine of State immunity or its corollary is incomplete without reference to the notion of consent or rather the lack of consent as a constitutive element of State immunity or the correlative duty to refrain from submitting another State to local jurisdiction.

48. Express reference to absence of consent as a *conditio sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.<sup>107</sup> The expression "*without consent*" in connection with the obligation to decline the exercise of jurisdiction is sometimes rendered in judicial references as "against the

<sup>106</sup> The notion of "consent" is also relevant to the theory of State immunity in another connection. The territorial or receiving State is sometimes said to have consented to the presence of friendly foreign forces passing through its territory and to have waived its normal jurisdiction over such forces. See, for example, Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon* (1812) (see footnote 81 above).

<sup>107</sup> See, for example, the reply of Trinidad and Tobago (June 1980) to question 1 of the questionnaire addressed to Governments:

"The common law of the Republic of Trinidad and Tobago provides specifically for jurisdictional immunities for foreign States and their property and generally for non-exercise of jurisdiction over foreign States and their property *without their consent*\*. A court seized of any action attempting to implead a foreign sovereign or State would apply the rules of customary international law dealing with the subject." (United Nations, Legislative Series, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 610.)

will of the sovereign State" or "against the unwilling sovereign".<sup>108</sup>

## 2. CONSENT AS AN ELEMENT PERMITTING EXERCISE OF JURISDICTION

49. If the lack of consent operates as a bar to the exercise of jurisdiction, it is interesting to examine the effect of consent by the State concerned. In strict logic it follows that the existence of consent on the part of the State against which legal proceedings are instituted should operate to remove this significant obstacle to the assumption and exercise of jurisdiction. If absence of consent is viewed as an essential element constitutive of State immunity, or conversely as entailing disability or no-power on the part of an otherwise competent court to exercise its existing jurisdiction, the expression of consent by the State concerned eliminates this impediment to the exercise of jurisdiction. With the consent of the sovereign State, the court of another State is thus enabled or empowered to exercise its jurisdiction by virtue of its general rules of competence, as though the foreign State were an ordinary friendly alien capable of bringing an action and being proceeded against in the ordinary way, without calling into play any doctrine or rule of State or sovereign immunity. Consent amounts therefore to a prior condition permissive of the exercise of normal competence by the territorial authority or local court. It is conceivable that in some instances consent may even give rise to jurisdiction, it is in such circumstances constitutive of competence itself. As such, consent could in some circumstances provide a legal basis or ground or justification or indeed the foundation for jurisdiction, not only an opportunity or facility for the assumption or exercise of existing jurisdiction.<sup>109</sup>

### B. The expression of consent to the exercise of jurisdiction

50.<sup>\*</sup> The implication of consent as a legal theory in partial explanation or rationalization of the doctrine of State immunity refers more generally to the consent of the State not to exercise its normal jurisdiction against another State or to waive its otherwise valid jurisdiction over another State without the latter's consent. The notion

of consent therefore comes into play in more ways than one, with particular reference in the first instance to the State consenting to waive its jurisdiction, so that another State is immune from such jurisdiction, and to the instances under consideration, in which the existence of consent to the exercise of jurisdiction by another State precludes the application of the rule of State immunity.

51. In the circumstances under consideration—that is in the context of the State against which legal proceedings have been brought—there appear to be several recognizable methods of expressing or signifying consent. In this particular connection, consent should not be taken for granted, nor readily implied. Any theory of "implied consent" as a possible exception to the general principles of State immunities outlined in this part should be viewed, not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognized exception. There is therefore no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner. Nor is the implication of consent of an involuntary State admissible in this context as an exception to State immunity. The existence or expression or proof of consent of the State in litigation is extinctive of immunity itself and not in any sense an exception thereto. It remains to be seen how such consent would be given or expressed so as to remove the obligation of the court of another State to refrain from the exercise of its jurisdiction against an equally sovereign State.

### 1. CONSENT GIVEN IN WRITING FOR A SPECIFIC CASE

52. An easy and indisputable proof of consent is furnished by the State expressing its consent in writing on an *ad hoc* basis for a specific case before the authority when a dispute has already arisen. A State is always free to communicate the expression of its consent to the exercise of jurisdiction by the court of another State in a legal proceeding against itself or in which it has an interest, by giving evidence of such consent in writing, properly executed by one of its authorized representatives, such as an agent or counsel, or through diplomatic channels or any other generally accepted channels of communication. By the same method, a State could also make known its unwillingness or lack of consent, or give evidence in writing that tends to disprove any allegation or assertion of consent.<sup>110</sup>

### 2. CONSENT GIVEN IN ADVANCE IN A WRITTEN AGREEMENT

53. Consent of State could be given in advance in general, or for one or more categories of disputes or cases. Such expression of consent is binding on the part of the

<sup>108</sup> See, for example, Lord Atkin in *The "Cristina"* (1938) (*Annual Digest* . . . 1938–1940 (London), vol. 9, case No. 86, p. 250):

"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law, which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, *they will not by their process make him against his will a party to legal proceedings*\* whether the proceedings involve process against his person or seek to recover from him specific damages." (*Ibid.*, p. 252.)

<sup>109</sup> Thus, Article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, approved in the Law of the Union of Soviet Socialist Republics dated 8 December 1961, provides: "The filing of a suit against a foreign State, the collection of a claim against it and the attachment of the property located in the USSR may be permitted *only*\* with the *consent*\* of the competent organs of the State concerned." (United Nations, *Materials on Jurisdictional Immunities* . . . (*op. cit.*), p. 40.)

<sup>110</sup> See, for instance, statements submitted in writing to the Court by accredited diplomats in *Krajina v. Tass Agency* (1949); cf. *Compañía Mercantil Argentina v. United States Shipping Board* (1924) and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (cases cited in footnote 87 above).

State giving it in accordance with the manner and circumstances in which consent is given and subject to the limitations prescribed by its expression. The nature and extent of its binding character depend on the party invoking such consent. For instance, if consent is expressed in the provision of a treaty concluded by States, it is certainly binding on the consenting State, and State parties entitled to invoke the provisions of the treaty could avail themselves of the expression of such consent. The law of treaties upholds the validity of the expression of consent to jurisdiction as well as the applicability of other provisions of the same treaty. Consequently, privity of treaty precludes non-parties from the benefit or advantage to be derived from the provisions of the treaty. If, likewise, consent is expressed in a provision of an international agreement concluded by States and international organizations, the permissive effect of such consent is available to all parties including international organizations. On the other hand, the extent to which individuals and corporations non-parties to the treaty or international agreement may successfully invoke one of the provisions of the treaty is either negative or non-existent.

54. Indeed, the practice of States does not go so far as to support the proposition that the court of a State is bound to exercise its existing jurisdiction over or against another sovereign State which has previously expressed its consent to such jurisdiction in the provision of a treaty or an international agreement, or indeed in the express terms of a contract with the individual or corporation concerned. While the State, having given consent in any of these ways, may be bound by its own expression under international law or internal law or by application of a rule of estoppel, the exercise of jurisdiction or the decision to exercise or not to exercise jurisdiction is exclusively within the province and function of the trial court itself. In other words, the rules regarding the expression of consent by the State involved in a litigation are not absolutely binding on the court of another State, which is free to continue to refrain from exercising jurisdiction for reasons it is not obliged to disclose. The court could and must devise its own rules and satisfy its own requirements regarding the manner in which such a consent could be given with desired consequences. The court may refuse to recognize the validity of consent either given in advance and not at the time of the proceeding, not before the competent authority, or not given *in facie curiae*.<sup>111</sup> Care should therefore be taken that the proposition to be formulated in draft article 8 should be discretionary and not mandatory as far as the court is concerned. The court may or may not exercise its jurisdiction. Customary international law or international usage recognizes the exercisability of

jurisdiction by the Court against another State that has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent.

### 3. CONSENT TO THE JURISDICTION BY CONDUCT OF THE STATE

55. While it is necessary to exclude any implication of consent in this particular connection of non-application of State immunity in the event of consent to submit to the jurisdiction, the expression of consent or its communication in any event must be explicit. Consent could be evidenced by positive conduct of the State; it cannot be presumed to exist by sheer implication, nor by mere silence, acquiescence or inaction on the part of that State. A clear instance of conduct or action amounting to the expression of assent or concurrence or agreement or approval or consent to the exercise of jurisdiction is illustrated by the entry of appearance by or on behalf of the State contesting the case on the merit. Such conduct may be in the form of a State requesting to be joined as party to the litigation, irrespective of the degree of its preparedness or willingness to be bound by the decision or the extent of its prior acceptance of subsequent enforcement measures or execution of judgement.<sup>112</sup> There is clearly an unequivocal evidence of consent to the assumption and exercise of jurisdiction by the court, if and when the State knowingly enters an appearance in answer to a claim of right or to contest a dispute involving the State or over a matter in which it has an interest, and when such entry of appearance is unconditional and unaccompanied by a plea of State immunity, despite the fact that other objections may have been raised against the exercise of jurisdiction in that case on grounds recognized either under the general conflict rules or under the rules of competence of the trial court, other than by reason of jurisdictional immunity.

56. By choosing to become a party to a litigation before the court of another State, a State clearly consents to the exercise of such jurisdiction, regardless of whether it is a plaintiff or a defendant or indeed in an *ex parte* proceeding or an action *in rem* or in a proceeding seeking to attach or seize a property which belongs to it or in which it has an interest, or a property which is in its possession or control. A State does not, however, consent to the exercise of jurisdiction of another State by entering a conditional appearance or by appearing expressly to contest or challenge jurisdiction on the grounds of sovereign immunity or State immunity, although such appearances accompanied by further contentions on the merit to establish its

<sup>111</sup> See, for example, *Duff Development Co. Ltd. v. Government of Kelantan* (1924) (see footnote 67 above, *in fine*): by assenting to the arbitration clause in a deed, or by applying to the courts to set aside the award of the arbitrator, the Government of Kelantan did not submit to the jurisdiction of the High Court in respect of a later proceeding by the company to enforce the award. See also *Kahan v. Pakistan Federation* (1951) (see footnote 68 above, *in fine*) and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 87 above).

<sup>112</sup> Although, for practical purposes, F. Laurant in his *Le droit civil international*, (Brussels, Bruylant-Christophe, 1881), vol. III, pp. 80–81, made no distinction between “power to decide” (jurisdiction) and “power to execute” (execution), consent by a State to the exercise of the power to decide by the court of another State cannot be presumed to extend to the exercise of the power to execute or enforce judgement against the State, having consented to the exercise of jurisdiction by appearing before the court without raising a plea of jurisdictional immunity.

immunity could result in the actual exercise of jurisdiction by the court.<sup>113</sup>

57. In point of fact, the expression of consent, either in writing or by conduct, which is the subject of draft article 8 entails practically the same results as voluntary submission to the jurisdiction in draft article 9. The line of distinction between consent and voluntary submission is necessarily a very fine one, and, as such, is not readily discernible, nor indeed clearly appreciable. Voluntary submission could be viewed as a more affirmative method of expressing consent by conduct, since volition is likely to be regarded as a clearer and more explicit expression of assent, or an unhesitating and unequivocal manifestation of willingness and readiness on the part of a free-willing sovereign state to submit to all the consequences of adjudication by the court of another State, up to but not including measures of execution.

### C. Text of article 8

58. Article 8 on consent of State might contain the following provision:

#### *Article 8: Consent of State*

**1. A State shall not exercise jurisdiction against another State without the consent of that other State in accordance with the provisions of the present articles.**

**2. Jurisdiction may be exercised against a State which consents to its exercise.**

**3. A State may give consent to the exercise of jurisdiction by the court of another State under paragraph 2:**

**(a) in writing, expressly for a specific case after a dispute has arisen, or**

**(b) in advance, by an express provision in a treaty or an international agreement or in a written contract in respect of one or more types of cases, or**

**(c) by the State itself, through its authorized representative appearing before the Court in a proceeding to contest a claim on the merit without raising a plea of State immunity.**

<sup>113</sup> There could be no real consent without full knowledge of the right to raise an objection on the ground of State immunity (*Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 87 above)), but see also *Earl Jowitt in Juan Ysmael & Co. v. Government of the Republic of Indonesia* (1954) (see footnote 103 above), where he said *obiter* that a claimant Government:

"... must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim." (*Op. cit.*, p. 99.)

Cf. the *Hong Kong Aircraft* case (see footnote 102 above), in which Sir Leslie Gibson of the Supreme Court of Hong Kong did not consider mere claim of ownership to be sufficient (*International Law Reports*, 1950 (London), vol. 17, case No. 45, p. 173). Contrast Justice Scrutton in *The "Jupiter"* No. 1 (1924) (United Kingdom, *The Law Reports, Probate Division*, 1924, p. 236), and Lord Radcliffe in the *Gold bars* case, *United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England* (1952) (*Annual Digest ... 1949* (London), vol. 16, case No. 36, pp. 176-177).

### ARTICLE 9 (Voluntary submission)

#### A. The concept of voluntary submission

59. The notion of voluntary submission is essentially not dissimilar from an expression of consent to the exercise of jurisdiction by a court of another State. The only slight difference between voluntary submission in this draft article 9 and consent of a State in draft article 8 lies in the emphasis on the initiative taken by the State, which has of its own accord opted or elected to submit to the jurisdiction of another State. The capacity of a State to initiate proceedings in a court of another State is subject to the rules of competence and procedures prevailing in the State of the forum.<sup>114</sup> If a State expressly chooses a forum, the choice is tantamount to voluntary submission. If a State becomes a plaintiff or intervenes in a proceeding before a court of that other State, it has taken a step even slightly beyond mere consent to be sued or to be brought to trial before the court of that other State. The net result of voluntary submission under this article and the expression of consent under article 8 is identical. The State is considered as being impleaded in either event, whether it has itself freely and voluntarily submitted to the jurisdiction, or merely consented to the exercise of such jurisdiction by a court of another State, as in article 8. Once jurisdiction becomes exercisable without the need to compel the State to submit to it, that State cannot be heard afterwards to object to the exercise of such jurisdiction for lack of consent, for the simple reason that it has either expressly consented to it or has willingly submitted to it.

60. In other words, a State is deemed to have failed to raise a plea of State immunity once the proceedings have reached a stage in which it has become clear that the State has in fact consented or voluntarily submitted to the jurisdiction. At this point, that State can no longer withdraw from the proceedings by invoking State immunity, or by insisting on fulfilment of the obligation on the part of the State of the forum to decline jurisdiction as required by article 7.

61. Voluntary submission is therefore an act which is clearly expressive of the willingness of a State to have the case decided, or the question determined, or the dispute settled, by a court of another State. There are several ways in which this willingness or volition of State could be expressed or demonstrated. How to manifest or communicate this volition is for each State to decide in any given situation. Nevertheless, the question whether such expression of volition could be said to be manifest must ultimately be determined by the judicial authority in accordance with its own established practice or its own rules of procedure, having regard to the circumstances of each case.

<sup>114</sup> It is possible to envisage some disabilities or lack of capacity to sue for technical procedural reasons, such as the case of an "enemy State" in time of war before some jurisdictions.

## 1. INSTITUTING OR INTERVENING IN A LEGAL PROCEEDING

62. One clearly visible method of voluntary submission consists in the act of bringing an action or instituting a legal proceeding before a court of another State. By becoming a plaintiff before the judicial authority of another State, the claimant State, seeking judicial relief or other remedies, manifestly submits to the jurisdiction of the forum. There can be no doubt that when a State initiates a litigation before a court of another State, it has irrevocably submitted to the jurisdiction of that other State to the extent that it can no longer be heard to complain against the exercise of the jurisdiction it has itself initially invoked.<sup>115</sup>

63. The same result follows in the event a State intervenes in a proceeding before a court of another State, unless the intervention is exclusively or simultaneously accompanied by a plea of State immunity or purposely to object to the exercise of jurisdiction on the ground of its sovereign immunity.<sup>116</sup> Similarly, a State which participates in an interpleader's proceeding voluntarily submits to the jurisdiction of that court. Any positive action by way of participation in a proceeding by a State on its own initiative and not under any compulsion is inconsistent with a subsequent contention that the volunteering State is being impleaded. However, participation for the limited purpose of objecting to the continuation of the proceedings will not be viewed as voluntary submission.<sup>117</sup>

## 2. ENTERING AN APPEARANCE ON A VOLUNTARY BASIS

64. A State may be said to have voluntarily submitted to the jurisdiction of a court of another State without being itself a plaintiff or claimant or intervening in proceedings before that court. For instance, a State may volunteer its appearance or freely enter an appearance, not in answer to any claim or any writ of summons, but of its own free will as *amicus curiae* or otherwise, in the interest of justice to

make a point or to assert an independent claim in connection with proceedings before a court of another State. Unless the assertion is one concerning jurisdictional immunity in regard to the proceedings in progress, entering an appearance on a voluntary basis before a court of another State constitutes another example of voluntary submission to the jurisdiction, after which no plea of State immunity could be successfully raised.

65. By way of contrast, it follows that failure on the part of a State to enter an appearance in a legal proceeding is not to be construed as passive submission to the jurisdiction. Alternatively, a claim of interest by a State in a property under litigation is not inconsistent with its assertion of jurisdictional immunity.<sup>118</sup> A State cannot be compelled to come before a court of another State to assert an interest in a property against which an action *in rem* is in progress, if that State does not choose to submit to the jurisdiction of the court entertaining the proceedings.

## 3. OTHER INDICATIONS OF INTENTION TO SUBMIT TO THE JURISDICTION

66. Voluntary submission to the jurisdiction is a positive act performed by a State which clearly indicates its intention in this regard. A State may undertake to submit to the jurisdiction of a court of another State in a treaty or an international agreement, and such undertaking could be done in such a way as to be binding on it under the law of treaties.<sup>119</sup> There is nothing to prevent a State from concluding a contract in writing with an individual, containing a term specifying an agreed choice of law governing the contract as well as a mutually selected method of settlement of dispute arising out of the transaction. A State could freely choose not only the substantive law but also a court of law other than its own to have a question decided. Such a chosen court may operate as a *forum prorogatum* in private international law.<sup>120</sup> However, the final determination on competence or decision to exercise jurisdiction will, in the ultimate analysis, depend on the local rules of procedure, or the *lex fori* itself, which could set a standard or requirements more exacting than mere indications of willingness or clear intention or binding undertaking to submit to the jurisdiction. The competent forum may insist on actual

<sup>115</sup> For example, the European Convention on State Immunity (see footnote 79 above), which provides, in article 1, para. 1, that:

"A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State."

See Council of Europe, *Explanatory Reports on the European Convention on State Immunity* (Strasbourg, 1972).

<sup>116</sup> Thus, according to article 1, para. 3, of the European Convention on State Immunity:

"A Contracting State which makes a counterclaim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counterclaim but also to the principal claim."

See also draft article 10 below, para. 81.

<sup>117</sup> See, for example, art. 13 of the European Convention on State Immunity:

"Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it."

See also *Dollfus Mieg et Cie* (1950) (1952) (see footnote 89 above).

<sup>118</sup> For example, in *The "Jupiter"* No. 1 (1924) (see footnote 113 above), Judge Hill held that a writ *in rem* against a vessel in the possession of the Soviet Government must be set aside in as much as the process against the ship compelled all persons claiming interests therein to assert their claims before the court, and inasmuch as the USSR claimed ownership in her and did not submit to the jurisdiction. Contrast *The "Jupiter"* No. 2 (1925), where the same ship was then in the hands of an Italian company and the Soviet Government did not claim an interest in her. (United Kingdom, *The Law Reports, Probate Division*, 1925, p. 69.)

<sup>119</sup> See, for example, the practice cited in footnote 143 below.

<sup>120</sup> See, for example, art. 2, para. (b) of the European Convention on State Immunity: "by an express term contained in a contract in writing."



voluntary submission, and nothing short of submission could entail exercise of jurisdiction.<sup>121</sup>

### B. The effect of voluntary submission

67. The fact that a State voluntarily submits to the jurisdiction of a court of another State by any of the recognized means or methods of voluntary submission entails the consequence of disentitlement of that State from pleading jurisdictional immunity. Thus, if a State has intervened or taken a step in the proceedings before a court of another State, it must be deemed to have submitted to the jurisdiction of that court, unless it can justify the assertion that such intervention or such a step was only for the purpose of claiming immunity or asserting an interest in property in circumstances such that the State would have been entitled to immunity had the proceedings been brought against it.<sup>122</sup>

68. The practical consequence of voluntary submission, insofar as it is recognized by a competent court exercising jurisdiction, extends to all stages of appeal but not to measures of execution, nor to any counterclaim unless it arises out of the same legal relationship or facts as the claim.<sup>123</sup> Propositions of law relating to the effect of counterclaim will be considered in draft article 10 (see paras. 72–80 below). Suffice it to state that for the purposes of article 9, voluntary submission by instituting proceedings, or by intervention or by taking a step in proceedings, or by otherwise indicating a clear intention to submit to the jurisdiction, will entail legal consequences of amenability in respect to those proceedings only, and not to other proceedings or independent counterclaims.<sup>124</sup>

69. As has been seen in the case of expression of consent by a State to the exercise of jurisdiction by a court of another State, voluntary submission by a State to the jurisdiction of a similar court only enables the juridical authority to overlook or forego consideration of possible questions of jurisdictional immunity. It does not serve to compel the court of another State to decline jurisdiction or

to refrain from the exercise of its otherwise competent jurisdiction; it merely renders exercisable an otherwise existing jurisdiction in spite of the fact that a foreign State is involved. The exercise of jurisdiction by the competent court in the event of voluntary submission is merely permissive or discretionary, and not mandatory or compulsory for the court. Indeed, the court may have to follow other rules of competence or procedure which prohibit the exercise of jurisdiction regardless of voluntary submission, notwithstanding the fact that the foreign State itself has instituted the proceedings or effectively intervened or taken a step in the proceedings already initiated or pending before the court. Each court is ultimately master of its own procedure regarding particularly the extent of its own jurisdiction and the justiciability of each cause of action.

70. The practice of States has not given much indication as to the direction in which the court is likely to react in the event of voluntary submission by a State, which is indubitably binding on that State, but not necessarily on the courts of another State. A court may dismiss an action on countless grounds, including non-justiciability and lack of competence or jurisdiction for reasons other than the application of State immunity. It may do so on grounds of its own public policy or may prefer to decline jurisdiction owing to the existence of a more convenient forum. For these reasons, the provisions of article 9 on voluntary submission should be formulated with extreme care and must be delicately balanced.

### C. Text of article 9

71. The following wording is suggested for article 9:

#### *Article 9. Voluntary submission*

1. Jurisdiction may be exercised against a State which has voluntarily submitted to the jurisdiction of a court of another State:

(a) by itself instituting or intervening in proceedings before that court; or

(b) by appearing before that court of its own volition or taking a step in connection with proceedings before that court without raising a claim of State immunity; or

(c) by otherwise expressly indicating its volition to submit to the jurisdiction and to have the outcome of a dispute or question determined by that court.

2. The mere fact that a State fails to appear in proceedings before a court of another State shall not be construed as voluntary submission.

3. Appearance or intervention by or on behalf of a State in proceedings before a court of another State with a contention of lack of jurisdiction on the ground of State immunity, or an assertion of an interest in a property in question shall not constitute voluntary submission for the purpose of paragraph 1.

#### ARTICLE 10 (Counter-claims)

72. A treatment of general principles of State immunity would of necessity be incomplete without reference to another aspect of consent of State in a somewhat different

<sup>121</sup> For example, the United Kingdom State Immunity Act 1978, which provides, in sect. 2, paras. (1) and (2):

“(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of courts of the United Kingdom.

“(2) . . . but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as submission.” (*Op. cit.*, pp. 715–716.)

<sup>122</sup> See, for example, subsections 4(a) and (b) of section 2 of the United Kingdom State Immunity Act 1978. Subsection 5 does not regard as voluntary submission any step taken by a State on proceedings before a court of another State “in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.” (*Op. cit.*, p. 716.) Delay in raising a plea or defence of jurisdictional immunity may create an impression in favour of submission.

<sup>123</sup> See, for example, article 1, subpara. 1(a) of the European Convention on State Immunity.

<sup>124</sup> Voluntary submission to the jurisdiction of a court of another State is limited to the proceedings in respect of which a State has made voluntary submission, and not to other cases before that court, much less to all other cases in general before the judicial authority of that other State.



connection. As has been seen in draft articles 8 and 9, there are many ways in which a State may signify its consent or voluntarily submit to the jurisdiction of a court of another State, with differing implications and to a varying degree or extent of subjection to the jurisdiction of the State of the forum. A State may institute proceedings in a court of another State. The question may arise as to the extent to which such initiative could entail subjection or amenability of that State to the jurisdiction of courts of another State in respect of counter-claims against the plaintiff State. Conversely, a State against which a legal proceeding has been instituted in a court of another State may decide to counter-claim against the party that initiated the proceedings. In both connections, a State is to some extent amenable to the competent jurisdiction of the forum, since in either case there is clear evidence of consent to submit to the jurisdiction. The consequence of the expression of such consent or manifestation of such volition to submit to the jurisdiction may vary in the degree and extent of its amenability or the effectiveness of its subjection to the competent jurisdiction of the authority concerned. In each case, whether a State brings a counter-claim or a counter-claim is brought against a State in a court of another State, an important question arises as to the extent and scope of effectiveness of such a counter-claim by or against a State.

#### A. Counter-claims against a State

73. A situation closely following voluntary submission by a State to the jurisdiction of a court of another State by instituting proceedings before that court is produced by the possibility open to the defendant or an interested party to bring a counter-claim against the State. It has been noted that by bringing an action, the State is amenable to the jurisdiction of the court of another State in respect of that course of action. The State has submitted to the jurisdiction fully in regard to its claim (see para. 67 above). It should be further observed in the present context that such submission entails not only as respects the principal claim but also with respect to counter-claims arising out of the same legal relationship or the same facts as the claim.<sup>125</sup>

74. The legal consequences of voluntary submission are indeed far-reaching. A State which voluntarily submits to the jurisdiction of a court of another State by instituting proceedings or intervening in proceedings before that court submits to all the consequential outcome of the exercise of jurisdiction, all stages of the proceedings, including decision of first instance, appellate and final adjudication, as well as the incidence of costs, which lies within the exclusive discretion of the deciding authority. While submission to jurisdiction stops short of subjection to execution of judgement, which is a separate stage requiring separate consent of the State, it may cover wider ground than the original claim. It can extrude beyond the principal claim, and in some measure also covers counter-claims against the State.

75. Once a State sets in motion the machinery of justice of another State, unforeseen consequences may follow. Cross-actions might be brought against the State by the defendant, seeking to set off the principal claim either by an independent counter-claim or by counter-claiming in respect of the same subject-matter. Seeing that a foreign State has submitted to the local jurisdiction, other creditors may feel inclined to join in as additional parties to the proceedings. Care should be taken to delineate the extent of the consequences of voluntary submission by a State to the jurisdiction of a court of another State. Such voluntary submission has a limited scope, and entails consequences primarily with respect to the proceedings instituted by the State or in which the State has intervened. The State making such submission does not submit to the jurisdiction generally, for all matters and for all times. One effect of submission which is perhaps not contemplated by the State is its liability or amenability to the jurisdiction of the judicial authority of another State in respect of counter-claims arising out of the same transaction or occurrence that is the subject-matter of the principle claim,<sup>126</sup> or of the same legal relationship or facts as the principal claim.<sup>127</sup>

76. Independent counter-claims arising out of different transactions or occurrence not forming part of the subject-matter of the claim, or arising out of a distinct legal relationship or separate facts as the principal claim may only be maintained against the State if they fall within the scope of one of the admissible exceptions to the rule of State immunity. In other words, separate and independent counter-claims or cross-actions could be brought against the foreign State only when such separate proceedings would have been available and actionable under other parts of the present articles, regardless of consent or voluntary submission, or the fact that the State has instituted or intervened in proceedings before that court.<sup>128</sup>

77. Even in respect of counter-claims arising out of the same transaction or occurrence on which the claim is based, jurisdiction is only exercisable to the extent that the counter-claims do not exceed the amount of the principal claim or do not seek relief differing in kind. In such event, the court has the choice of proceeding with consideration

<sup>126</sup> See, for example, the United States Foreign Sovereign Immunities Act of 1976 (see footnote 86 above), section 1607 (Counterclaims): "(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state."

<sup>127</sup> See, for example, section 2, para. 6, of the United Kingdom State Immunity Act 1978. See also *Strousberg v. Republic of Costa Rica* (1881) *Law Times Reports* (London), vol. 44, p. 199, where the defendant was allowed to assert any claim he had by way of cross-action or counter-claim to the original action in order that justice may be done. But such counter-claims and cross-suits can only be brought in respect of the same transactions and can only operate as set-offs.

<sup>128</sup> Common law jurisdictions tend to limit the scope and extent of counter-claims against foreign States, while in some civil law jurisdictions, independent counter-claims have been allowed to operate as offensive remedies. In some cases, affirmative relief has been granted. See, for example, *Etat de Pérou v. Krelinger* (1857) (*Pasicrisie belge*, 1857 (Brussels), part 2, p. 348); *Letort v. Gouvernement Ottoman* (1914) (*Revue juridique internationale de la locomotion aérienne*, 1914 (Paris), p. 142);

<sup>125</sup> See footnote 123 above.

of the counter-claim to the extent of the amount of relief sought in the principle claim, without any further relief differing in kind. Counter-claims beyond the extent thus described may be permissible but will be reduced in scope and extent to the same amount and kind of relief as the original claim and as such would operate merely as set-offs rather than offensive counter-claims.<sup>129</sup>

### B. Counter-claims by a State

78. The exercise of jurisdiction is also possible in regard to counter-claims by a State. A State may make voluntary submission by introducing or making counter-claims before the court of another State. By itself bringing a cross-action, a cross-suit or a counter-claim before the judicial authority of another State, the State submits to the jurisdiction of that other State. Such cross-actions may be entertained irrespective of their scope or the extent of the relief sought or the nature of the remedy requested. If they do not arise out of the same transaction as the original claim, then the State only submits to the jurisdiction in respect of the independent counter-claims or the separate proceedings instituted by the State. As they are separate and unconnected proceedings, voluntary submission to one does not necessarily imply submission to the other.

79. It should be observed, however, that in respect of the original claim or the principal claim against the State which has arisen out of the same transactions or occurrence on which the counter-claims are based, voluntary submission by the State counter-claiming must of necessity extend to the principal claim, covering fully the original action as well. Unlike counter-claims against foreign States, which in the practice of many jurisdictions are limited in the scope and extent allowable,<sup>130</sup> counter-claims by the State can, but need not, operate only as set-offs. The State could seek an affirmative relief by bringing a counter-claim or a cross-suit, the proceedings in respect of which it has thereby submitted to the jurisdiction of the tried court. The only difference appears to be that the relief sought in the original claim may exceed that envisaged in the counter-claim by the State, both in amount and in kind. Submission to jurisdiction by the State making a counter-claim entails a further-reaching effect than voluntary submission by the State instituting original proceedings or making principal claims before that same court.<sup>131</sup>

80. This discrepancy in favour of the position of a State as a plaintiff before the courts of another State in respect of counter-claims against it, as opposed to the position of the same State as a dependant bringing counter-claims before these courts, is somewhat startling. It may entail an unintended consequence—that of encouraging States to seek relief by instituting proceedings or intervening in

proceedings before the courts of other States, rather than await the fate of having proceedings instituted against themselves before deciding to make offensive counter-claims, with fuller and more damaging effect than defensive counter-claims against the States, which could at best operate as set-offs. This anomaly could be rectified by equalizing the effect of counter-claims against and by the State. On the other hand, there may still be valid reasons for inducing the State to take the initiative of voluntary submission.

### C. Text of article 10

81. Article 10 may be thus worded:

#### *Article 10. Counter-claims*

**1. In any legal proceedings instituted by a State, or in which a State intervenes, in a court of another State, jurisdiction may be exercised against the State in respect of any counter-claim:**

**(a) for which in accordance with the provisions of the present articles jurisdiction could be exercised had separate proceedings been instituted before that court; or**

**(b) arising out of the same legal relationship or facts as the principal claim; and**

**(c) to the extent that the counter-claim does not seek relief exceeding in amount or differing in kind from that sought by the State in the principal claim.**

**2. Any counter-claim beyond the extent referred to in paragraph 1(c) shall operate as a set-off only.**

**3. Notwithstanding voluntary submission by a State under article 9, jurisdiction may not be exercised against it in respect of any counter-claim exceeding in amount or differing in kind from the relief sought by the State in the principal claim.**

**4. A State which makes a counter-claim in proceedings before a court of another State voluntarily submits to the jurisdiction of the courts of that other State with respect not only to the counter-claim but also to the principal claim.**

### ARTICLE 11 (Waiver)

#### **A. The notion of waiver and its consequences**

82. Another known method of expressing consent of a State to the exercise of jurisdiction by a court of another State is renunciation of jurisdictional immunity by the State. Renunciation or waiver of immunity may be considered as a form of voluntary submission. It is recognized as such in the practice of States. Waiver is often treated in several legislations under the same heading as voluntary submission.<sup>132</sup> The internal laws of some

<sup>129</sup> See, for example, art. 1, para. 2 of the European Convention on State Immunity; sect. 1607 (c) of the United States Foreign Sovereign Immunities Act of 1976; and sect. 2, para. 6, of the United Kingdom State Immunity Act 1978.

<sup>130</sup> See the practice of States referred to above in footnote 128.

<sup>131</sup> See, for example, art. 1, para. 3 of the European Convention on State Immunity.

<sup>132</sup> See, for example, the United Kingdom State Immunity Act 1978, sect. 2, on submission to jurisdiction as an exception from immunity. See also the reply of Yugoslavia (August 1980) to question 2 of the questionnaire addressed to Governments:

"Since court action was initiated by a foreign State, the respective foreign State thereby *waived*\* the jurisdictional immunity by bringing

(Continued on next page.)

countries contain specific provisions on waiver of State immunity, in the same sense and with the same meaning and effect as voluntary submission.<sup>133</sup>

83. Waiver is therefore another formal way of expressing consent to the jurisdiction to be exercised by the judicial authority of another State. As a juridical concept, "waiver" presupposes the existence of a right to be waived. Thus, jurisdictional immunity may be waived by a State only in the event in which that State is immune or is entitled to immunity from the jurisdiction of the courts of another State. It is not inconceivable, as in practice it has been so considered, that waiver as an effective method of voluntary submission is treated as an exception to the rule of State immunity.<sup>134</sup>

84. It is not inaccurate to state that in effect waiver entails the same consequences as voluntary submission to jurisdiction. As a notional concept, however, it reflects a different aspect of the sovereign authority of a State. As has been seen in early judicial reasonings, the notions of sovereignty, dignity, reciprocity, consent and waiver have been mentioned in this connection.<sup>135</sup> State immunity itself is sometimes said to be the direct consequence of consent or implied waiver of the sovereign right of a State to exercise jurisdiction over foreign diplomats and visiting forces. Conversely, State immunity as an aspect of sovereign right of every State can also be waived by the authority of that State.

85. As waiver of jurisdictional immunity has been notionally known practically interchangeably with voluntary submission with comparable constitute elements, the consequences of an effective waiver are broadly similar to those of voluntary submission. An effective waiver or renunciation by a State enables the courts of another State to exercise its competent judicial authority over the State which has waived its jurisdictional immunity. Once effectively waived, State immunity cannot be claimed. Waiver entails the effect of renouncing or denouncing the use or exercise of a right, which in this case is State immunity. Therefore, an effective or validly executed waiver will preclude that State which has renounced its

own right from claiming or relying on that right or raising a successful plea of jurisdictional immunity. A State which has explicitly or by clear implication waived its jurisdictional immunity from the courts of another State cannot be heard to say or argue that it is immune from their jurisdiction. It is stopped from denying the consequences of its own conduct and remains amenable to all stages of the exercise of judicial jurisdiction, up to but not including execution.

## B. Methods of waiving State immunity

### 1. EXPRESS WAIVER *in facie curiae*

86. To be effective, a waiver has to conform to the ground rules of the State of the forum. In the practice of most States, an express waiver in the face of the court when a dispute has arisen will be considered sufficient to waive State immunity. In some countries,<sup>136</sup> only such express waiver performed *in facie curiae* when jurisdiction of the court is being invoked, and nothing short of that, will satisfy the test of an effective renunciation.<sup>137</sup>

87. The judicial practice of States is not uniform on the requirements of an express waiver. While some common law jurisdictions regard an express waiver as inoperative unless it takes place before the court when there is *in esse* a proceeding against the State,<sup>138</sup> other jurisdictions look to the intent rather than the form or the timing of such expression of consent.<sup>139</sup>

### 2. EXPRESS UNDERTAKING TO WAIVE IMMUNITY

88. Jurisprudence is far from settled in State practice regarding an undertaking to waive immunity. Strict requirement has been known, which does not consider to be effective waiver of prior assent in an arbitration clause<sup>140</sup> or an agreement in a contract to submit to jurisdiction.<sup>141</sup> A clearer trend appears to be emerging,

(Footnote 132 continued.)

action in the court on a specific matter." (United Nations, *Materials on Jurisdictional Immunities* . . . (op. cit.), p. 641.)

<sup>133</sup> See, for example, the United States Foreign Sovereign Immunities Act of 1976, sect. 1605 of which provides:

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign State has waived its immunity\* either explicitly or by implication . . .";

<sup>134</sup> For example, sect. 1605, cited in the preceding footnote, appears to treat waiver as a general exception to sovereign immunities.

<sup>135</sup> See, for example, Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (see footnote 81 above):

"... every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." (Op. cit., p. 137.)

See also Lord Justice Brett in *The "Parlement belge"* (1880) (United Kingdom, *The Law Reports, Probate Division*, vol. V (1880), p. 197):

"... each and every [sovereign State] declines to exercise by means of its courts any of its territorial jurisdiction over . . . any sovereign or ambassador of any other State . . . though such sovereign, ambassador . . . be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." (*Ibid.*, pp. 214–215.)

<sup>136</sup> See, for example, *Mighell v. Sultan of Johore* (1894) (see footnote 71 above). According to Lord Esher, "it is only when the time comes that the Court is asked to exercise jurisdiction over him [the sovereign] that he can elect whether he will submit to the jurisdiction". (op. cit., p. 159.)

<sup>137</sup> See, for example, the House of Lords in *Duff Development Company Ltd. v. Government of Kelantan and another* (1924) (see footnote 67 above, *in fine*).

<sup>138</sup> See, for example, Judge Philip of the Supreme Court of Queensland (Australia), in *United States of America v. Republic of China* (1950) (see above, footnote 66), where it was held that an agreement to submit to the jurisdiction in the instrument of hypothecation was ineffective.

<sup>139</sup> See, for example, art. 2 of the European Convention on State Immunity:

"A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:

"(a) by an international agreement;

"(b) by an express term contained in a contract in writing; or

"(c) by an express consent given after dispute between the parties has arisen."

<sup>140</sup> See, for example, *Duff Development Company Ltd v. Government of Kelantan and another* (1924) (see footnote 67 above, *in fine*).

<sup>141</sup> See, for example, *Kahan v. Pakistan Federation* (1951) (see footnote 68 above, *in fine*).

however, in the legislative practice of States, of regarding the express undertaking by a State to submit to the jurisdiction of the courts of another State as a valid and operative waiver of jurisdictional immunity.<sup>142</sup> The current trend appears to favour a less rigid requirement. An express waiver is not ineffective even if it was prematurely concluded in an agreement before any dispute arose and prior to any question of jurisdiction being considered by any court. An undertaking by a State to submit to jurisdiction or to waive immunity is today considered to be binding on the State, or to constitute an effective waiver of immunity, whether it is made in a treaty or an international agreement,<sup>143</sup> or even in an ordinary contract in writing.<sup>144</sup>

89. In principle, an undertaking by a State to submit to the jurisdiction of the courts of another State, or to a forum of their mutual choice previously selected, is binding on the State in the system in which appropriately it is being considered. If the undertaking is given in a treaty or an international agreement governed by international law, then the parties to the treaty could invoke that obligation of the State to submit to jurisdiction. In actual practice, however, the question of jurisdiction is considered primarily by municipal courts, and the decision on the effectiveness of waiver or an undertaking to submit has initially to be taken by the trial court, whether or not the undertaking to submit is contained in a treaty provision or as a term of a written contract.

### 3. WAIVER BY CONDUCT OR IMPLICATION

90. As in previous articles, there is no clear evidence in support of any theory of implied waiver as an exception *per se* to State immunity. Waiver of immunity could nonetheless be effected by implication or by conduct, such as actual submission to jurisdiction by a State by instituting or intervening in proceedings without raising a

plea of jurisdictional immunity or by counter-claiming in proceedings against the State itself.

91. The crucial question relates to the problem of identifying the authority which could be considered properly authorized to effect a waiver on behalf of the State. Who can waive State immunity is a subject that requires very close attention. Generally, the highest governmental authority could waive immunity. The authority that could submit the State to the jurisdiction of another State could by its conduct waive immunity by entering an appearance before the court through its authorized representatives after the dispute has arisen. Similarly, the State organ or authority vested with the treaty-making power or the capacity and authority to conclude a written contract binding on the State could effectively agree or undertake by way of waiver of immunity to submit to the jurisdiction of a court of another State.<sup>145</sup>

### C. Text of article 11

92. Article 11 could read as follows:

#### *Article 11. Waiver*

1. Jurisdictional immunity may be waived by a State at any time before commencement or during any stage of the proceedings before a court of another State.

2. Waiver may be effected by a State or its authorized representative,

(a) expressly *in facie curiae*, or

(b) by an express undertaking to submit to the jurisdiction of a court of that other State as contained in a treaty or an international agreement or a contract in writing, or in any specific case after a dispute between the parties has arisen.

3. A State cannot claim immunity from the jurisdiction of a court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim to immunity can be based until after it has taken such a step, in which event it can claim immunity based on those facts if it does so at the earliest possible moment.

4. A foreign State is not deemed to have waived immunity if it appears before a court of another State in order specifically to assert immunity or its rights to property.

<sup>142</sup> See, for example, the United Kingdom State Immunity Act 1978, which provides in sect. 2, para. (2) that "A State may submit . . . by a prior written agreement . . ."; and the United States Foreign Sovereign Immunities Act of 1976, which provides in sect. 1605 that immunity could be waived "either explicitly or by implication."

<sup>143</sup> See, for example, treaties of commerce, navigation and trade between the USSR and the following countries: Romania (Moscow, 20 February 1947) (United Nations, *Treaty Series*, vol. 226, p. 94), arts. 5 and 6; Hungary (Moscow, 15 July 1947) (*ibid.*, vol. 216, p. 266), art. 5; Czechoslovakia (Moscow, 11 December 1947) (*ibid.*, vol. 217, p. 54), art. 4; Bulgaria (Moscow, 1 April 1948) (*ibid.*, p. 116), art. 4; German Democratic Republic (Berlin, 27 September 1957) (*ibid.*, vol. 292, p. 92), art. 4; Mongolia (Moscow, 17 December 1947) (*ibid.*, vol. 687, p. 250), art. 4; Albania (Moscow, 15 February 1958) (*ibid.*, vol. 313, p. 276), art. 4; Democratic Republic of Viet Nam (Hanoi, 12 March 1958) (*ibid.*, vol. 356, p. 164), art. 4; Democratic People's Republic of Korea (Moscow, 22 June 1960) (*ibid.*, vol. 399, p. 22), art. 4.

See also the practice of the Netherlands, in United Nations, *Materials on Jurisdictional Immunities* . . . (*op. cit.*), pp. 587-589.

<sup>144</sup> The prevailing practice is in favour of freedom of contract or treaty-making. The extent of the binding force of each contract and international agreement is a matter that requires further crystallization in State practice. There are conflicting trends in both directions.

<sup>145</sup> See, for example, the United Kingdom State Immunity Act 1978, sect. 2, para. 7:

"The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

# STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

[Agenda item 8]

DOCUMENT A/CN.4/347\* and Add.1 and 2

## Second report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur

[Original English]  
[19 June, 2 and 7 July 1981]

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## NOTE

Multilateral conventions mentioned in the present report:

	Source
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter called 1961 Vienna Convention	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter called 1963 Vienna Convention	<i>Ibid.</i> , vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	General Assembly Resolution 2530 (XXIV), annex.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) Hereinafter called 1975 Vienna Convention	<i>Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations</i> , vol. II, <i>Documents of the Conference</i> (United Nations publication, Sales No. E.75.V.12), p. 207.

## I. Introduction

1. The present report is the second on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier submitted by the Special Rapporteur for consideration by the International Law Commission. It follows the preliminary report<sup>1</sup> which was submitted by the Special Rapporteur at the thirty-second session of the Commission in 1980.<sup>2</sup>

2. The preliminary report contained a consolidated account of the consideration of the topic by the Commission and the Sixth Committee of the General Assembly, as well as of the comments submitted in writing by Governments of Member States. Emphasis was placed, in particular, on the scope, contents and structure of the appropriate legal instrument to be elaborated by the

Commission. This was done with a view to facilitating the exploratory discussion on certain important issues on which the Special Rapporteur sought advice and guidance before proceeding to the submission of draft articles. Taking into account the specific official functions of the diplomatic courier and the diplomatic bag, it was pointed out that the facilities, privileges and immunities accorded to the courier and the bag should create conditions for the normal performance of these functions, which are instrumental in the exercise of the right of communication for all official purposes. It was further maintained that this functional approach should be applied in a comprehensive manner to all types of official couriers and official bags sent to diplomatic missions, consular posts, special missions, permanent missions to international organizations or delegations to international organs or international conferences. In this connection, the Special Rapporteur had expressed a view that the concepts of "official courier" and "official bag" might, by assimilation to the status of the diplomatic courier and diplomatic bag, embrace all kinds of couriers and bags used for official

<sup>1</sup> See *Yearbook . . . 1980*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/335.

<sup>2</sup> See *Yearbook . . . 1980*, vol. I, pp. 260–263, 1634th meeting, paras. 1–27; and *Yearbook . . . 1980*, vol. II (Part Two), pp. 162–164, paras. 147–161.

communications of States with their missions abroad. In his view, without exceeding the terms of reference for the present topic, the Commission might consider advisable the adoption of the terms "official courier" and "official bag", in order to arrive at the elaboration of a more coherent and uniform set of draft articles comprising all types of official couriers and official bags sent to diplomatic missions, consular posts, special missions or to representations of States to international institutions.<sup>3</sup> The preliminary report pointed out the need to elaborate in greater detail draft provisions relating to the status of the diplomatic courier, the facilities, privileges and immunities accorded to him and to the courier *ad hoc* in the performance of their functions. It further emphasized the practical importance of the status of the diplomatic bag and, in particular, the unaccompanied bag, with special reference to its inviolability, the possible abuses and the requirements for the safe and rapid delivery of the bag, and respect for the sovereignty and legitimate considerations of the receiving and transit State. The preliminary report contained certain tentative suggestions regarding the format and structure of the draft articles.

3. At its thirty-second session, in 1980, the Commission considered the preliminary report and made comments on the issues raised in it and on questions relating to the topic as a whole.<sup>4</sup> It was generally agreed that, taking into account the practical significance of the topic, special emphasis should be placed on the application of an empirical and pragmatic method, aiming to secure a proper balance between provisions containing specific rules and provisions containing general rules with regard to the status of the courier and the bag, without any excessive details. It was also agreed that a comprehensive approach leading to a coherent set of draft articles should be applied with great caution, taking into consideration the possible reservations of States. In this connection, the prevailing view was that, while the draft articles should cover all types of official couriers and official bags, the terms "diplomatic courier" and "diplomatic bag" should be maintained as such, but the coherence and uniformity in the legal protection of all types of official couriers and official bags should be achieved through an assimilation formula, without necessarily introducing new concepts that might not be susceptible of wide acceptance by States. It was further emphasized that the nature and scope of the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag should be in conformity with their specific functions as tools for realization of the principle of communication for all official purposes. A considerable part of the discussion was concentrated on the status of the courier *ad hoc* and the status of the diplomatic bag. Several members of the

Commission, while recognizing the importance of the principle of inviolability of the bag, referred to the problem of possible abuses, the role of legal rules in the prevention of such abuses or the enhancement of practical measures of control, including the use of modern and more sophisticated means of checking the bags. It was generally agreed that the draft articles should try to secure an effective interplay between the principle of freedom of communication for all official purposes and respect for the laws and regulations of the receiving or transit State and international law, in establishing a reasonable balance between the secrecy of the diplomatic communication, and security and other legitimate considerations. The tentative structure of the draft articles suggested by the Special Rapporteur in his preliminary report<sup>5</sup> received general support, with some observations and suggestions with regard to the order and place of some provisions.<sup>6</sup> There were some other points raised during the discussion referring to the need for legal definitions of the diplomatic courier, the nature of the eventual legal instrument to be elaborated by the Commission embodying the draft articles on the topic under consideration and its relation to the existing multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations.<sup>7</sup>

4. The Commission's work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier received comments by many representatives in the Sixth Committee of the General Assembly at its thirty-fifth session.<sup>8</sup> The prevailing view

<sup>3</sup> See *Yearbook ... 1980*, vol. II (Part One), pp. 241–242, document A/CN.4/335, para. 47.

<sup>6</sup> See *Yearbook ... 1980*, vol. I, p. 264, 1634th meeting, para. 38 (Mr. Reuter); p. 282, 1637th meeting, para. 7 (Mr. Francis); p. 283, para. 16 (Mr. Thiam); p. 284, para. 26 (Mr. Riphagen) and para. 31 (Sir Francis Vallat). See also *Yearbook ... 1980*, vol. II (Part Two), p. 165, para. 170.

<sup>7</sup> See *Yearbook ... 1980*, vol. I, p. 264, 1634th meeting, para. 37 (Mr. Reuter); p. 275, 1636th meeting, para. 11 (Mr. Šahović); p. 276, para. 23 (Mr. Tabibi); p. 282, 1637th meeting, paras. 6–7 (Mr. Francis); p. 283, para. 16 (Mr. Thiam); p. 284, para. 22 (Mr. Díaz González) and para. 26 (Mr. Riphagen); p. 285, para. 37 (Mr. Pinto). See also *Yearbook ... 1980*, vol. II (Part Two), pp. 164–165, paras. 166, 169, 170 and 174.

The multilateral conventions concluded under the auspices of the United Nations referred to in the present report are: the 1961 Vienna Convention, the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention (see p. 153 above for note concerning these instruments).

<sup>8</sup> See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 44th meeting, para. 41 (Netherlands); 48th meeting, para. 46 (Japan) and para. 55 (Finland); 50th meeting, para. 10 (Romania) and para. 50 (France); 51st meeting, para. 16 (United Kingdom), para. 39 (Brazil) and para. 54 (Ethiopia); 52nd meeting, para. 4 (German Democratic Republic), para. 60 (Sri Lanka) and para. 72 (USSR); 53rd meeting, para. 25 (Italy) and para. 34 (Mongolia); 54th meeting, para. 6 (Jamaica), para. 24 (Czechoslovakia) and para. 53 (India); 55th meeting, para. 23 (Spain), para. 39 (Algeria) and para. 51 (Hungary); 56th meeting, para. 74 (Egypt); 57th meeting, para. 13 (Venezuela), para. 26 (Argentina), para. 38 (Libyan Arab Jamahiriva) and para. 48 (Byelorussian SSR); 58th meeting, para. 13 (Pakistan), para. 21 (Poland), para. 33 (Tunisia); 59th meeting, para. 9 (Cyprus), paras. 22–26 (Bulgaria) and para. 54 (Bangladesh). See also "Topical summary, prepared by the Secretariat, of the discussion on the report of

<sup>3</sup> See the preliminary report, paras. 42 and 60–62 (*Yearbook ... 1980*, vol. II (Part One), pp. 241 and 244–245, document A/CN.4/335); and *Yearbook ... 1980*, vol. II (Part Two), p. 163, para. 153.

<sup>4</sup> See *Yearbook ... 1980*, vol. I, pp. 263–264, 1634th meeting, paras. 28–41; pp. 274–276, 1636th meeting, paras. 1–23; pp. 281–287, 1637th meeting, paras. 1–56; and *Yearbook ... 1980*, vol. II (Part Two), pp. 164–165, paras. 162–176.



was that the development of contemporary international relations and the intensified communications through the use of diplomatic couriers and diplomatic bags of different types called for some additions and further elaboration of new rules which would supplement the existing conventions and fill their legal gaps.<sup>9</sup> It was pointed out that the elaboration of such rules safeguarding the inviolability of diplomatic couriers and diplomatic bags was particularly important to the developing countries, with their limited human and material resources.<sup>10</sup> Some representatives, however, expressed the view that the status of the diplomatic courier and the diplomatic bag had been adequately regulated in existing international treaties and that the problem was not so much one of lack of regulation as one of political will of States to observe the existing international conventions.<sup>11</sup> Most of the representatives considered that the preliminary report submitted by the Special Rapporteur contained all the pertinent elements for the preparation of draft articles and provided a useful basis for further work. The comments made by the Commission on the scope and content of the draft articles with regard to the functional and comprehensive approach to be applied were met with general agreement. In this connection, it was emphasized that while considering the courier and the bag as important instruments in the exercise of the freedom of communication for all official purposes, the draft articles should ensure the unrestricted and uniform regulation of the status of all kinds of couriers and bags used by States to maintain links with their missions abroad. Several representatives agreed with the suggestion, reflected in paragraph 159 of the Commission's report, that the draft articles should formulate the fundamental principles of international law underlying the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations.<sup>12</sup> In the opinion of some representatives, the elaboration of definitions of the diplomatic courier and the diplomatic bag, applied to all kinds of official couriers or bags, would contribute significantly to the completion of some of the tasks facing the Commission and would have a beneficial effect on the development of diplomatic law as a whole.<sup>13</sup>

(Footnote 8 continued.)

the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 366–382.

<sup>9</sup> See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 50th meeting, para. 10 (Romania); 51st meeting, para. 39 (Brazil); 52nd meeting, para. 60 (Sri Lanka) and para. 72 (USSR); 53rd meeting, para. 34 (Mongolia); 55th meeting, para. 39 (Algeria) and para. 51 (Hungary); 58th meeting, para. 21 (Poland). See also "Topical summary . . ." (A/CN.4/L.326), paras. 367, 370 and 371.

<sup>10</sup> See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 52nd meeting, para. 60 (Sri Lanka); 54th meeting, para. 6 (Jamaica); 55th meeting, para. 39 (Algeria).

<sup>11</sup> *Ibid.*, 48th meeting, para. 46 (Japan); 51st meeting, para. 16 (United Kingdom); 53rd meeting, para. 25 (Italy); 55th meeting, para. 23 (Spain); 57th meeting, para. 13 (Venezuela).

<sup>12</sup> See footnote 7 above, second para.

<sup>13</sup> See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 53rd meeting, para. 25 (Italy); 59th meeting, para. 26 (Bulgaria). See also "Topical summary . . ." (A/CN.4/L.326), paras. 376 and 378.

It was maintained that the elaboration of pertinent rules with regard to the status of the courier and the bag would help to solve issues of possible abuses and would have an effective preventive role in this matter.<sup>14</sup> Some representatives indicated that they would present their comments on the topic when the Commission would submit draft articles for consideration by the Sixth Committee of the General Assembly, and the wish was expressed that in the not too distant future the Commission would be able to begin its work on the draft articles to be proposed by the Special Rapporteur.

5. The General Assembly, having considered the Commission's report on the work of its thirty-second session, recommended, in paragraph 4(f) of its resolution 35/163 of 15 December 1980, that the Commission should "continue its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, with a view to the possible elaboration of an appropriate legal instrument" on that topic. The present report is submitted by the Special Rapporteur to the Commission at its thirty-third session pursuant to the above-mentioned resolution of the General Assembly.

6. Following the recommendation that emerged from the debate in the Sixth Committee, namely, that the Commission should begin work on the draft articles to be proposed by the Special Rapporteur at the current session of the Commission,<sup>15</sup> and in the light of the comments made so far, the present report contains the first draft articles on the topic. They are submitted on a tentative basis, as an indication of the thinking and general approach followed by the Special Rapporteur on issues relating to the scope of the draft articles and some definitional problems which by their very nature may affect the further work on the topic under consideration as a whole.

7. The structure of the draft articles and the plan of work suggested in the present report are along the lines of the proposals advanced in the preliminary report<sup>16</sup> and the comments made during the debate in the thirty-second session of the Commission<sup>17</sup> and the Sixth Committee of the General Assembly at its thirty-fifth session.<sup>18</sup> Accordingly, it is proposed that the following structure of the draft articles be adopted:

*Part I. General provisions.*

*Part II. Draft articles on the status of the diplomatic*

<sup>14</sup> See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 52nd meeting, para. 72 (USSR); 53rd meeting, para. 34 (Mongolia); 54th meeting, para. 24 (Czechoslovakia). See also "Topical summary . . ." (A/CN.4/L.326), para. 378.

<sup>15</sup> See "Topical summary . . ." (A/CN.4/L.326), paras. 370–371.

<sup>16</sup> See *Yearbook . . . 1980*, vol. II (Part One), pp. 244–245, document A/CN.4/335, para. 60.

<sup>17</sup> Subject to certain reservations and proposals (see *Yearbook . . . 1980*, vol. I, p. 264, 1634th meeting, para. 38 (Mr. Reuter); p. 276, 1636th meeting, para. 19 (Mr. Evensen); p. 282, 1637th meeting, para. 7 (Mr. Francis); p. 283, para. 16 (Mr. Thiam); p. 284, paras. 24–26 (Mr. Riphagen) and para. 29 (Sir Francis Vallat)), the tentative structure suggested by the Special Rapporteur as a working hypothesis met with the general support of the Commission (see *Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 170).

<sup>18</sup> See "Topical summary . . ." (A/CN.4/L.326), para. 371.

courier, including the courier *ad hoc* and the status of the captain of a commercial aircraft or ship carrying a diplomatic bag.

*Part III.* Status of the diplomatic bag, including the diplomatic bag not accompanied by diplomatic courier.

*Part IV.* Other provisions (miscellaneous provisions), including obligations of the transit State and the third

State, relationship of the draft articles to the existing multilateral conventions in the field of the diplomatic law concluded under the auspices of the United Nations, and other provisions.

8. The present report would be confined to the consideration of some issues relating to draft articles within part I.

## II. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

### PART I. GENERAL PROVISIONS

#### Introduction

9. It is suggested that within the general provisions should come draft articles that by their nature could constitute an introduction to the specific legal rules and would apply to the whole set of articles. In our submission, and taking into account the well-established pattern of the structure of multilateral treaties and the prevailing codification practice, such a general provision on the topic under consideration could refer to:

(a) the scope of the present draft articles;

(b) the use of terms for the purposes of the draft articles;

(c) the enunciation of certain general principles of diplomatic law, in particular principles of international law underlying the multilateral conventions concluded under the auspices of the United Nations with special reference to the status of the diplomatic courier and the diplomatic bag.

10. When dealing with the question of the scope of application of the present draft articles, the Special Rapporteur intends to explore the possibilities of adopting a comprehensive approach comprising the diplomatic courier and the diplomatic bag as well as other couriers and bags used by States in their official communications with their consular posts, special missions, permanent missions to international organizations or delegations abroad. In this connection special emphasis is placed on the brief review of the legislative history of the four multilateral conventions concluded under the auspices of the United Nations and the State practice in the field of diplomatic law.

11. Following the comments and suggestions advanced in the debate during the thirty-second session of the Commission and in the Sixth Committee of the General Assembly during its thirty-fifth session, the present report endeavours to concentrate on the definition of the terms "diplomatic courier" and "diplomatic bag" by revealing their main features.<sup>19</sup> With regard to the use of other terms

which are pertinent to the present draft articles, it is intended to make wider use of the existing definitions embodied in the multilateral conventions concluded under the auspices of the United Nations and generally agreed upon in State practice. However, it should be pointed out at the outset that the definition of the terms "diplomatic courier" and "diplomatic bag" within the article on the "use of terms" would only indicate the main elements of their status, without exhausting all the substantive aspects which, in their entirety, determine the legal status of the diplomatic courier and the diplomatic bag under international law, particularly with respect to the facilities, privileges and immunities accorded to them in the performance of their functions. The rules relating to the specific aspects of the status of the courier and the bag will be dealt with in the subsequent draft articles constituting part I (on the status of the diplomatic courier) and part II (on the status of the diplomatic bag).

12. The formulation within the general provisions of certain principles of international law underlying the four multilateral conventions concluded under the auspices of the United Nations was suggested in the preliminary report and was met with general agreement during the discussions in the Commission and in the Sixth Committee of the General Assembly.<sup>20</sup> There were some observations on the appropriate moment for submission of draft articles on general principles, as to whether this should be done at the initial stage or when the specific draft articles had been considered.<sup>21</sup> The Special Rapporteur is inclined to agree that only after the substance of the draft articles relating to

*Assembly, Thirty-fifth Session, Sixth Committee, 53rd meeting, para. 25 (Italy); 59th meeting, para. 26 (Bulgaria); and "Topical summary . . ." (A/CN.4/L.326), para. 376.*

<sup>20</sup> See *Yearbook . . . 1980*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/335, paras. 6, 47, 54, 59–60; *Yearbook . . . 1980*, vol. I, p. 274, 1636th meeting, para. 3 (Mr. Bedjaoui); p. 276, para. 21 (Mr. Tabibi); p. 282, 1637th meeting, para. 7 (Mr. Francis); *Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 170; *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 51st meeting, para. 54 (Ethiopia); 59th meeting, para. 25 (Bulgaria); and "Topical summary . . ." (A/CN.4/L.326), para. 373.*

<sup>21</sup> See *Yearbook . . . 1980*, vol. I, p. 264, 1634th meeting, para. 40 (Mr. Reuter).

<sup>19</sup> See *Yearbook . . . 1980*, vol. I, p. 282, 1637th meeting, para. 6 (Mr. Francis); p. 285, para. 37 (Mr. Pinto); *Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 169; *Official Records of the General*

the status of the courier and the bag had been examined would it be appropriate to formulate precisely such general principles as those of freedom of communication for all official purposes through the diplomatic courier and diplomatic bag, respect for international law and the laws and regulations of the receiving and the transit State, and the principle of non-discrimination and reciprocity in the treatment of the diplomatic courier and the diplomatic bag. At the same time, a tentative enunciation of these principles might serve as a useful guidance and indication of the foundations of the legal framework upon which the specific rules on the status of the courier and the bag are based. In the light of such an approach, a tentative formulation is suggested, on a purely preliminary basis, of the general principles with a view to providing an early opportunity for a general exchange of views, while deferring their substantive and detailed examination and formulation to a later stage when the consideration of the content of the draft articles had been specified.

#### A. Scope of the present draft articles

##### 1. THE MEANING OF THE COMPREHENSIVE APPROACH TO THE QUESTION OF THE SCOPE OF THE PRESENT DRAFT ARTICLES

13. The adoption of a comprehensive approach to all kinds of couriers and bags used by States in the official communications with their missions abroad was one of the basic elements of the preliminary report. It was stated that:

The courier and the bag, whatever their particular denomination, are all official means of communication used by a State to maintain contact with or between its missions, as the case may be—whether diplomatic, permanent, permanent observer or special—as well as its consular posts and its delegations.<sup>22</sup>

Accordingly, the Special Rapporteur referred to the notions of “official courier” and “official bag” as convenient working tools at the initial stage of the work on the topic under consideration,<sup>23</sup> “embracing in this way all types of means of communication for official purposes through official courier and official bag, as stipulated in the relevant provisions of the above-mentioned four multilateral conventions”.<sup>24</sup> In the view of the Special Rapporteur “such a comprehensive approach would reflect more adequately the significant developments that have taken place since the 1961 Vienna Convention”.<sup>25</sup>

14. The prevailing trend that emerged from the debate in the Commission and in the Sixth Committee of the General Assembly was that a comprehensive approach was advisable in principle, since it could lead to a coherent set of draft articles on the topic, but should be applied with greater caution, taking into account a possible reaction of

anxiety and reservations of States when new concepts were introduced. It was further suggested that, while retaining the concept of “diplomatic courier” and “diplomatic bag”, an appropriate solution might be found through an assimilation formula which may comprise all types of couriers and bags used by States for official communications.<sup>26</sup>

15. Thus, the Special Rapporteur was faced with two possible options. The first would be to introduce the global concepts of “official courier” and “official bag”, embracing all kinds of couriers and bags, as was tentatively suggested in the preliminary report (see para. 13 above). The second option would be to maintain the well-established and familiar notions of “diplomatic courier” and “diplomatic bag” and, after having examined all their constitutive elements and legal features on the basis of the 1961 Vienna Convention and relevant State practice, to suggest by assimilation to apply the appropriate rules to all other couriers and bags used by States for official communications, taking into account the provisions of the other multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations and the State practice in the field of diplomatic law.

16. Each of these possible solutions has its advantages and disadvantages. A global concept of the courier and the bag comprising the diversity of couriers and bags under a simple uniform notion could be instrumental for the elaboration of a comprehensive and coherent set of legal rules governing the regime of all official couriers and bags. But, as was pointed out during the debate in the Commission and in the Sixth Committee of the General Assembly, the introduction of the new terms “official courier” and “official bag” may give rise to some reservations and apprehensions (see para. 14 above), due to the deviation from the longstanding and familiar notion of “diplomatic courier” and “diplomatic bag”, which have acquired legal certainty in international and municipal law as well as in State practice.

17. In the light of these considerations, and taking into consideration some of the comments advanced in the previous examination of this issue, the Special Rapporteur would be prepared not to insist on his tentative suggestion about the use of the new global concept of “official courier” and “official bag” for all kinds of couriers and bags used by States to maintain official communications with their missions abroad. This would not mean that the attempt at applying a comprehensive and uniform approach to the couriers and bags would be abandoned altogether. The elaboration of a coherent and uniform set of rules governing the status of the diplomatic bag and the diplomatic courier as well as all other kinds of official couriers and bags, used by consular posts, special missions, permanent missions to international organizations, etc., would remain the main objectives of the present draft articles. The difference will be inevitably in the working method leading to the same objective. This is supposed to be achieved through an examination of the

<sup>22</sup> *Yearbook ... 1980*, vol. II (Part One), p. 241, document A/CN.4/335, para. 42, and also paras. 39, 40, 57 and 62.

<sup>23</sup> *Ibid.*, p. 244, para. 57.

<sup>24</sup> *Ibid.*, p. 245, para. 62.

<sup>25</sup> *Ibid.*

<sup>26</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 164, para. 167.

relevant provisions of the 1961 Vienna Convention and the identification of the essential elements contained therein with regard to the status of the diplomatic courier and the diplomatic bag. The next step should be to ascertain to what extent the provisions of the other three multilateral conventions relating to the appropriate couriers and bags are identical with those of the 1961 Convention, in order to establish whether or not they form a common legal ground on which could be based the uniform treatment of all kinds of couriers and bags, modelled after the regime of the diplomatic courier and the diplomatic bag.

18. Consequently, a comprehensive and uniform approach as regards the scope of the present draft articles would pursue a twofold object. First, to try and elaborate as comprehensive as possible a set of general and specific rules regulating the whole range of functions of the diplomatic courier in the service of all kinds of missions of the sending State by carrying and delivering various kinds of bags—diplomatic, consular, bags of special missions, bags of permanent missions to international organizations, or delegations to conferences as the case may be—according to the tasks assigned to the diplomatic courier by the competent authorities of the sending State, namely the Ministry for Foreign Affairs. It has been a widespread practice of States to use the services of a given diplomatic courier during one of his assignments to carry packages duly sealed and with visible external marks indicating their destination, which the courier has to deliver on his way to a permanent diplomatic mission, to one or more consular posts and to other official missions of the sending State in the territory of the receiving State. This is very often the case, for instance, with a diplomatic courier who is performing his functions to Switzerland, carrying a diplomatic pouch to the embassy of the sending State in Bern, some parcels for its consular posts in Zurich or Geneva, and other official correspondence and material to the Permanent Mission to the United Nations or the delegation of the sending State at the Committee on Disarmament and other missions to some of the specialized agencies in Geneva.

Such a multipurpose service of the diplomatic courier with respect not only to the permanent diplomatic mission but also to various other official missions or delegations of the sending State has become a routine practice of many States, particularly with the ever-increasing role of international conferences and international organizations. The diplomatic courier may also use a diplomatic or other mission of the sending State as an intermediate post along his way, which could serve as a collecting and distributing centre. From that centre the official bag could be dispatched by a courier of the mission to other missions of the sending State in the territory of the receiving State or in third States. In such instances the “diplomatic courier” in fact may perform functions contemplated by article 35 of the 1963 Vienna Convention or article 28 of the Convention on Special Missions, or articles 27, 57 or 72 of the 1975 Vienna Convention. The status of such a diplomatic courier and the diplomatic bag entrusted to him would neither change, nor would it be affected at any moment when he is servicing a consular post or a

delegation to international organ and is delivering a consular bag, or a bag of a delegation, as the case may be. The regime of such a courier and the bag carried by him, with regard to the facilities, privileges and immunities accorded by the receiving State in the performance of the courier’s functions, will be the same. For it is obvious that regardless of the denomination of the courier and the destination of the official parcels, it is their confidential content and function that require special protection and facilities recognized by international law and by the law of the receiving State. There has never been any kind of hierarchy, in law or in fact, between the treatment of the couriers based on their denomination or on the destination of the official bag. In accordance with conventional and customary international law, the receiving State has the duty to permit and protect free communication for all official purposes of the sending State with its missions, through all appropriate means, including couriers and the despatch of correspondence and other documents for official use.

19. The second objective of a comprehensive and uniform approach with regard to the scope of the draft articles should be to provide a proper formula for applying the regime governing the diplomatic courier and the diplomatic bag to all types of couriers and bags used by States for all official purposes with their consular posts and other official missions and delegations. Such an assimilating formula would necessarily rest on a common denominator deriving from the pertinent provisions of the multilateral conventions in the field of diplomatic law which constitute the legal basis for the uniform treatment of the various couriers and bags. This could be ascertained only on the basis of a comparative examination of these provisions.

## 2. THE MULTILATERAL CONVENTIONS IN THE FIELD OF DIPLOMATIC LAW CONCLUDED UNDER THE AUSPICES OF THE UNITED NATIONS AS THE LEGAL BASIS FOR A UNIFORM REGIME GOVERNING THE STATUS OF THE COURIER AND THE BAG

### (a) *The 1961 Vienna Convention on Diplomatic Relations*

20. The most relevant provisions on the scope of application of the principle of freedom of communication for all official purposes, which is of particular significance for the elaboration of the model set of rules relating to the status of the diplomatic courier and the diplomatic bag, are contained in article 27 of the 1961 Vienna Convention, which reads as follows:

#### *Article 27*

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending States, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

21. It may be pointed out at the outset, that for the examination of the problem of the scope of application of the rules relating to the diplomatic courier and the diplomatic bag, the very provisions are contained in paragraph 1 about the means employed in the communications "for all official purposes" with the missions of the sending States, "wherever situated"; paragraph 6 about the designation of diplomatic courier *ad hoc*, distinct from the regular professional diplomatic courier, and paragraph 7 on the diplomatic bag not accompanied by diplomatic courier and entrusted to the captain of a commercial aircraft, who shall not be considered to be a diplomatic courier. The survey of the legislative history of these provisions is very indicative for the evolving process of codification towards a comprehensive treatment of the various types of official couriers and bags.

22. The initial draft article submitted by the Special Rapporteur on the topic "Diplomatic intercourse and immunities" to the Commission at its seventh session, in 1955, relating to the status of the diplomatic courier and the diplomatic bag, was much more restricted in its scope than the present article 27. At that time, the provisions on the freedom of communication and the status of the diplomatic courier and the diplomatic bag, which correspond to article 27, were contained in the first proposal submitted by the Special Rapporteur under draft article 16, which stipulated:

#### Article 16

1. The receiving State shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the Ministry of Foreign Affairs of the sending State or its consulates and nationals in the territory of the receiving State.<sup>27</sup>

23. The relatively restrictive character of the above formula can be identified in some directions at least. First, it refers only to communications between the diplomatic mission with the ministry for foreign affairs of the sending State and its consulates and nationals on the territory of the receiving State. Thus, official communications through

diplomatic courier between the various missions of the sending State abroad are not contemplated. It is true that, perhaps because of the influence of article 14 of the Harvard Law School Draft Convention on Diplomatic Privileges and Immunities, official communications of the diplomatic mission with the nationals of the sending State<sup>28</sup> were provided, but this provision was abandoned in the subsequent drafts submitted by the Special Rapporteur. This draft article 16 does not therefore contain the key provisions "free communications ... for all official purposes" maintained with the other missions of the sending States, "wherever situated," which undoubtedly give much wider scope of the possible functions of the diplomatic couriers and the official bags entrusted to them by different kinds of official missions of the sending State on the territory of the receiving State. Secondly, this draft article 16 does not contain any reference to the designation of a diplomatic courier *ad hoc* or to the diplomatic bag not accompanied by diplomatic courier but entrusted to the captain of a commercial aircraft.

24. The revised draft article 16 on the same matter submitted by the Special Rapporteur for consideration by the Commission at its ninth session in 1957 was also restrictive along the same lines. As regards the diplomatic courier, it referred only to the obligation of the receiving State to

... permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the ministry of foreign affairs of the sending State or its consulates and nationals in the territory of the receiving State.<sup>29</sup>

In this draft article, communications were again confined to contacts with the ministry for foreign affairs and the consular posts and nationals of the sending State on the territory of the receiving State, and it was not expanded to include communications between all kinds of official missions of the sending State abroad. Observations to that effect were made already at the ninth session of the Commission in 1957.<sup>30</sup> The use of the diplomatic courier *ad hoc* and the diplomatic bag entrusted to the captain of a commercial aircraft or ship was also not brought up at that stage of the Commission's work.

25. The text of draft article 21, which the Commission adopted at its ninth session, for the first time introduced the key expressions "free communication on the part of the mission *for all official purposes*", maintained through diplomatic couriers "with the Government and the other missions and consulates of the sending State, *wherever situated*", which are contained in article 27 of the 1961 Vienna Convention on Diplomatic Relations. For reasons that will be identified further, it could be pointed out that these two provisions gave new dimensions to the scope of the functions of the diplomatic courier and the diplomatic bag.

<sup>28</sup> Harvard Law School, *Research in International Law*, part I: "Diplomatic Privileges and Immunities" (Cambridge, Mass., 1932), in *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 79-85.

<sup>29</sup> *Yearbook ... 1957*, vol. I, p. 74, 398th meeting, para. 27.

<sup>30</sup> *Ibid.*, pp. 74-78, 398th meeting, paras. 28-100; pp. 78-83, 399th meeting, paras. 1-87; and pp. 84-85, 400th meeting, paras. 1-33.

<sup>27</sup> *Yearbook ... 1955*, vol. II, p. 11, document A/CN.4/91 (original text of the article in French).

26. This broader formula with regard to the communications through diplomatic couriers and diplomatic bags for all official purposes with the missions of the sending State, wherever these missions were situated, was retained in the revised draft article 21 proposed by the Special Rapporteur at the tenth session of the Commission in 1958.<sup>31</sup> In the commentary to article 25 (formerly article 21)<sup>32</sup> it was emphasized that a broader application of the principle of free communication, as a generally recognized freedom, was essential for the functions of the diplomatic mission and that, in accordance with paragraph 1 of that article, the freedom of communication was to be:

accorded for all official purposes, whether for communications with the Government of the sending State, with the officials and authorities of that Government or the nationals of the sending State, with missions and consulates of other Governments or with international organizations.<sup>33</sup>

It was further pointed out that this provision:

sets out the general principle, and states specifically that, in communicating with its Government and the other missions and consulates of that Government, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher.<sup>34</sup>

This trend towards a more comprehensive treatment of the diplomatic courier and the diplomatic bag was explained by the extension and intensification of diplomatic intercourse. In this connection, it was explained in the commentary that:

Formerly, the freedom to employ all appropriate means of communications was limited in principle to the diplomatic mission's exchanges, on the one hand with the Government of the sending State and, on the other, with the consulates under its authority within the receiving State. Nowadays, with the extension of air communications, the practice has changed.<sup>35</sup>

According to that practice of States, diplomatic couriers were used for multipurpose functions, delivering diplomatic bags and parcels containing official correspondence and material to various missions or to certain exchange centres. Therefore, as was indicated in the commentary,

Communications with embassies and consulates in other countries no longer always pass through the Ministry for Foreign Affairs in the sending State; often use is made of certain intermediate posts from which despatches are carried to the various capitals to which they are addressed.<sup>36</sup>

27. The draft article on freedom of communication was adopted by the Commission at its tenth session, in 1958. Paragraph 1 of that article reads as follows:

#### Article 25

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all

appropriate means, including diplomatic couriers and messages in code or cipher.<sup>37</sup>

28. The substantive missing points in this formula, as regards the scope of the status of the diplomatic courier and the diplomatic bag, when compared with article 27 of the 1961 Vienna Convention, are the references to the diplomatic courier *ad hoc* and to the diplomatic bag not accompanied by diplomatic courier. It was only at the United Nations Conference on Diplomatic Intercourse and Immunities, held at Vienna in 1961, that special provisions were introduced on the designation of diplomatic couriers *ad hoc* and the use of diplomatic bags not accompanied by a diplomatic courier but entrusted to the captain of a commercial aircraft, who should be provided with a document indicating the number of packages constituting the bag, but would not be considered to be a diplomatic courier.<sup>38</sup>

29. The elaboration and adoption of article 27 on the freedom of communication (see para. 20 above), which contains special provisions with respect to the status of the diplomatic courier and the diplomatic courier *ad hoc*, as well as on the diplomatic bag, including the diplomatic bag not accompanied by diplomatic courier, was indeed one of the significant contributions in the codification and progressive development of diplomatic law. It provided the basis for the evolving rules of international law to be applied to various types of couriers and bags used by States for communication with their diplomatic missions, consular posts and other missions and delegations abroad. In our submission, the most tangible achievement in the enhancement of a comprehensive and coherent regime of diplomatic communications through couriers and bags can be identified in the following three areas: *first*, the general recognition of the principle of free communication for all official purposes between the sending State and its various missions, wherever situated, through all appropriate means, including diplomatic couriers and diplomatic bags. The freedom of communication accorded for all official purposes is applied to communications of the diplomatic mission with the Government of the sending State, with the other missions, delegations or officials of that State, between the various missions of the sending State, and with the authorities and missions of other Governments or with international organizations. Such an interpretation leads to a comprehensive and uniform regime governing the legal status of the diplomatic courier and the diplomatic bag, which could provide the basis for

<sup>31</sup> *Yearbook* ... 1958, vol. II, p. 17, document A/CN.4/116/Add.1 and 2.

<sup>32</sup> For the text of article 25 and the commentary thereto, *ibid.*, pp. 96-97, document A/3859, chap. III, sect. II.

<sup>33</sup> *Ibid.*, para. (2) of the commentary.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, para. (3) of the commentary.

<sup>36</sup> *Ibid.*

<sup>37</sup> This draft article contains five paragraphs. Para. 2 deals with the inviolability of the official correspondence of the mission; para. 3 stipulates that "The diplomatic bag shall not be opened or detained"; para. 4, that the bag "must bear visible external marks of its character" and that it "may only contain diplomatic documents or articles for official use"; and para. 5, that "The diplomatic courier shall be protected by the receiving State [and] shall enjoy personal inviolability and shall not be liable to any form of arrest or detention."

<sup>38</sup> See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), p. 71, document A/CONF.20/L.2, Draft Vienna Convention on Diplomatic Relations, art. 25, paras. 6 and 7.

embracing the various types of couriers and bags. *Second*, article 27 of the 1961 Vienna Convention introduced as a legal institution the diplomat courier *ad hoc*, which responded to modern requirements of diplomatic intercourse and broadened the scope of application of the freedom of communication for all official purposes. *Third*, the widespread use of a diplomatic bag entrusted to the captain of a commercial aircraft, as a relatively new phenomenon of international diplomatic practice, has found legal recognition and protection. These three aspects of the codification process in the field of diplomatic law indeed gave new dimensions to the functions of the diplomatic bag and paved the way for the establishment of a coherent international regime governing all kinds of official couriers and bags.

30. The other relevant provisions of article 27 of the 1961 Vienna Convention with particular significance for the regime of the diplomatic courier and the diplomatic bag—and which would be relevant for the identification of the common features of the status of all kinds of couriers and bags used by States for official communications—are contained in paragraphs 2, 3, 4 and 5, relating respectively to the inviolability of the bag, which shall not be opened or detained; the content of the bag and its visible external marks; and to the status of the diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, as well as his protection by the receiving State in the performance of his functions and his personal inviolability and immunity from any form of arrest or detention. In order to find out whether there is any common denominator between the regime of the diplomatic courier and the diplomatic bag under the 1961 Vienna Convention and the status of the couriers and bags under the other three multilateral conventions, which could form the legal basis for a comprehensive and coherent treatment of all kinds of couriers and bags, it is necessary to proceed to a brief survey of their relevant provisions.

#### (b) *The 1963 Vienna Convention on Consular Relations*

31. Without entering into detailed examination of the legislative background of article 35 of the 1963 Vienna Convention, it could be pointed out at the outset that in principle this article is modelled after article 27 of the 1961 Vienna Convention, in both structure, format and content. The main elements defining the legal status of the diplomatic courier and the diplomatic bag could be found with almost similar or identical expressions in the provisions of article 35, dealing with the legal status of the consular courier, consular courier *ad hoc* and the consular bag, including the consular bag entrusted to the captain of a ship or of a commercial aircraft, who shall not be considered to be a consular courier. The legal protection of the consular courier and bag and their immunities and privileges are the same as those accorded to the diplomatic courier and the diplomatic bag.

32. However, there are some specific features of the legal status of the consular courier and the consular bag which

have to be singled out. First of all, it should be mentioned that article 35, para. 1 contemplates the possibility for the consular post to employ diplomatic or consular couriers and diplomatic or consular bags. Accordingly, the consular bag may either be a part of the diplomatic bag, carried by a diplomatic courier, or may be carried by the same courier as a separate package indicated on the diplomatic courier's waybill.<sup>39</sup> At the same time, article 35 provides for the use of consular couriers and consular couriers *ad hoc* performing couriers' functions independently from the diplomatic courier. Secondly, as regards the status of the consular bag, article 35, para. 3, provides as an exception the right of the competent authorities of the receiving State, to request "that the bag be opened in their presence by an authorized representative of the sending State", if they have serious reason to believe that the bag contains something other than the correspondence, documents or articles intended exclusively for official use. If the request of the authorities of the receiving State is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

33. With the exception of this option, as indicated in paragraph 3 of article 35, all other elements of the legal status of the consular courier and the consular bag are identical with those of the diplomatic courier and the diplomatic bag. It was emphasized in the commentary to draft article 36<sup>40</sup> that "the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable" to consular couriers and consular bags, with "the same protection in the receiving State as the diplomatic courier."

34. This concept of uniformity in the regime of the diplomatic courier and diplomatic bag and the regime of the consular courier and consular bag also prevailed in the consideration of this problem at the United Nations Conference on Consular Relations, held at Vienna in 1963. There was strong opposition to the attempts to accord to the consular courier more limited privileges and immunities than those accorded to the diplomatic courier. It was rightly maintained that "it was essential for couriers to receive complete inviolability and not to have the limited inviolability given to consular officials".<sup>41</sup> A double treatment may create a dichotomy in the exercise of the freedom of communication which would only create confusion and conflicts. The present regime under the 1963 Vienna Convention is indeed fully consistent with that of the 1961 Vienna Convention in all its parts, with the exception contemplated in article 35, paragraph 3. This homogeneity of the legal status of the diplomatic courier and diplomatic bag and the legal status of the consular courier and consular bag, sets out the basis for a

<sup>39</sup> See for example, the commentary to article 36 provisionally adopted by the Commission at its twelfth session in 1960 (*Yearbook* . . . 1960, vol. II, p. 165, document A/4425, chap. II).

<sup>40</sup> *Ibid.*, paras. (3) and (4) of the commentary.

<sup>41</sup> See *Official Records of the United Nations Conference on Consular Relations*, vol. I, *Summary records of plenary meetings and of the meetings of the First and Second Committees* (United Nations publication, Sales No. 63.X.2), p. 320, Second Committee, 13th meeting, para. 15.



coherent regime governing these two categories of official means for communication used by States.

35. Following the pattern established by article 27 of the 1961 Vienna Convention and subsequently by article 35 of the 1963 Vienna Convention, there is a significant number of bilateral consular and other conventions in the field of diplomatic law which apply an assimilation formula with regard to the legal status of various kinds of couriers and bags, and in particular with respect to official communications with consular posts. Some of these bilateral treaties containing assimilation formulae preceded the 1961 and 1963 Vienna Conventions, but most of them were concluded after the Vienna Conventions. The majority of them, without explicit reference in the text to the regime of the diplomatic courier and bag, provided legal protection of the consular courier and bag identical to the regime of the diplomatic courier and diplomatic bag.<sup>42</sup> Other bilateral treaties contain an explicit provision to the effect that "consular couriers of the sending State shall enjoy in the territory of the receiving State the same rights, privileges and immunities as diplomatic couriers".<sup>43</sup>

#### (c) *The 1969 Convention on Special Missions*

36. The initial draft article concerning the courier of the special mission submitted by the Special Rapporteur on the topic of "Special missions" at the sixteenth session of the Commission in 1964 contained a very concise formula, which stipulated that:

Special missions may send *ad hoc* couriers to communicate in both directions with the organs of their State. Only members of the mission or of its staff may act as couriers.<sup>44</sup>

This formula was quite far from the text of article 27 of the 1961 Vienna Convention and article 35 of the 1963 Vienna Convention.

37. After the Commission's consideration of the initial draft article, in his second report, submitted to the seventeenth session of the Commission in 1965, the Special Rapporteur suggested a more elaborated draft article 22, taking into consideration the main provisions of article 27 of the 1961 Vienna Convention applicable to

special missions.<sup>45</sup> Subsequently, at its nineteenth session in 1967,<sup>46</sup> the Commission adopted the final text of this article, which became article 28 of the 1969 Convention on Special Missions, modelled after article 27 of the 1961 Vienna Convention.

38. Article 28 of the 1969 Convention, therefore, in substance and formulation fully corresponds to article 27 of the 1961 Vienna Convention and article 35 of the 1963 Vienna Convention. One specific feature of the regime of communication on the part of the special mission is the provision of paragraph 3 of article 28, which states that:

Where practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State.

This provision, introduced during the discussions at the Sixth Committee, reflects the current practice of States in their official communication with their special missions abroad, or between the special mission and the other missions, consular posts and official delegations of the sending State, as the case may be. With regard to the denomination of the courier of the special mission, the Commission preferred the term "courier of the special mission" instead of "diplomatic courier of the special mission" which was also considered as a possible option.<sup>47</sup> It is important to point out, in conclusion, that the regime of the diplomatic courier and the diplomatic bag under the 1961 Vienna Convention is fully applicable, *mutatis mutandis*, to the regime of the official communications of the special missions as provided for in the Convention on Special Missions elaborated in 1968 and adopted by the General Assembly in its resolution 2530 (XXIV) of 8 December 1969. This is indeed still another indication of the common ground for a comprehensive and coherent treatment of all kinds of couriers and bags used by States for official communications.

#### (d) *The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*

39. Article 27 of the 1975 Vienna Convention, dealing with the freedom of communication of the permanent missions of States to international organizations, was, from its early stage, modelled after the provisions of article 27 of the 1961 Vienna Convention. Draft article 27, as submitted by the Special Rapporteur on the topic of relations between States and intergovernmental organizations to the Commission at its twentieth session in 1968, followed closely the structure, format and content of the relevant provisions of the 1961 Vienna Convention and the 1969 Convention on Special Missions.<sup>48</sup>

40. The same approach was applied to the drafting of article 57 of the 1975 Vienna Convention, on the freedom of communication on the part of the delegations to

<sup>42</sup> See, for example, the Consular Convention between the United Kingdom and France of 31 December 1951 (United Nations, *Treaty Series*, vol. 330, p. 145); the Consular Convention between the United States of America and Ireland of 1 May 1950 (*ibid.*, vol. 222, p. 107), the Consular Treaty between the USSR and the German Democratic Republic of 10 May 1957 (*ibid.*, vol. 285, p. 152), the Consular Convention between Finland and the USSR of 24 January 1966 (*ibid.*, vol. 576, p. 60), the Consular Convention between the USSR and Bulgaria of 12 December 1957 (*ibid.*, vol. 302, p. 21) and many other bilateral consular conventions registered with the Secretariat of the United Nations.

<sup>43</sup> See article 13 of the Consular Convention between Poland and the USSR of 27 May 1971 (*ibid.*, vol. 831, p. 48); the Consular Convention between the United Kingdom and the USSR of 2 December 1965 (*ibid.*, vol. 655, p. 259); the Consular Convention between the United Kingdom and Hungary of 12 March 1971 (*ibid.*, vol. 824, p. 3); the Consular Convention between the USSR and Japan of 29 July 1966 (*ibid.*, vol. 608, p. 93); the Consular Convention between Bulgaria and the United Kingdom of 13 March 1968 (*ibid.*, vol. 681, p. 273) and many other conventions with similar provisions.

<sup>44</sup> *Yearbook* ... 1964, vol. II, p. 109, document A/CN.4/166, article 21, para. 4.

<sup>45</sup> *Yearbook* ... 1965, vol. II, pp. 129–130, document A/CN.4/179.

<sup>46</sup> *Yearbook* ... 1967, vol. II, pp. 360–361, document A/6709/Rev.1, chap. II, art. 28.

<sup>47</sup> *Ibid.*, para. (3) of the commentary to art. 28.

<sup>48</sup> See *Yearbook* ... 1971, vol. II (Part One), p. 302, document A/8410/Rev.1, chap. II, article 27 of the draft articles adopted by the Commission at its twenty-third session.



international organs or international conferences. Of course there were certain terms or expressions such as "host State", or "courier of the mission", "bag of the mission", etc., which were adapted to the specific features of the subject-matter of that Convention. It should also be noted that in article 57, para. 3, we find the same expression used in article 28, para. 3, of the 1969 Convention on Special Missions, which stipulates that:

Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of a consular post, of the permanent mission, or of the permanent observer mission of the sending State.

41. Under article 72 of the 1975 Vienna Convention, the provisions of article 57 shall apply to observer delegations of States to international organizations and international conferences as regards the status of the courier and the bag used by such delegations.

### 3. THE APPLICABILITY OF AN ASSIMILATION PROVISION TO ALL KINDS OF COURIERS AND BAGS USED BY STATES FOR OFFICIAL PURPOSES

42. The survey of the relevant provisions of the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations leads to the conclusion that a common legal basis for a comprehensive and coherent treatment of all types of couriers and bags used by States for official communication with their missions abroad already exists. The established uniform rules on this matter have been widely applied in the practice of States. This set of rules is governing the communications of States for all official purposes with their missions, wherever situated, and whatever their denomination. The rights and interests of States that are subject to legal protection are the same. This uniformity is evidenced by the identity of the existing provisions modelled after the 1961 Vienna Convention and supported by the subsequent multilateral and bilateral treaties in the field of diplomatic law. Therefore, a comprehensive and uniform approach would rest on both the existing conventional and customary law and would be supported by well-established State practice.

43. It would be only logical that the scope of the present articles with regard to the legal status of the diplomatic courier and the diplomatic bag be applicable also to all kinds of couriers and bags used by States for official communications with their consular posts, special missions, permanent missions to international organizations and delegations to international organs and conferences.

44. In that case, the scope of the present articles, which is focused on the legal status of the diplomatic courier and the diplomatic bag, would also embrace all other types of couriers and bags used by States for free communication for all official purposes, employing all appropriate means, including couriers and bags.

### 4. COMPREHENSIVE AND COHERENT TREATMENT OF ALL KINDS OF COURIERS AND BAGS CONFINED ONLY TO COURIERS AND BAGS USED ONLY BY STATES

45. In the light of the prevailing trend in the consideration of the scope of application of the present articles

which took place during the thirty-second session of the Commission in 1980 and in the Sixth Committee of the General Assembly at its thirty-fifth session, the Special Rapporteur wishes to suggest that the scope of the present draft articles be confined to the couriers and bags used by States.

46. Consequently, it is proposed that the legal status of the official couriers and official bags used by international organizations should be outside the scope of application of the present articles, even though it is well known that, with the ever increasing role of international organizations in the global system of international relations, they use official couriers and official bags on a large scale. This widespread practice is also evidenced by a number of international agreements. The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946<sup>49</sup> and the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly on 21 November 1947,<sup>50</sup> have been followed by other similar treaties governing the diplomatic intercourse of various intergovernmental organizations.<sup>51</sup> There are several bilateral treaties concluded between States and international organizations in the field of diplomatic law.<sup>52</sup> In their entirety these international agreements have already formed an important field of contemporary diplomatic law. Therefore, the codification and progressive development of the diplomatic law with respect to international organizations, including the regulation of their official communications, could not be overlooked.

47. Some of these agreements contain an assimilation provision, which stipulates that the couriers and the bags of the international organization shall have the same

<sup>49</sup> Arts. III and IV (United Nations, *Treaty Series*, vol. 1, pp. 20 and 22).

<sup>50</sup> Arts. IV and V (*ibid.*, vol. 33, pp. 270 and 272).

<sup>51</sup> See for example the General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949 (*ibid.*, vol. 250, p. 10); the Agreement on the North Atlantic Treaty Organization, National Representatives and International Staff, signed at Ottawa on 20 September 1951 (*ibid.*, vol. 200, p. 3); the Convention on the Privileges and Immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959 (*ibid.*, vol. 368, p. 242).

<sup>52</sup> See the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, on 11 June 1946 and on 1 July 1946, approved by the General Assembly of the United Nations on 14 December 1946, art. III (*ibid.*, vol. 1, p. 169); *Procès-Verbal*, Agreement between the Swiss Federal Council and the International Labour Organisation, signed on 11 March 1946, art. 15, and Arrangement for the Execution of the Agreement, art. 5 (*ibid.*, vol. 15, pp. 389 and 401); Agreement between the Swiss Federal Council and the World Health Organization, approved on 17 July 1948 and 21 August 1948, art. 15 (*ibid.*, vol. 26, pp. 339–340); Agreement between the International Civil Aviation Organization and the Government of Canada, signed on 14 April 1951, sects. 9 and 10 (*ibid.*, vol. 96, p. 162); Agreement between the Swiss Federal Council and the World Meteorological Organization, signed on 10 March 1955, arts. 12 and 13, and Plan of Execution of the Agreement, art. 3 (*ibid.*, vol. 211, pp. 283 and 293).

immunities and privileges as diplomatic couriers and bags.<sup>53</sup>

48. Nevertheless, for practical convenience, it is suggested at this stage of the work of the Commission, to leave the regulation of the status of the courier and the bag of the intergovernmental organizations outside the scope of application of the present draft articles. The Special Rapporteur, however, would propose that a formula be provided along the lines of article 3 of the 1969 Vienna Convention on the Law of Treaties, as a safeguard provision with respect to the legal status of the couriers and bags of the international organizations.

#### DRAFT ARTICLES 1 AND 2

49. Taking into consideration the observations made on the problem of the scope of the present draft articles, the Special Rapporteur would like to submit to the Commission for examination and approval the following draft articles:

#### PART I: GENERAL PROVISIONS

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

1. The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, or with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags.

2. The present articles shall apply also to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, and with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing consular couriers and bags, and couriers and bags of the special missions or other missions or delegations.

##### *Article 2. Couriers and bags not within the scope of the present articles*

1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.

<sup>53</sup> See the Convention on the Privileges and Immunities of the United Nations, art. III, sect. 10 (see footnote 49 above), and the Convention on the Privileges and Immunities of the Specialized Agencies, art. IV, sect. 12 (see footnote 50 above).

#### B. Use of terms for the purposes of the present draft articles

##### INTRODUCTION

50. In accordance with the structure of the present draft articles and the plan of work suggested by the Special Rapporteur, the present report is confined to the examination of some issues relating to the draft articles within the general provisions (see paras. 7 and 8 above).

51. The first item of the general provisions was the scope of the present draft articles. The report proceeded to the study of it on the basis of a survey of the historic background of article 27 of the 1961 Vienna Convention and the relevant provisions of the other three multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations (see paras. 20 *et seq.* above). The basic objective of this exercise was to identify the essential legal elements that form a common basis for a comprehensive and uniform treatment of the diplomatic courier and the diplomatic bag as well as all other types of couriers and bags used by States for official communication with their diplomatic and other missions and delegations abroad.

52. In the light of the preliminary conclusions reached by the Special Rapporteur, he suggested for examination and approval by the Commission two draft articles, article 1 on the scope of the present draft articles and article 2 on the couriers and bags not within the scope of the present articles, namely, on the legal status of couriers and bags used by international organizations.

53. The main task of this part of the present report is the examination of some definitional problems relating to the use of terms for the purposes of the present draft articles. As has already been pointed out (see para. 11 above), following the comments and suggestions made in the Commission and the Sixth Committee, the work at this stage should be concentrated on the definition of the terms "diplomatic courier" and "diplomatic bag". In this connection, the study of some issues pertaining to the scope of the present articles may provide some assistance in exploring the main legal features defining the status of the courier and the bag. On the other hand, the use of the same source material and *travaux préparatoires* in both instances could create an impression of redundancy, which we shall try to avoid as much as possible.

54. The definitional problems inherent in the nature of the subject matter under examination relating to the interpretation of the terms to be used in the present draft articles, are, generally speaking, of two categories. The first refers to terms already defined by existing treaties and, in particular, by the four multilateral conventions. Such terms have acquired legal certainty and may not need further elaboration for the purposes of the present draft articles. They may form quite a long list of terms, such as: "sending State", "receiving State", "transit State", "third State", "diplomatic mission", "permanent mission", "permanent observer mission", "delegation", "international organ", "international organization", "international conference", etc. Those terms are very relevant to the interpretation of the appropriate provisions

on diplomatic intercourse by means of couriers and bags; but due to the fact that they have been embodied in international treaties in force and enjoy general recognition in international practice, they may be used directly or through reference to the respective international treaties of a universal character, such as the four multilateral conventions concluded under the auspices of the United Nations. This would be the suggestion of the Special Rapporteur.

55. The second category of terms relating to the courier and the bag has two main features. First, these terms relate closely to the *sedes materiae* of the topic under consideration, and their definition in the text of the draft articles and in the commentary thereupon is absolutely indispensable. Secondly, the terms "diplomatic courier" and "diplomatic bag", "consular courier" and "consular bag" and the other kinds of couriers and bags, including the courier *ad hoc*, are only partially defined in the provisions of the existing conventions. It is evident that for the purposes of the present draft articles on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the definition of these terms should take its preponderant place.

56. It is proposed to identify the essential elements of the notion of the diplomatic courier and the diplomatic bag, as well as the other types of couriers and bags. This should be done, primarily, through the examination of the *travaux préparatoires* and the relevant provisions of the four multilateral conventions in the field of diplomatic laws, in particular the provisions on the freedom of communication and State practice on that matter. The idea is to suggest a definition which could have certain practical significance for the elaboration of the specific rules on the legal status of the courier and the bag, with special reference to their functions and the facilities, privileges and immunities accorded to them in the performance of these functions.

57. The remaining item, dealt with in the present report, within part I of the draft articles (General Provisions) would be devoted to the general principles of international law underlying the four multilateral conventions concluded under the auspices of the United Nations. Following the considerations advanced above (see paras. 4, 9 and 12), it is proposed to submit draft articles containing the formulation of those principles on a purely tentative basis, for a preliminary exchange of views, on the understanding that their substantive and detailed examination would take place at a later stage when the content of the draft articles had been studied by the Commission.

#### 1. DEFINITION OF THE TERM "DIPLOMATIC COURIER"

58. The term "diplomatic courier" has acquired universal recognition in international law and practice as a denomination of a person duly authorized by the competent authorities of the sending State who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the missions abroad of that State. Though in the practice of some States or in their national laws and regulations such terms as "messenger", "bearer of official

dispatches"<sup>54</sup> or other denominations<sup>55</sup> of the diplomatic couriers were used in the past and are, if seldom, found today, the term "diplomatic courier" has gained an absolute application as a generally accepted notion with a well-known legal meaning.

59. The notion of "the diplomatic courier *ad hoc*" has become more familiar since the adoption of the 1961 Vienna Convention. However, in some rare instances national rules and regulations have used other expressions, such as "*courriers porteurs de dépêches*" to designate a diplomatic courier who is an official of the Ministry for Foreign Affairs, not necessarily a professional diplomatic courier, or other officials, including diplomats or nationals of the sending State appointed to carry and deliver a diplomatic bag on an *ad hoc* basis.<sup>56</sup>

60. The present report attempts to analyse the status of "diplomatic courier" first of all on the basis of the *travaux préparatoires* of the relevant provisions of the four multilateral conventions concluded under the auspices of the United Nations. It is intended that herein some of the basic notions of the diplomatic courier would be clarified, such as the definition, functions, appointment, nationality, facilities and freedom of movement of the diplomatic courier. It goes without saying that the core question of the diplomatic courier is the question of inviolability and immunity, and the extent thereof to be recognized. However, those basic elements constituting the status of the diplomatic courier are no less important for the discussion on inviolability and immunity, which could profitably take place only after the basic agreement of the former.

<sup>54</sup> See for example the letter of 29 May 1861 from the Secretary of State of the United States of America, Mr. Seward to the Minister to Colombia, Mr. Burton, concerning the refusal of a passport to Mr. Valeri "as a bearer of dispatches" and the right "to designate the messengers" (J.B. Moore, *A Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1906), pp. 695-696) and the telegram dated 8 September 1915 in which Secretary of State Lansing instructed the United States Ambassador in Austria-Hungary, where reference is made to the status of an American citizen "as a secret bearer of official despatches" (G.H. Hackworth, ed., *Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1942), pp. 621-622).

<sup>55</sup> See "Mémorandum sur le régime fiscal, douanier, etc., applicable aux membres du corps diplomatique accrédités en Belgique", in which the terms "courriers ou porteurs de dépêches" are used (United Nations, Legislative Series, vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (Sales No. 58.V.3), p. 30), and "Instruction du Ministère des finances concernant les immunités diplomatiques, 1955 (Administration des douanes et accises)", in which the terms "courriers", "courriers de cabinet" and "courriers porteurs de dépêches" are used (*ibid.*, p. 45). For the use of the term "courriers de cabinet", see also C. Calvo, *Le droit international théorique et pratique*, 6th ed., rev. (Paris, Guillaumin, 1888), vol. III, p. 329.

<sup>56</sup> Thus in the State practice of Belgium, the national regulations mentioned above (footnote 55) provide as follows:

"On peut charger comme courriers des hommes de toute confiance. Les courriers ordinaires forment un corps spécial; on les appelle courriers de cabinet.

"On peut charger de cette mission d'autres personnes, à titre extraordinaire: des fonctionnaires ministériels, des aides de camp, des secrétaires, des attachés, même de simples particuliers; on les appelle alors courriers porteurs de dépêches" (United Nations, Legislative Series, vol. VII, *op. cit.*, p. 45.)

61. After having identified the main features determining the notion of the diplomatic courier, based upon the relevant provisions of the four multilateral conventions, we hope to arrive at the definition of the term "diplomatic courier" as well as of the notion of all other types of couriers used for official purposes by the sending State in communicating with its missions abroad.

62. In the study of the definitional aspects, special reference should also be made to the notion of the "diplomatic courier *ad hoc*" and the notion of a special courier who is not considered to be a diplomatic courier, such as the captain of a commercial aircraft or ship entrusted with the custody and transportation of a diplomatic bag which is to be delivered to a member of the mission of the sending State.

(a) *The notion of the "diplomatic courier" under the 1961 Vienna Convention*

(i) *The work of the Commission (1955–1958)*

63. As regards the diplomatic courier, the original draft articles submitted to the Commission at its seventh session, in 1955, by the Special Rapporteur for the topic "Diplomatic intercourse and immunities" consisted of a few simple sentences:

*Article 16*

1. The receiving State shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the Ministry of Foreign Affairs of the sending State or its consulates and nationals in the territory of the receiving State.

...

3. The messenger carrying the dispatches shall be protected by the receiving State.

4. Third States shall be bound to accord the same protection to dispatches and messengers in transit.<sup>57</sup>

64. The revised draft articles submitted by the Special Rapporteur to the ninth session of the Commission in 1957 read as follows:

*Article 16*

1. The receiving State shall accord all necessary facilities for the performance of the work of the mission. In particular, it shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc*...

...

3. The messenger carrying the dispatches shall be protected by the receiving State.<sup>58</sup>

65. In submitting the draft article, the Special Rapporteur explained that he had refrained from including a long list of persons and institutions, as had been done in the Harvard Draft (art. 14, para. 1),<sup>59</sup> to avoid giving the impression that the list was intended to be exhaustive.<sup>60</sup>

<sup>57</sup> *Yearbook* ... 1955, vol. II, p. 11, document A/CN.4/91; text of article in French.

<sup>58</sup> *Yearbook* ... 1957, vol. I, p. 74, 398th meeting, para. 27. The obligation of third States to accord the same protection to "messengers in transit" was provided in paragraph 4 of the same article.

<sup>59</sup> See footnote 28 above.

<sup>60</sup> *Yearbook* ... 1957, vol. I, p. 74, 398th meeting, para. 30.

66. During the debate in the Commission at its ninth session, in 1957, it was pointed out that the phrase "the messenger carrying the dispatches" was confusing and that "no difficulty would arise if the Commission adhered firmly to the well-established idea of a diplomatic courier as someone who carried special papers showing his official status as a courier".<sup>61</sup> As to the kinds of diplomatic couriers, although reference was made to regular and *ad hoc* couriers, much of the discussion focused on the status of aeroplane pilots entrusted with diplomatic mail. It was suggested, for instance, by one member of the Commission, that pilots carrying diplomatic mail could be divided into three categories: (a) the ordinary commercial airline pilots, (b) commercial airline pilots accredited as diplomatic couriers and (c) flying couriers operating planes allocated to embassies for the sole purpose of carrying diplomatic mail.<sup>62</sup> The majority of the Commission appeared to be agreed that, where commercial airline pilots were involved, it was the diplomatic pouch only that enjoyed immunity and not the pilot.<sup>63</sup>

67. Following the discussions at that session, the Commission adopted the text of draft article 21, paragraph 4 of which read as follows:

The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial.<sup>64</sup>

68. The commentary relating to the above paragraph stated that:

The diplomatic courier is furnished with a document testifying to his status: normally, a courier's passport. When the diplomatic bag is entrusted to the captain of a commercial aircraft who is not provided with such a document, he is not regarded as a diplomatic courier under the terms of this paragraph.<sup>65</sup>

69. In the light of the comments and suggestions made by Governments,<sup>66</sup> the Special Rapporteur submitted his revised text of article 21 to the Commission at its tenth session (1958), in which the following definition was inserted:

3. The expression "diplomatic courier" means a person who carries a diplomatic bag and who is for this purpose furnished with a document (courier's passport) testifying to his status. If such a person is travelling exclusively as a diplomatic courier he shall enjoy personal inviolability during his journey and shall not be liable to arrest or detention, whether administrative or judicial.<sup>67</sup>

70. The Commission was divided on this proposal, however, and the text (now article 25) and commentary thereto were therefore left virtually unchanged. In the discussion, the focus was again on the captain of an

<sup>61</sup> *Ibid.*, p. 83, 399th meeting, para. 85.

<sup>62</sup> *Ibid.*, p. 84, 400th meeting, para. 4.

<sup>63</sup> *Ibid.*, para. 15.

<sup>64</sup> *Yearbook* ... 1957, vol. II, p. 138, document A/3623, chap. II, sect. II.

<sup>65</sup> *Ibid.*, para. (4) of the commentary to article 21.

<sup>66</sup> "Diplomatic intercourse and immunities: summary of observations received from Governments and conclusions of the Special Rapporteur" (A/CN.4/116), pp. 48–50 (mimeographed document).

<sup>67</sup> *Yearbook* ... 1958, vol. II, p. 17, document A/CN.4/116/Add.1 and 2.

aircraft, and as a result the following was added to the commentary:

This case must be distinguished from the not uncommon case in which a diplomatic courier pilots an aircraft specially intended to be used for the carriage of diplomatic bags. There is no reason for treating such a courier differently from one who carries the bag in a car driven by himself.<sup>68</sup>

(ii) *The United Nations Conference on Diplomatic Intercourse and Immunities (1961)*

71. The Conference devoted very little discussion to the question of diplomatic couriers, which was completely overshadowed by the question of wireless transmitters and the diplomatic bag.<sup>69</sup> However, three amendments were adopted which replaced the Commission's text entirely by the much more detailed provisions contained in the last three paragraphs of article 27, thus greatly expanding and clarifying the content of customary international law regarding diplomatic couriers. The French amendment,<sup>70</sup> which became paragraph 5, introduced three requirements into the text: (1) the courier must be furnished with a document indicating his status (which the Commission had stated in its commentary to be practice), (2) he must carry a document indicating the number of packages in the diplomatic bag, and (3) protection is accorded to him "in the performance of his functions" by the accrediting State. Chile introduced the new provision which became paragraph 6 regarding "diplomatic courier *ad hoc*", to whom the protection is limited to the period during which he is in charge of the bag.<sup>71</sup>

72. The Swiss proposal was to add to the text a provision on the lines of the Commission's commentary regulating the status of the captain of a commercial aircraft;<sup>72</sup> this amendment became paragraph 7, with some details added by the Drafting Committee.

73. To sum up, article 27 of the 1961 Convention clarified the notion of diplomatic courier, professional and *ad hoc*. It also made it clear that the captain of a commercial aircraft entrusted with a diplomatic bag cannot be considered to be a diplomatic courier as such. Paragraphs 5 to 7 of article 27 are entirely devoted to the main legal features of these three categories of persons.

(b) *The notion of "diplomatic and consular couriers" under the 1963 Vienna Convention*

(i) *The work of the Commission (1957-1961)*

74. The first draft articles submitted to the Commission at its ninth session, in 1957, by the Special Rapporteur on

the topic "Consular intercourse and immunities" did not contain any specific reference to either diplomatic or consular couriers, although article 23 provided in general terms for "communication with the authorities of the sending State", and article 25 for the "inviolability of consular correspondence, archives and premises".<sup>73</sup> None of the draft articles submitted by the Special Rapporteur at the twelfth session of the Commission in 1960—in particular, article 29 on "Freedom of communication"<sup>74</sup>—contained a specific provision regarding the courier.

75. It was in the course of the discussion on draft article 29 at the Commission's twelfth session that the question of "consular couriers" was first raised. Some members of the Commission were of the view that in practice there was no such person as a consular courier, but only a diplomatic courier, used also by consulates, and therefore did not think that there was any need to mention a consular courier as such in article 29.<sup>75</sup> The Special Rapporteur, however, pointed out that cases might arise where special couriers were used to enable one consulate to communicate with another or with a diplomatic mission.<sup>76</sup> It was suggested that the use of consular couriers should not be excluded in the draft article and that, possibly, the wording of article 13 of the Harvard Draft (which referred to messengers holding *ad hoc* passports)<sup>77</sup> might be followed in any provision relating to consular couriers.

76. In the light of the discussions, the Commission adopted at that session, in 1960, draft article 36 on "Freedom of communication", which provided that:

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or other special couriers . . .<sup>78</sup>

77. Paragraph 4 of the commentary relating thereto is substantially the same as the one in the Commission's final draft.<sup>79</sup>

78. At the thirteenth session of the Commission, in 1961, a suggestion was made to the effect that draft article 36 might be redrafted along the lines of article 27 of the 1961 Vienna Convention, and also that paragraph (4) of the commentary might be incorporated in the article itself.<sup>80</sup>

<sup>68</sup> *Ibid.*, p. 97, document A/3859, chap. III, para. (6) of the commentary to article 25.

<sup>69</sup> E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana, 1976), p. 130; E. Kerley, "Some aspects of the Vienna Conference on diplomatic intercourse and immunities", *The American Journal of International Law* (Washington, D.C.), vol. 56, No. 1 (January 1962), pp. 116-118.

<sup>70</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), p. 20, document A/CONF.20/C.1/L.125.

<sup>71</sup> *Ibid.*, pp. 20-21, document A/CONF.20/C.1/L.133.

<sup>72</sup> *Ibid.*, pp. 23-24, document A/CONF.20/C.1/L.158 and Add.1.

<sup>73</sup> *Yearbook . . . 1957*, vol. II, pp. 97-98, document A/CN.4/108. Also note articles 35 to 37 relating to privileges and immunities of honorary consuls and similar officers (*ibid.*, pp. 102-103).

<sup>74</sup> *Yearbook . . . 1960*, vol. II, p. 36, document A/CN.4/131.

<sup>75</sup> *Yearbook . . . 1960*, vol. I, p. 31, 532nd meeting, para. 29.

<sup>76</sup> *Ibid.*, para. 30.

<sup>77</sup> *Ibid.*, para. 32. For article 13 of the Harvard Draft, see Harvard Law School, *Research in International Law* (*op. cit.*), part II: "Legal Position and Functions of Consuls", in *Supplement to The American Journal of International Law*, vol. 26 (*op. cit.*), p. 306.

<sup>78</sup> *Yearbook . . . 1960*, vol. II, p. 165, document A/4425, chap. II, sect. III.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Yearbook . . . 1961*, vol. I, pp. 94-96, 596th meeting, paras. 74-99.

79. Thus the final draft article on freedom of communication (art. 35) appeared as follows:

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or consular couriers . . .

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft.<sup>81</sup>

80. It should be noted that in paragraph 1 the term "other special couriers" in the 1960 article has been changed to "consular couriers". Paragraphs 5 and 6 correspond to article 27, paragraphs 5 and 7, respectively, of the 1961 Vienna Convention.

81. The relevant part of the commentary to the Commission's final draft article 35, though substantially the same as its 1960 commentary, is reproduced below:

(3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag, and messages in code or cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service—i.e., of the couriers dispatched by the Ministry for Foreign Affairs of the sending State or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates in third States. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable. The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's way-bill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

(4) However, by reason of its geographical position, a consulate may have to send a consular courier to the seat of the diplomatic mission or even to the sending State, particularly if the latter has no diplomatic mission in the receiving State. The text proposed by the Commission provides for this contingency. The consular courier shall be provided with an official document certifying his status and indicating the number of packages constituting the consular bag. The consular courier must enjoy the same protection in the receiving State as the diplomatic courier. He enjoys inviolability of person and is not liable to any form of arrest or detention.

(8) The Commission, being of the opinion that the consular bag may be entrusted by a consulate to the captain of a commercial aircraft, has inserted a rule to that effect by adapting the text of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.<sup>82</sup>

## (ii) *The United Nations Conference on Consular Relations (1963)*

82. Regarding the definition of the "courier", three

amendments proposed at the Conference contributed to the clarification of the term. They were an amendment by Japan, a joint proposal of the Netherlands and the Byelorussian SSR and an amendment by Italy. As regards the new regime of the "consular courier", the amendment submitted by Japan<sup>83</sup> to the effect of deleting the term provoked a lively discussion at the Second Committee of the Conference. The reason for this proposal was that "the post of consular courier was entirely new and would only lead to complications."<sup>84</sup> The Japanese amendment was strongly opposed by the representative of Czechoslovakia, who stated that:

. . . although consular couriers might seem to be an innovation, it was essential to include them in the Convention for practical reasons. First, a courier carrying correspondence between the capital and a country where there was a consular but no diplomatic mission would, in effect, be a consular courier. Secondly, a head of a consular post or vice-consul carrying a bag to the capital would still be a consular and not a diplomatic courier for he did not appear on the diplomatic list. Thirdly, the representatives of the Netherlands and of the Byelorussian Soviet Socialist Republic had each proposed an amendment, which he supported, to the effect that *ad hoc* couriers appointed to carry the consular bag to the capital should be consular couriers.<sup>85</sup>

83. The main concern expressed in the Japanese amendment was that the draft convention should not include a new category of courier or official to whom the immunities in paragraph 5 of article 35 would have to be accorded. The Japanese representative also considered that in so far as the courier was not a diplomatic courier, he should be treated only as a consular official and given the corresponding limited inviolability and immunities. To this, the representative of the United Kingdom expressed his objection on two grounds that:

Firstly, couriers did not fall within the definition of consular officials in article 1. Secondly, and more important, it was essential for couriers to receive complete inviolability and not to have the limited inviolability given to consular officials. The situation that would result from the Japanese amendment—the existence of two categories of courier, with different degrees of inviolability—was neither satisfactory nor acceptable.<sup>86</sup>

84. Although the Japanese amendment was supported by several representatives (of Yugoslavia, Australia, Belgium and others), the majority of the Committee did not favour it.<sup>87</sup> In the words of the representative of India, "it might be true that the term 'consular courier' was a relatively new one, but it was a category that was going to figure increasingly in the world of consular relations."<sup>88</sup> Thus the term "consular couriers" was now accepted as a recognized notion of international law.

85. Then the amendments proposed by the Netherlands<sup>89</sup> and the Byelorussian SSR,<sup>90</sup> which were later merged into a joint proposal, created a new category by

<sup>83</sup> *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No. 64.X.1), p. 79, document A/CONF.25/C.2/L.55.

<sup>84</sup> *Ibid.*, vol. I (United Nations publication, Sales No. 63.X.2), p. 319, *Second Committee*, 13th meeting, para. 8.

<sup>85</sup> *Ibid.*, para. 10.

<sup>86</sup> *Ibid.*, p. 320, para. 15.

<sup>87</sup> *Ibid.*, p. 321, paras. 31–34.

<sup>88</sup> *Ibid.*, p. 320, para. 23.

<sup>89</sup> *Ibid.*, vol. II, p. 74, document A/CONF.25/C.2/L.15.

<sup>90</sup> *Ibid.*, p. 80, document A/CONF.25/C.2/L.70.

<sup>81</sup> *Yearbook . . . 1961*, vol. II, p. 111, document A/4843, chap. II, sect. IV.

<sup>82</sup> *Ibid.*, pp. 111–112.

inserting a provision which read: "The sending State, its diplomatic mission and its consulate may designate consular couriers *ad hoc*." The proposal was adopted without much opposition.<sup>91</sup>

86. Finally, the amendment proposed by Italy<sup>92</sup> raised another definitional question. The Italian amendment was composed of two parts: the first, to add, in paragraph 6 of the Commission's draft article 35, specific reference to the captain of a ship to whom a consular bag may be entrusted, which was adopted by the conference. The main thrust of the Italian amendment was the second part, which was to delete the words: "he [the captain of a ship or an aircraft] shall not be considered to be a consular courier", since, according to the representative of Italy, the captain in question "should be protected by certain safeguards."<sup>93</sup> However, this part of the amendment was opposed by several representatives, including that of the Netherlands, who reminded the Committee of article 27, paragraph 7 of the 1961 Vienna Convention, which expressly stated that the captain of an aircraft, to whom the diplomatic bag could be entrusted, would not be considered to be a diplomatic courier, and asked, "What then would be the captain's position if he were carrying both a diplomatic bag and a consular bag?"<sup>94</sup> Realizing that this part of the amendment might lead to confusion, the Italian representative revised his proposal, as suggested by the representative of Yugoslavia, to the effect that the captain in question "shall be considered to be a consular courier *ad hoc*". However, this amendment was rejected by the Second Committee of the Conference, thus leaving no doubt that the captain of a ship or an aircraft could not be considered as a consular courier, either regular or *ad hoc*.

87. To sum up, under the 1963 Vienna Convention there are three kinds of couriers: (1) the diplomatic courier, (2) the consular courier and (3) the consular courier *ad hoc*. It should be added that a captain of a ship or of a commercial aircraft entrusted with a consular bag cannot be considered to be a consular courier.

88. Thus, paragraphs 1, 5, 6 and 7 of article 35 of the Convention provide as follows:

*Article 35. Freedom of communication*

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the

performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

89. As was pointed out above (para. 35), prior to the 1961 Vienna Convention and the 1963 Vienna Convention, large numbers of bilateral agreements contained provisions to the effect that consular couriers of the sending States shall enjoy in the territory of the receiving States the same rights, privileges and immunities as diplomatic couriers.<sup>95</sup> It should also be emphasized that the use of a diplomatic courier for delivering a consular bag, as contemplated in article 35, paragraph 1, has been widely applied in State practice.

*(c) The notion of the "courier" under the 1969 Convention on Special Missions*

*(i) The work of the Commission (1964–1967)*

90. The first report submitted to the Commission at its sixteenth session, in 1964, by the Special Rapporteur on the topic of special missions contained a provision, in draft article 21 on "Freedom of communication", paragraph 4, which read as follows:

Special missions may send *ad hoc* couriers to communicate in both directions with the organs of their State. Only members of the mission or of its staff may act as couriers.<sup>96</sup>

91. In his second report, submitted at the following session in 1965, the Special Rapporteur had reworded the draft article, drawing on article 27 of the 1961 Vienna Convention, with changes corresponding to the nature of special missions, as follows:

*Article 22. Freedom of communication*

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including its couriers. . . .

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

<sup>95</sup> See footnotes 42 and 43 above.

<sup>96</sup> *Yearbook . . . 1964*, vol. II, p. 109, document A/CN.4/166. The Special Rapporteur's commentary to this provision merely stated that: "If the *ad hoc* mission is operating in a frontier area, it is generally accorded the right to maintain relations by courier with the territory of its own country, without the intermediary of the permanent mission." (*Ibid.*, p. 110, para. (4) of the commentary to article 21.) Draft article 35, para. 4, stipulated "the necessary guarantees and immunities to diplomatic couriers" (*ibid.*, p. 117).

<sup>91</sup> *Ibid.*, vol. I, pp. 327–28, *Second Committee*, 14th meeting.

<sup>92</sup> *Ibid.*, vol. II, p. 84, document A/CONF.25/C.2/L.102.

<sup>93</sup> *Ibid.*, vol. I, p. 328, *Second Committee*, 14th meeting, para. 43.

<sup>94</sup> *Ibid.*, para. 48.



8. Only members of the special mission or of its staff may act as couriers of the special mission.<sup>97</sup>

92. This new enlarged version of the draft article on the freedom of communication was explained in the commentary as follows:

...  
(9) In view of the nature of special missions, the Special Rapporteur has made no provision for the possibility of the special mission's using couriers *ad hoc* (article 27, paragraph 6 of the Vienna Convention on Diplomatic Relations) or for the possibility of its employing as courier a national or resident of the receiving State. He considers, however, that the courier might be any person, irrespective of his nationality, who forms part of the special mission under the terms of article 14 as already adopted. He believes that it is not necessary to insert a special rule on this point in the draft.

(10) Nor has the Special Rapporteur included any provisions on the use of the captain of a commercial aircraft (article 27, paragraph 7 of the Vienna Convention on Diplomatic Relations and article 35, paragraph 7 of the Vienna Convention on Consular Relations) or the captain of a ship (article 35, paragraph 7 of the Vienna Convention on Consular Relations) as courier for the special mission. Such persons are not generally used for these purposes. However, this is not an absolute rule in practice. It has been observed recently that in exceptional cases special missions employ such persons as couriers *ad hoc*. For this reason, the provisions of article 35, paragraph 7 of the Vienna Convention on Consular Relations should perhaps also be inserted in the present article.<sup>98</sup>

93. Since, by this time, the notions of the courier, whether diplomatic or consular, or whether professional or *ad hoc*, had already become familiar to the world of diplomatic law, there was not much in-depth discussion on these terms at the seventeenth session of the Commission, in 1965. With regard to paragraph 8 of the draft article quoted above, however, it was pointed out by one member of the Commission that "the use, when considered necessary, of diplomatic couriers who were not members of the special mission should also be permitted".<sup>99</sup> It was further suggested by another member that "reference should be made in paragraph 8 to the possibility of using captains of ships and of commercial aircraft as *ad hoc* couriers of the special mission, because in certain circumstances they constituted the most convenient means of communication".<sup>100</sup> To these comments the Special Rapporteur responded in the following manner:

It was against his own personal feelings that he had included paragraph 8, concerning couriers. The fact was that most special missions operated in frontier areas; and, if they used as *ad hoc* couriers persons recruited in the area who did not belong to the mission and were not members of the diplomatic or consular staff, serious problems might arise. The Swiss Federal Political Department had issued a circular stating that, in such cases, the courier could not be regarded as having any diplomatic status. A provision permitting *ad hoc* couriers had been accepted without difficulty in the Vienna Convention on Diplomatic Relations, but had met with some opposition at the 1963 Conference on Consular Relations. He saw no objection to introducing in article 22 of his draft a provision similar to that contained in article 35, paragraph 6, of the Vienna Convention on Consular Relations.<sup>101</sup>

<sup>97</sup> *Yearbook ... 1965*, vol. II, pp. 129–130, document A/CN.4/179.

<sup>98</sup> *Ibid.*, pp. 130–131.

<sup>99</sup> *Yearbook ... 1965*, vol. I, p. 216, 805th meeting, para. 80.

<sup>100</sup> *Ibid.*, para. 86.

<sup>101</sup> *Ibid.*, p. 218, 806th meeting, para. 17. The Special Rapporteur also pointed out that his draft did not mention diplomatic or consular couriers and hence did not exclude the possibility of diplomatic or consular officers acting as couriers for the special mission (*ibid.*, para. 18).

94. As a result of this exchange of views, the Commission decided to delete paragraph 8 of the draft article. It also provisionally adopted a new paragraph 6 regarding "couriers *ad hoc*" and a new paragraph 7 relating to the captain of a ship or of a commercial aircraft.<sup>102</sup>

95. Consequently, the relevant paragraphs of the final draft (which became article 28) adopted by the Commission at its nineteenth session in 1967 read as follows:

#### *Article 28. Freedom of communication*

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its other special missions, or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers.

...  
5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

7. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. ...<sup>103</sup>

96. It is important to note here that the commentary of article 28 clarified the point of terminology. It stated:

As to terminology, the Commission had a choice between two sets of expressions to designate the ... courier of a special mission. It could have referred to [it] as ... "the diplomatic courier of the special mission" or, more simply, as ... "the courier of the special mission". The Commission chose the second alternative in order to prevent any possibility of confusion with the ... courier of the permanent diplomatic mission.<sup>104</sup>

#### (ii) *The Sixth Committee of the General Assembly (1968)*

97. The only substantial addition to the text proposed by the Commission that was elaborated by the Sixth Committee of the General Assembly at its twenty-third session in 1968 came from the proposal for amendment by Ghana.<sup>105</sup> In introducing his amendment, the repre-

<sup>102</sup> *Ibid.*, p. 288, 817th meeting, para. 15. The text of the new paragraphs is the same as the Commission's final draft.

<sup>103</sup> *Yearbook ... 1967*, vol. II, pp. 360–61, document A/6709/Rev.1, chap. II, sect. D.

In the course of the discussion before adopting the final text, at the nineteenth session of the Commission, the Special Rapporteur stated that: "It should be noted that apart from regular diplomatic couriers, there were couriers *ad hoc* appointed by the sending States, as well as special couriers who might be the captain of a ship or of a commercial aircraft. Ministries of Foreign Affairs had reduced the number of regular couriers and made more use of special couriers, because they could thereby communicate more quickly and easily with their permanent diplomatic missions or special missions." (*Yearbook ... 1967*, vol. I, pp. 112–13, 915th meeting, para. 56.) The term "special couriers", however, may not be proper.

<sup>104</sup> *Yearbook ... 1967*, vol. II, p. 361, document A/6709/Rev.1, chap. II, sect. D, para. (3) of the commentary to article 28.

<sup>105</sup> A/C.6/L.696/Rev.1. The United Kingdom had a similar proposal (A/C.6/L.699) which was later withdrawn. *Official Records of the*

(Continued on next page.)



sensitive of Ghana stated that "practice would tend to suggest that it was in the best interests of both the sending State and the receiving State to avoid any situation that would lead to proliferation of . . . diplomatic couriers." He therefore proposed that the special mission should employ the services of the couriers of the permanent diplomatic mission wherever practicable.<sup>106</sup>

98. With minor drafting changes, the Sixth Committee adopted this amendment as a new paragraph 3 of article 28,<sup>107</sup> and it also adopted the draft articles submitted by the Commission without change (other than necessary renumbering of the original paragraphs). The relevant provisions of the Convention on Special Missions adopted by the General Assembly, in its resolution 2530 (XXIV) of 8 December 1969, read as follows:

*Article 28. Freedom of communication*

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its other special missions or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers . . .

3. Where practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State.

6. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

7. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

8. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. . . .

(d) *The notions of the "courier of the mission" and the "courier of the delegation" under the 1975 Vienna Convention*

(i) *The work of the Commission (1968–1971)*

99. The Special Rapporteur on the topic of "Relations between States and International Organizations" submitted to the Commission at its twentieth session, in 1968, draft article 27 on "Freedom of communication" of the permanent missions to international organizations. The relevant provisions, which were based on article 27 of the 1961 Vienna Convention and the other multilateral Conventions concluded under the auspices of the United

Nations, with appropriate changes for a convention on the present subject, read as follows:

*Article 27. Freedom of communication*

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government and the diplomatic missions, consulates and special missions of the sending State, wherever situated, the permanent mission may employ all appropriate means, including diplomatic couriers . . .

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent missions. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. . . .<sup>108</sup>

100. It may be noted that, on the model of article 28 of the Convention on Special Missions, the article used the expression "the courier of the permanent mission". The expression "diplomatic courier" was not used, except in paragraph 1, in order to prevent any possibility of confusion with the courier of the permanent diplomatic mission.<sup>109</sup> The word "diplomatic" before "courier" in paragraph 1 was deleted in the course of consideration of this article (which had become article 29) at the Commission's twenty-first session, in 1969, in order to avoid any further confusion.<sup>110</sup>

101. As for the delegations of States to organs and conferences, the Commission adopted, at its twenty-second session in 1970, a provision (which had become article 97) parallel with that on permanent missions, substituting the word "delegation" for "permanent mission".<sup>111</sup> The Commission also adopted draft article 67, in which, *inter alia*, article 29 on freedom of communication was also to apply to permanent observer missions.<sup>112</sup>

102. In the subsequent consideration by the Commission of these draft articles, there was no change made with regard to the meaning of the notion of "courier".<sup>113</sup>

103. The text of article 27 of the Commission's final draft, which was substantially the same as the Special

<sup>108</sup> *Yearbook . . . 1968*, vol. II, pp. 149–150, document A/CN.4/203 and Add.1–5.

<sup>109</sup> *Ibid.*, p. 150, para. (6) of the commentary to article 27.

<sup>110</sup> *Yearbook . . . 1969*, vol. I, p. 136, 1017th meeting, para. 53.

<sup>111</sup> *Yearbook . . . 1970*, vol. I, pp. 197–198, 1077th meeting, para. 83; and *Yearbook . . . 1970*, vol. II, pp. 293–294, document A/8010/Rev.1, chap. II, sect. B, see also art. 110, *ibid.*, pp. 297–298.

<sup>112</sup> *Ibid.*, vol. II, pp. 284–285.

<sup>113</sup> *Yearbook . . . 1971*, vol. II (Part One), pp. 54–55, document A/CN.4/241 and Add.1 and 2, art. 29, and pp. 130–131, document A/CN.4/241/Add.6, art. 97.

(Footnote 105 continued.)

General Assembly, Twenty-third Session, Annexes, agenda item 85, document A/7375, "Report of the Sixth Committee", para. 214(b).

<sup>106</sup> *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1068th meeting, para. 16.

<sup>107</sup> *Ibid.*, 1089th meeting, para. 8.

Rapporteur's original draft, with minor drafting changes, read as follows:

*Article 27. Freedom of communication*

1. The host State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the mission may employ all appropriate means, including couriers . . .

5. The courier of the mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5 shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

7. The bag of the mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the mission. . . .<sup>114</sup>

(ii) *The United Nations Conference on the Representation of States in their Relations with International Organizations (1975)*

104. The Conference made no substantial change to the Commission's text that might affect the definition of "courier". In paragraph 1 of article 27, the words "observer delegations" were added to the list of organs with which the mission may communicate by appropriate means, including couriers. Article 57 is a parallel provision for delegation to organs and to conferences. As for observer delegations to organs and conferences, article 72 provided that article 57, *inter alia*, shall also apply thereto.<sup>115</sup>

(e) *The main legal features of the status of the professional diplomatic courier, the diplomatic courier ad hoc and the captain of a commercial aircraft or*

*ship entrusted with the custody, transportation and delivery of the diplomatic bag as well as of the other couriers employed by the sending State for official communication with its missions abroad*

105. The survey of the legislative background of article 27 of the 1961 Vienna Convention reveals the main legal features which determine the notion of the diplomatic courier. Although article 27 does not deal in detail with all aspects of the legal status of the diplomatic courier, it offers enough substantive elements which could serve as a basis for the legal definition of the diplomatic courier. Moreover, it indicates not only the components of the legal definition of the regular or professional diplomatic courier, but also some specific characteristics of the status of the diplomatic courier *ad hoc* and of the captain of a commercial aircraft or ship to whom is entrusted a diplomatic bag.

106. The identification of the main legal features of the diplomatic courier within the provisions of article 27 could also be useful as a starting point for the definition of the status of all other types of couriers employed by States as provided for in the other multilateral conventions concluded under the auspices of the United Nations.

(i) *The professional diplomatic courier*

107. The notion of the regular or professional diplomatic courier as defined by the relevant provisions of article 27 of the 1961 Vienna Convention and substantiated by extensive State practice, contains several legal elements relating to his functions, the requirements for the proof of his status and the facilities, privileges and immunities accorded to him by the receiving or transit State in the performance of his functions. The professional diplomatic courier is an official of the sending State duly authorized by the competent authorities of that State to take the responsibility for the custody, transportation and delivery of the diplomatic bag or the transmission of an oral message from the sending State to its diplomatic missions, consular posts or other missions and delegations, as well as to other States or international organizations, in the receiving State. In accordance with well-established practice in diplomatic intercourse, the professional diplomatic courier, as a rule, is a national of the sending State and an official of the Ministry for Foreign Affairs of that State. Consequently, he should be neither a national nor a permanent resident of the receiving State. As an official of the sending State he serves as one of the appropriate means employed by that State in the exercise of its right to communicate with its missions abroad, or with other States or international organizations.

108. Article 27 of the 1961 Vienna Convention further stipulates that the diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag. In conformity with this rule and the routine practice, the diplomatic courier is provided with a diplomatic passport certifying his official function and a diplomatic courier's letter, containing his name, status as a diplomatic courier and the number of packages carried by him. This diplomatic courier's letter (or diplomatic courier's list) is

<sup>114</sup> *Ibid.*, p. 302, document A/8410/Rev.1, chap. II, sect. D. A parallel provision for delegations to organs and to conferences appeared in article 58 (*ibid.*, p. 318). In the annex to the draft articles, concerning observer delegations to organs and to conferences, article L provided for the freedom of communication (*ibid.*, p. 337).

<sup>115</sup> See the discussion at the Conference concerning the aforementioned articles in *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. I (United Nations publication, Sales No. E.75.V.11), p. 21, 6th plenary meeting, paras. 66–74 (art. 27); pp. 26–27, 7th plenary meeting, paras. 68–70 (art. 58—now art. 57); pp. 37–41, 9th plenary meeting, paras. 48–68, and 10th plenary meeting, paras. 1–36: (annex to the draft articles); p. 178, *Committee of the Whole*, 18th meeting, paras. 31–34 (art. 27); pp. 236–242, *ibid.*, 27th meeting, paras. 41–59, and 28th meeting, paras. 1–47 (art. 58); pp. 280–283, *ibid.*, 36th meeting, paras. 22–52 (art. L of the annex); p. 313, *ibid.*, 42nd meeting, paras. 42–44 (art. 78); p. 343, *ibid.*, 47th meeting, para. 54 (art. 27); p. 345, *ibid.*, 48th meeting, para. 20 (art. 58); p. 347, *ibid.*, para. 42 (annex to the draft articles). See also the Report of the Committee of the Whole of the Conference, *Official Records of the United Nations Conference on the Representation of States . . .*, vol. II (United Nations publication Sales No. E.75.V.12), pp. 101–102 (art. 27); pp. 123–125 (art. 58); pp. 147–149 (art. L of the annex); pp. 159–160 (art. 78).

duly signed and certified with the seal of the institution issuing it, the Ministry for Foreign Affairs or the diplomatic mission, as the case may be. The courier's passport, and in particular, the document indicating his status and the number of packages constituting the diplomatic bag, are the formal credentials of the diplomatic courier which are required for the exercise of his functions.

109. According to the rules established by customary and conventional international law, as evidenced by article 27 of the 1961 Vienna Convention and supported by longstanding international practice, the receiving and the transit States are obliged to permit and protect free communication through diplomatic couriers and to offer them certain facilities, privileges and immunities. The receiving State has the duty to protect the courier and to create conditions for the discharge of his tasks. Among the immunities accorded to the diplomatic courier, special emphasis is made on the rule that the diplomatic courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

110. These three main components of the notion of the professional diplomatic courier, namely, his official functions, the required credentials and the facilities, privileges and immunities accorded to him in the performance of his official functions, constitute the basic elements determining his legal status. They could be identified, *mutatis mutandis*, within the basic legal elements determining the legal status of all other types of couriers used by States for official communications.

(ii) *The diplomatic courier ad hoc*

111. The possibility of designating diplomatic couriers *ad hoc* was considered by the Commission at an early stage of its work on the codification and progressive development of diplomatic law. As was pointed out above (paras. 66, 71 and 73), at the ninth session of the Commission in 1957, during discussion of the report submitted by the Special Rapporteur on diplomatic intercourse and immunities, reference was made *inter alia* to diplomatic couriers *ad hoc*. However, more elaborate provisions were worked out at the Vienna Conference in 1961, when specific proposals were made on this matter.

112. The codification of international diplomatic law regarding the status of the diplomatic courier *ad hoc* came as a result of the widespread practice of States at a time when the intensification of diplomatic intercourse required more flexible use of various means of official communication. The service of regular or professional diplomatic couriers had to be more often supplemented by the employment of other officials of the sending State entrusted with the delivery of diplomatic mail. This kind of *ad hoc* courier's service proved to be both economical and expedient, especially for countries whose Foreign Office disposed of limited financial means and personnel. In many countries the use of diplomatic couriers *ad hoc* has acquired great practical significance, and even surpassed the regular diplomatic courier's service. This trend in the field of official communications has been evolving with the further expansion and intensification of international relations.

113. There are no kind of specific rules or uniform practice regarding the persons who could be entrusted with the mission of diplomatic courier *ad hoc*. There has been great diversity in the use of officials of the sending State as diplomatic couriers. Some countries apply a more restrictive approach on this matter by confining the list of possible *ad hoc* couriers to diplomatic officers or officials of the foreign service enjoying diplomatic privileges and immunities, while other countries follow a more liberal approach, entrusting a diplomatic bag not only to functionaries of the Foreign Office but also to other officials, and even to any national authorized to that effect by the sending State.<sup>116</sup> The prevailing practice has been, however, that the functions of diplomatic couriers *ad hoc* have been charged to officials belonging to the foreign service or other institutions of the sending State with similar functions in the field of foreign relations, such as, for example, the Ministry for Foreign Trade or Foreign Economic Relations, or State organs involved in international cultural co-operation. The essential requirement is always a proper authorization by the competent authorities of the sending State, evidenced by the official document testifying to the status of the *ad hoc* courier and the number of packages constituting the diplomatic bag.

114. Article 27, paragraph 6, stipulates that the "sending State or the mission may designate diplomatic couriers *ad hoc*." It further states that in cases when such couriers are employed, the provisions of the same article with respect to the status of the regular diplomatic couriers shall also apply until the delivery of the diplomatic bag. That means that the courier *ad hoc* is duly authorized to perform the same functions as the professional diplomatic courier and shall have the same responsibilities regarding the custody, transportation, and safe delivery of the diplomatic bag. He is also provided with the required official document indicating his status and the number of packages constituting the diplomatic bag. The receiving State has the same obligation to protect the diplomatic courier *ad hoc* and to accord to him the facilities, privileges, and immunities necessary for the performance of his official functions. Like the professional (regular) diplomatic courier, the *ad hoc* courier also enjoys personal inviolability and is not liable to any form of arrest or detention.

115. The only significant difference in the legal status of the two categories of diplomatic couriers is the duration of the immunities accorded to them. In the case of the professional diplomatic couriers, the facilities, privileges, and immunities provided by the sending State continue to apply until they leave the territory of that State after having accomplished their official mission. The main reason for this regime could be explained by the nature of the functions of the courier, who is responsible for the delivery of the bag to the missions concerned and for collecting and carrying, on his return, the bag from the missions to the competent authorities of the sending State.

<sup>116</sup> As was pointed out above (see footnote 55), according to the national regulations of Belgium, for instance, diplomatic couriers *ad hoc* could be officials of the Ministry for Foreign Affairs, *aides-de-camp*, private secretaries, or ordinary citizens.

The official mission of the diplomatic courier *ad hoc* is accomplished when such a courier has delivered to the consignee the diplomatic bag in his charge, as provided by paragraph 6 of article 27 of the 1961 Vienna Convention. Since the facilities, privileges, and immunities are accorded to the courier for the performance of his official mission, they cease to apply when he has delivered the diplomatic bag to the missions concerned. As has been pointed out on several occasions, the courier is one of the appropriate means for the exercise of the freedom of communication, and protection is due to him by the sending State only in the performance of his official functions. Therefore, it is natural that when the *ad hoc* courier has completed his mission, there is no legal justification for maintaining the special status accorded to him in his capacity as a courier. However, if the diplomatic courier *ad hoc* happens to be a member of a diplomatic mission or an official with diplomatic status, then he is entitled to enjoy accordingly the privileges and immunities recognized to the diplomatic agents.

(iii) *The legal status of the captain of a commercial aircraft or ship entrusted with the transportation and delivery of a diplomatic bag*

116. The regulation of the legal status of the captain of a commercial aircraft or ship entrusted with the custody, transportation and handing over of a diplomatic bag to members of the mission of the sending State at the port of entry of the receiving State, represents a significant development of modern diplomatic law. It has further expanded the practical means for the exercise of the freedom of communication through the dispatch of a diplomatic bag not accompanied by a professional (regular) or *ad hoc* diplomatic courier. The codification of international law with respect to this kind of official communication was an appropriate response to the increasing demand for speedy and more economic delivery of diplomatic mail. The establishment of relevant legal rules in this field has provided for more reliable and efficient protection of the accompanied diplomatic bag and has further promoted this kind of communication. At present, the use of a diplomatic bag entrusted to the captain of a commercial aircraft has acquired very significant practical application by all States, and in particular by those with limited financial means, which could not afford to maintain a large service of professional diplomatic couriers.

117. The need for elaboration of specific rules with respect to the diplomatic bag entrusted to the captain of a commercial aircraft was expressed already at the initial stage of the Commission's work in the field of diplomatic law. As has been pointed out (see paras. 66, 68, 70 and 73), during the debate at the ninth session of the Commission in 1957 special emphasis was placed on the status of aeroplane pilots entrusted with diplomatic mail and on its protection.

118. The main provisions relating to the status of the captain entrusted with the function of carrying and delivering the diplomatic bag are contained in paragraph 7 of article 27 of the 1961 Vienna Convention. It stipulates

that a diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. The main mission of the captain regarding the bag which is not accompanied by a diplomatic courier is to take care of the custody, transportation and safe handing over of the bag to an authorized member of the diplomatic mission, who shall have access to the aircraft and take possession of the bag directly and freely from the captain. It is further required that the captain shall be provided with an official document indicating the number of packages constituting the diplomatic bag. Though he is essentially performing a significant part of the functions of a diplomatic courier, namely the custody, transportation and delivery of the bag to a member of the receiving diplomatic mission, article 27 explicitly states that the captain performing such functions shall not be considered to be a diplomatic courier, and consequently he shall not enjoy the facilities, privileges and immunities accorded by the receiving State to a regular diplomatic courier or a diplomatic courier *ad hoc*. However, the diplomatic bag entrusted to the captain shall enjoy the inviolability provided for the official correspondence and shall not be opened or detained. The legal protection and immunity in this case were accorded to the diplomatic bag, and not to the captain who was entrusted with it (see para. 73 above), though there were some suggestions to provide the captain with certain safeguards, which were not accepted at the United Nations Conference on Consular Relations (see paras. 86–87 above).

(iv) *Other couriers employed by the sending State for the delivery of consular bags or official bags to its missions and delegations abroad*

119. The legal status of all other couriers used for official communications under the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention, are modelled after the provisions of article 27 of the 1961 Vienna Convention. The official functions, required documents indicating the status of the respective courier and the number of packages constituting the official bag, as well as the facilities, privileges and immunities accorded to them by the receiving State, are identical to those of the diplomatic courier under article 27 of the 1961 Vienna Convention.

120. The relevant provisions of the three multilateral conventions concluded under the auspices of the United Nations, mentioned above, also provide for an official bag entrusted to the captain of a commercial aircraft. The only difference with paragraph 6 of article 27 is the possibility of entrusting such a bag not only to the captain of a commercial aircraft but also to the captain of a ship. Perhaps this was an unessential omission, which was later remedied by a reference to the possibility of entrusting the bag to a captain of a ship.

(v) *The main elements of the definition of a diplomatic courier*

121. In the light of the main legal features of a diplomatic courier under the relevant provisions of article 27 of the 1961 Vienna Convention, the following working

definition is suggested for the purpose of the present draft articles:

The diplomatic courier is a person duly authorized by the competent authorities of the sending State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the missions and delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State with facilities, privileges, and immunities in the performance of his official functions.

122. This definition could provide the basis for the definition of the notion of diplomatic courier *ad hoc* and the other types of official couriers employed for official communications with consular posts, special missions, permanent missions to international organizations and delegations to international organs and international conferences, taking into consideration their specific features. Such definitions could be incorporated in the draft article dealing with the use of terms for the purpose of the present articles. The definition should indicate the main legal features of the status of the diplomatic courier, without being exhaustive in detail with respect to each one of those legal features, which should be elaborated in specific draft articles, in particular, articles relating to the legal status of the diplomatic courier, including the facilities, privileges and immunities accorded to him in the performance of his official functions.

## 2. DEFINITION OF THE TERM "DIPLOMATIC BAG"

123. The definition of the diplomatic bag, accompanied or not accompanied by a diplomatic courier, represents one of the main definitional problems inherent in the nature of the topic under consideration. After examination of the main legal features determining the status of the diplomatic courier and the captain of a ship or a commercial aircraft entrusted with a diplomatic bag, the next item for examination should be the definition of the term "diplomatic bag", and then, by analogy to it, all other kinds of official bags. The definition of the diplomatic bag falls within the terms to be used for the purpose of the present draft articles, which constitute indeed the *sedes materiae* of the topic (see paras. 55 and 56 above). Following the examination of the main components of the legal notion of the diplomatic bag, we shall proceed to the definition of the other terms to be used in the draft articles, as was suggested above (para. 54).

124. It is proposed to examine the legal status of a diplomatic bag accompanied by diplomatic courier and diplomatic bag not accompanied by such courier which is entrusted to the captain of a ship or dispatched through a commercial aircraft or postal channels.

125. In the examination of the main legal features of the diplomatic bag, special emphasis will be placed, as in the case of the diplomatic courier, on the survey of the "travaux préparatoires" of the relevant provisions of the

four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations, as well as the practice of States regarding the legal protection of the diplomatic bag and other official bags used by States in communications with their missions abroad.

### (a) *The notion of the "diplomatic bag" under the 1961 Vienna Convention*

#### (i) *The work of the Commission (1955–1958)*

126. The original draft articles submitted to the Commission, at its seventh session in 1955, by the Special Rapporteur for the topic of diplomatic intercourse and immunities contained the following provisions:

#### *Article 16*

...

2. The diplomatic pouch shall be exempt from inspection unless there are very serious grounds for presuming that it contains illicit articles. The pouch may be opened for inspection only with the consent of the Ministry of Foreign Affairs of the receiving State and in the presence of an authorized representative of the mission.<sup>117</sup>

127. However, this original text was withdrawn and the revised draft article 16 he submitted to the Commission at its ninth session, in 1957, simply provided that:

2. The diplomatic pouch shall be exempt from inspection.<sup>118</sup>

128. Explaining why he had abandoned his original text, the Special Rapporteur stated that it was drafted before he had been able to study the municipal laws on the subject.

On discovering that none of the many municipal laws dealing with the question of the diplomatic bag provided for any exception to the principle of inviolability, he had come to the conclusion that it would be better to state the bare principle in the article, and see whether the Commission wished to include in the commentary qualifications on the lines of those made in his original text.<sup>119</sup>

129. In the course of discussion in the Commission at its ninth session, some members favoured the inviolability of the bag in all circumstances,<sup>120</sup> while others stressed the danger of abuse of the bag. Taking into consideration these conflicting views, one member observed that "the best way to preserve intact the rule of the inviolability of the diplomatic bag, while preventing possible abuse, was to give a clear definition of the diplomatic bag"<sup>121</sup> and

<sup>117</sup> *Yearbook* ... 1955, vol. II, p. 11, document A/CN.4/91. Thus the Special Rapporteur considered it an established international practice that in cases where it had grounds for suspecting abuse of the bag as containing illegal objects, the receiving State might challenge it with the approval of its Foreign Ministry and in the presence of a member of the mission of the sending State. See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana, 1976), pp. 125–126.

<sup>118</sup> *Yearbook* ... 1957, vol. I, p. 74, 398th meeting, para. 27. Paragraph 4 also stipulated that "Third States shall be bound to accord the same protection to ... messengers in transit".

<sup>119</sup> *Ibid.*, p. 80, 399th meeting, para. 29.

<sup>120</sup> One member submitted an amendment to article 16, paragraph 2, which read: "Diplomatic despatches carried by diplomatic messengers shall in no circumstances whatsoever be subject to opening or detention." (*ibid.*, p. 77, 398th meeting, para. 84).

<sup>121</sup> According to that member of the Commission, a distinction could be made between the "diplomatic mail, not only sealed but also certified by the head of the mission or the foreign minister." and "other diplomatic bags or packages, which were only sealed and not certified" (*ibid.*, p. 79, 399th meeting, paras. 4–5).

referred to the explanation given by Oppenheim.<sup>122</sup> While several members of the Commission were in favour of including a definition of the diplomatic bag, others expressed doubts as to whether it would be possible to frame a definition that would prevent the abuses of the bag.<sup>123</sup> Eventually a delicate compromise was reached by the adoption of a proposal to the effect that the text of the article should set out the general principle of inviolability, while the commentary should contain a qualifying passage. It was also pointed out that a distinction should be drawn between diplomatic bags accompanied by couriers and those not accompanied by such couriers.<sup>124</sup>

130. Thus, the text of the part of the article and commentary relating to the diplomatic bag which were adopted by the Commission at its ninth session in 1957 appeared as follows:

*Article 21. Freedom of communication*

- ...
2. The diplomatic bag may not be opened or detained.
  3. The diplomatic bag may contain only diplomatic documents or articles intended for official use.
- ...

*Commentary*

...  
(2) Paragraph 2 states that the diplomatic bag is inviolable, while paragraph 3 indicates what the diplomatic bag may contain. In accordance with the terms of the latter paragraph, the diplomatic bag may be defined as a bag (sack or envelope) containing diplomatic documents or articles intended for official use.

(3) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 3 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.<sup>125</sup>

131. In the light of the comments and suggestions made by Governments, the Special Rapporteur submitted his revised text of article 21 to the Commission at its tenth session, in 1958, para. 2 of which read:

2. The diplomatic bag, which may contain only diplomatic documents or articles of a confidential nature intended for official use, shall be furnished with the sender's seal and bear a visible indication of its character. The diplomatic bag may not be opened or detained.<sup>126</sup>

132. The Special Rapporteur explained that the reason for proposing an amalgamated text was that "it might be advisable to provide a definition of the diplomatic bag, and the definition should come first".<sup>127</sup> This proposal was not

acceptable to the Commission, however, "since it might be argued from such a juxtaposition that the inviolability of the bag was conditional on its complying with the requirements regarding contents".<sup>128</sup>

133. Thus, the Commission preferred to retain the text adopted at the previous session in 1957. It agreed, however, to add a phrase dealing with seals and external identification marks.<sup>129</sup>

134. The relevant paragraphs of the final text of the article and commentary relating thereto adopted by the Commission read as follows:

*Article 25. Freedom of communication*

- ...
3. The diplomatic bag shall not be opened or detained.
  4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.
- ...

*Commentary*

...  
(4) Paragraph 3 (former paragraph 2) states that the diplomatic bag is inviolable. Paragraph 4 (former paragraph 3) indicates what the diplomatic bag may contain. The Commission considered it desirable that the statement of the inviolability of the diplomatic bag should be preceded by the more general statement that the official correspondence of the mission, whether carried in the bag or not, is inviolable. In accordance with paragraph 4, the diplomatic bag may be defined as a bag (sack, pouch, envelope or any type of package whatsoever) containing documents and (or) articles intended for official use. According to the amended text of this paragraph, the bag must bear visible external marks of its character.

(5) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.<sup>130</sup>

*(ii) The United Nations Conference on Diplomatic Intercourse and Immunities (1961)*

135. There were a great number of amendments submitted to the Conference aimed at restricting in one way or another the unconditional inviolability of the diplomatic bag as stipulated in the Commission's draft articles. A French amendment contained a provision permitting inspection of the bag in the presence of a representative of the mission,<sup>131</sup> while the amendment of the United States of America aimed at permitting such inspection rather than send the bag back, allowing the receiving State to reject a suspect bag.<sup>132</sup> The amendment of Ghana provided for the right of the sending State to

<sup>122</sup> "... according to general usage, those parts of their luggage [the luggage of couriers] which contain diplomatic despatches and are sealed with the official seal must not be opened and searched." (L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. by H. Lauterpacht (London, Longmans, Green, 1955), vol. I, p. 813).

<sup>123</sup> *Yearbook* ... 1957, vol. I, pp. 78-80, 398th and 399th meetings.

<sup>124</sup> *Ibid.*, p. 80, 399th meeting, para. 24.

<sup>125</sup> *Yearbook* ... 1957, vol. II, pp. 137-138, document A/3623, chap. II, sect. II.

<sup>126</sup> *Yearbook* ... 1958, vol. II, p. 17, document A/CN.4/116/Add.1.

<sup>127</sup> *Yearbook* ... 1958, vol. I, p. 139, 457th meeting, para. 57.

<sup>128</sup> Denza, *op. cit.*, pp. 126-127.

<sup>129</sup> *Yearbook* ... 1958, vol. I, p. 139, 457th meeting, paras. 60-62.

<sup>130</sup> *Yearbook* ... 1958, vol. II, pp. 96-97, document A/3859, chap. III, sect. II.

<sup>131</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, p. 20, document A/CONF.20/C.1/L.125.

<sup>132</sup> *Ibid.*, p. 23, document A/CONF.20/C.1/L.154.

withdraw such a bag unopened.<sup>133</sup> The joint amendment of France and Switzerland attempted to add to the definition of the bag the phrase "an official nature necessary for the performance of the functions of the mission".<sup>134</sup>

136. Referring to the above French-Swiss amendment, the representative of the USSR made the following statement, which was seemingly shared by the majority of the Conference:

A close examination of the first amendment submitted by France and Switzerland (A/CONF.20/C.1/L.286, para. 1) suggested that it might mean that the diplomatic bag enjoyed inviolability only if its contents were in keeping with the specifications laid down in the amendment. In theory, of course, inviolability was based on the contents of the diplomatic bag. The International Law Commission had, however, tried to avoid the kind of misinterpretation to which the amendment seemed to be open by avoiding a direct link between the definition of the contents of the bag and the statement that the bag was inviolable. Article 25, paragraph 3, provided that the diplomatic bag should not be opened or detained, while paragraph 4 provided that it should only contain diplomatic documents or articles intended for official use. If one of those provisions was infringed, the necessary action could be taken, although there was no direct link. Paragraphs 3 and 4 as they stood were therefore preferable to the terms of the amendment.<sup>135</sup>

137. Thus, this amendment, as well as all other amendments, were rejected<sup>136</sup> on more or less the same ground as that given by the representative of USSR. Accordingly, paragraphs 3 and 4 of the article (now article 27) remained unchanged.

138. It should be noted that, at the Conference, paragraphs 5, 6 and 7 were added, which were related primarily to the question of "couriers" (see paras. 71-73 above). Paragraph 5 refers to the diplomatic bag accompanied by a diplomatic courier. Paragraph 6 deals with the diplomatic courier *ad hoc* and paragraph 7 provides that a diplomatic bag may be entrusted to the captain of a commercial aircraft.

(b) *The notion of the "diplomatic and consular bag" under the 1963 Vienna Convention*

(i) *The work of the Commission (1957-1961)*

139. Neither the original draft articles submitted by the Special Rapporteur to the Commission at its ninth session in 1957, nor his revised draft articles submitted at its twelfth session in 1960, provided for the diplomatic or consular bag specifically as a means of communication.<sup>137</sup> In the course of the discussion in the Commission at its twelfth session, in 1960, it was suggested that some reference should be made to the use of the diplomatic bag as a means of communication by consular representatives. On this point one member of the Commission referred to the treaty practice that bags containing the

official correspondence of consulates were entitled to receive the same treatment as diplomatic bags.<sup>138</sup> At the same time, it was pointed out by another member of the Commission that any refusal to permit the use of a consular bag would lead to consulates using the diplomatic bag, and would place at a disadvantage the consulate of a country which did not have a diplomatic mission in the receiving State concerned.<sup>139</sup>

140. In the light of that discussion, the Commission provisionally adopted the text of draft article 36 and the commentary thereto, which read as follows:

*Article 36. Freedom of communication*

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including . . . the diplomatic or consular bag . . .

2. The bags containing the consular correspondence shall not be opened or detained.

3. These bags, which must bear visible external marks of their character, may only contain documents or articles intended for official use.

*Commentary*

...

(3) . . . The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's waybill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

...

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing documents or articles, or both, intended for official purposes. The consular bag must not be opened or detained. This rule, set forth in paragraph 2, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents, which is the subject of article 33 of the draft. As is specified in paragraph 3, consular bags must bear visible external marks of their character, i.e. they must bear an inscription or other external mark so that they can be identified as consular bags.

...<sup>140</sup>

141. At the thirteenth session of the Commission, in 1961, several members of the Commission expressed some doubts as to whether the status of the consular bag could be assimilated to that of the diplomatic bag in view of the fact that, even in the case of the latter, nearly one-third of the representatives at the 1961 United Nations Conference favoured a provision under which the diplomatic bag could be either opened or denied admission by the authorities of the receiving State in certain special cases. A majority of the members, however, stressed that the matter had been discussed thoroughly in the Commission at previous sessions and hence there was no need to reopen the question.<sup>141</sup> The Commission consequently did not make any substantial change to its original draft, but it included some drafting changes and also a new provision regarding the captain of a commercial aircraft to whom a consular bag may be entrusted.

<sup>133</sup> *Ibid.*, p. 42, document A/CONF.20/C.1/L.294.

<sup>134</sup> *Ibid.*, pp. 38-39, document A/CONF.20/C.1/L.286.

<sup>135</sup> *Ibid.*, vol. I, p. 179, *Committee of the Whole*, 29th meeting, para. 64.

<sup>136</sup> *Ibid.*, pp. 180-181, paras. 72-79.

<sup>137</sup> See *Yearbook . . . 1957*, vol. II, pp. 97-99, document A/CN.4/108 (arts. 23 and 25), and *Yearbook . . . 1960*, vol. II, p. 36, document A/CN.4/131 (art. 29), respectively.

<sup>138</sup> *Yearbook . . . 1960*, vol. I, p. 27, 531st meeting, paras. 37-38.

<sup>139</sup> *Ibid.*, p. 28, para. 53.

<sup>140</sup> *Yearbook . . . 1960*, vol. II, p. 165, document A/4425, chap. II, sect. III.

<sup>141</sup> *Yearbook . . . 1961*, vol. I, pp. 94-95, 596th meeting, paras. 83-84.



142. Thus the relevant text of the Commission's final draft article adopted at its thirteenth session (1961), and the commentary thereto, read as follows:

*Article 35. Freedom of communication*

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including . . . the diplomatic or consular bag and . . .

3. The consular bag, like the diplomatic bag, shall not be opened or detained.

4. The packages constituting the consular bag must bear visible external marks of their character and may contain only official correspondence and documents or articles intended for official use.

6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft.

*Commentary*

(3) . . . The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's way-bill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing the official correspondence, documents or articles intended for official purposes or all these together. The consular bag must not be opened or detained. This rule, set forth in paragraph 3, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents which is the subject of article 32 and of paragraph 2 of article 35 of the draft. As is specified in paragraph 4, consular bags must bear visible external marks of their character—i.e., they must bear an inscription or other external mark so that they can be identified as consular bags.

(8) The Commission, being of the opinion that the consular bag may be entrusted by a consulate to the captain of a commercial aircraft, has inserted a rule to that effect by adapting the text of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.

142

*(ii) The United Nations Conference on Consular Relations (1963)*

143. At the Conference, there were a series of amendments which centred around paragraph 3 of draft article 35, with the aim of restricting the unconditional inviolability of the consular bag.<sup>143</sup> The sponsors of these

<sup>142</sup> *Yearbook . . . 1961*, vol. II, pp. 111–112, document A/4843, chap. II, sect. IV. Asked by a member of the Commission about the utility of the phrase “like the diplomatic bag”, in paragraph 3, the Chairman of the Drafting Committee explained that these words had been inserted because consular papers were sometimes sent in the diplomatic bag. (*Yearbook . . . 1961*, vol. I, p. 242, 619th meeting, paras. 23–24.)

<sup>143</sup> See *Official Records of the United Nations Conference on Consular Relations*, vol. II, p. 81, document A/CONF.25/C.2/L.73 (Federal Republic of Germany), document A/CONF.25/C.2/L.75 (South Africa); p. 83, document A/CONF.25/C.2/L.91 (Spain); p. 85, document A/CONF.25/C.2/L.108 (Nigeria).

amendments stressed that they reflected the “prevailing distinction between purely diplomatic bags and consular bags,” representing a compromise between the rights of the receiving State and those of the sending State.<sup>144</sup>

144. These amendments were emphatically opposed by other representatives who favoured the text proposed by the Commission which guaranteed the absolute inviolability of consular bags. It was pointed out, for instance, that “such phrases as ‘serious reasons’ used in those amendments . . . left wide scope for interpretation by the receiving State and could lead to abuse and the restriction of the sending State’s freedom of communication”.<sup>145</sup> Fear was also expressed that the amendments would “only add to the possibility of friction, suspicion and misunderstanding”.<sup>146</sup>

145. The amendments were merged into one submitted by the Federal Republic of Germany, as orally revised, and it was adopted by the Second Committee of the Conference by 46 votes to 15, with 3 abstentions.<sup>147</sup>

146. As a result of the deliberations on the above amendments, the 1963 Vienna Convention, as adopted by the Conference, specifically authorizes officials of the receiving State to “request that the bag be opened in their presence by an authorized representative of the sending State” if they have serious reason to believe that the bag contains something other than official papers or articles intended exclusively for official use; should the request be denied, the bag shall be returned to its place of origin. In this sense, the legal status of the consular bag, as opposed to the diplomatic bag, is clearly restricted.<sup>148</sup>

*(c) The notion of the “bag of the special mission” under the 1969 Convention on Special Missions*

*(i) The work of the Commission (1964–1967)*

147. The first report submitted to the Commission, at its sixteenth session in 1964, by the Special Rapporteur on the topic of special missions contained no provision regarding the bag of the special mission, and no mention was made thereof in its commentary to article 21 (Freedom of communication).<sup>149</sup>

148. In the second report, submitted at the following session of the Commission, in 1965, however, the Special

<sup>144</sup> *Ibid.*, vol. I, pp. 321 and 322, *Second Committee*, 13th meeting, paras. 37 and 42.

<sup>145</sup> *Ibid.*, pp. 321–22, para. 40.

<sup>146</sup> *Ibid.*, p. 324, para. 67.

<sup>147</sup> *Ibid.*, p. 325, para. 79. See also plenary meetings, *ibid.*, pp. 29–34, 10th meeting, paras. 2–60.

<sup>148</sup> It has been observed, however, that “they fail to take account of the situation in which the consular bag originated not from the sending State, but rather from the consulate in the receiving State itself”. (L. T. Lee, *Vienna Convention on Consular Relations* (Leyden, Sijthoff, 1966), p. 101.)

<sup>149</sup> *Yearbook . . . 1964*, vol. II, pp. 109–110, document A/CN.4/166. Only a reference to “diplomatic bags” was made with regard to the treatment thereof “while in transit through the territory of a third State” in draft article 35, para. 5 (*ibid.*, p. 117).



Rapporteur had redrafted the draft article in line with the 1961 Vienna Convention, as follows:

*Article 22. Freedom of communication*

...

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

...

149. As was described earlier, the 1961 Vienna Convention lays down the principle of the absolute inviolability of the diplomatic bag (art. 27, para. 3), while the 1963 Vienna Convention confers more limited protection on the consular bag (art. 35, para. 3).

150. As to the question whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions, the Special Rapporteur stated in his commentary that he had been unable to decide whether the guarantees in this respect should be limited in the case of particular categories of special missions, and requested the Commission to give its attention to this matter. He added, however, that it would be dangerous to decide summarily to limit the guarantees in the case of all special missions of a technical nature: "Such limitation might", he wrote, "constitute a threat to good relations between States, to preservation of the dignity of the State whose special mission is affected by it and to the smooth performance of such a mission's task".<sup>151</sup>

151. The Commission generally agreed not to limit the guarantees, assimilating the legal status of the bag of the special mission with the diplomatic bag under the terms of the 1961 Vienna Convention. It also agreed that a provision should be inserted to the effect that "the bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft".<sup>152</sup>

152. In his third report, submitted to the Commission at its eighteenth session in 1966, the Special Rapporteur referred to the written comment of the Belgian Government in which the question of a special postal rate for diplomatic bags was discussed, as follows:

After studying this comment by the Belgian Government, the Special Rapporteur feels bound to point out that what was intended by the Commission in paragraphs 3 and 4 of article 22 was solely the protection under substantive law of the inviolability of the contents and secrecy of the bag, and not any special treatment of diplomatic bags in respect of postal rates. The Special Rapporteur is of the opinion that the Commission should not discuss the question of privileged rates, which is not referred to in the Vienna Conventions of 1961 and 1963; the diplomatic bag should be uniformly protected regardless of the means used for its transport and there is no need to draw special attention to the situation of diplomatic bags sent by post.<sup>153</sup>

<sup>150</sup> *Yearbook* ... 1965, vol. II, pp. 129–130, document A/CN.4/179.

<sup>151</sup> *Ibid.*, p. 130, para. (8) of the commentary to article 22.

<sup>152</sup> *Yearbook* ... 1965, vol. I, p. 288, 817th meeting, paras. 15–16; *Yearbook* ... 1965, vol. II, pp. 183–184, document A/6009, chap. III, sect. B, paras. (5) and (6) of the commentary to article 22.

<sup>153</sup> *Yearbook* ... 1966, vol. II, p. 146, document A/CN.4/189 and Add.1 and 2, para. 191.

153. There was no discussion affecting the status of the bag of the special mission at the nineteenth session of the Commission in 1967. Thus the text relating to the bag in the Commission's final draft article 28 read as follows:

*Article 28. Freedom of Communication*

...

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

...

7. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.<sup>154</sup>

154. As to the terminology, the commentary noted as follows:

... the Commission had a choice between two sets of expressions to designate the bag ... of a special mission. It could have referred to [it] as "the diplomatic bag of the special mission" ... or, more simply, as "the bag of the special mission" ... The Commission chose the second alternative in order to prevent any possibility of confusion with the bag ... of the permanent diplomatic mission.<sup>155</sup>

(ii) *The Sixth Committee of the General Assembly (1968)*

155. As in the case of the "couriers of the special mission" (see paras. 97–98 above), the only substantial change to the text proposed by the Commission was elaborated at the Sixth Committee of the General Assembly at its twenty-third session in 1968; it was based on the amendment proposed by Ghana,<sup>156</sup> which was eventually adopted, with minor drafting changes, as new paragraph 3 of the Convention.<sup>157</sup> The relevant provisions of the Convention on Special Missions adopted by the General Assembly in resolution 2530 (XXIV) of 8 December 1969 read as follows:

*Article 28. Freedom of communication*

3. Where practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State.

4. The bag of the special mission shall not be opened or detained.

5. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

<sup>154</sup> *Yearbook* ... 1967, vol. II, p. 361, document A/6709/Rev.1, chap. II, sect. D.

<sup>155</sup> *Ibid.*, para. (3) of the commentary to article 28.

<sup>156</sup> A/C.6/L.696/Rev.1; see *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, "Report of the Sixth Committee", para. 214(b). The representative of Ghana, introducing the amendment, stated that it was in the best interests of both the sending State and the receiving State to avoid any situation that would lead to proliferation of diplomatic bags ... and proposed that special missions should use the bag of the permanent diplomatic mission wherever practicable. (*Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1068th meeting, para. 16.)

<sup>157</sup> *Ibid.*, 1089th meeting, para. 8.

...

8. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

(d) *The notions of the "bag of the mission"  
and the "bag of the delegation"  
under the 1975 Vienna Convention*

(i) *The work of the Commission (1968–1971)*

156. As was described earlier (paras. 99–103 above), the draft article 27 on the topic of relations between States and intergovernmental organizations, submitted by the Special Rapporteur to the Commission at its twentieth session, in 1968, was based on article 27 of the 1961 Vienna Convention and the other multilateral conventions concluded under the auspices of the United Nations, with appropriate drafting changes;<sup>158</sup> accordingly, there was no significant addition to the definition of the "bag" in the consideration of this topic by the Commission.

157. The Commission's final text on "Freedom of communication" on the part of the mission (art. 27) and the delegation (art. 58)<sup>159</sup> was the same as the text of the Convention as finally adopted.

(ii) *The United Nations Conference on the Representation of States in Their Relations with International Organizations (1975)*

158. The text of the relevant provisions, namely, articles 27, 57 and 72, was adopted by the Conference<sup>160</sup> without any significant debate affecting the definition of the term "bag".

(e) *The main elements of the legal status of the diplomatic bag and other bags used by the sending State for official communications*

(i) *The substantive elements of the legal status of the diplomatic bag whether accompanied or not by diplomatic courier*

159. The examination of the legislative background of article 27 of the 1961 Vienna Convention and the relevant provisions of the other multilateral conventions concluded under the auspices of the United Nations in the field of diplomatic law regarding the legal status of the diplomatic

bag constitute a reliable source for the identification of the main components for the legal definition of the diplomatic bag. In the view of the Special Rapporteur, there are at least five such substantive components, which are inter-related and as a whole form the legal notion of a diplomatic bag, namely: (a) the function of the bag, (b) its content, (c) the external features relevant to its identification as such, (d) the required documents indicating the character of the bag and (e) its treatment by the authorities of the receiving or the transit State in accordance with international law.

160. The diplomatic bag is one of the means employed by States for official communications with their missions abroad and also between those missions, wherever situated. It is one of the main instruments for the exercise of the freedom of communication for all official purposes which is recognized as a fundamental principle of international law. This function of the diplomatic bag predetermines the scope of the rule aimed at the legal protection of the bag, including its inviolability and the facilities and preferential treatment accorded to it by the sending or the transit State. At the same time, the official function of the bag is instrumental for the determination of the content of the bag, which is related to the official functions of the missions of the sending State.

161. Article 27 of the 1961 Vienna Convention stipulates that the diplomatic bag may contain only diplomatic documents or articles intended for official use. Under this general provision fall, first of all, the official correspondence of the mission, documents, manuals for the use of code or cipher, any kind of confidential materials and articles for official use relating to the functions of the mission. This provision is of such a nature that its strict observance by the sending State and its missions require, above all, mutual respect and good faith, having in mind the generally recognized immunities accorded to the diplomatic mail and the inviolability of the diplomatic bag. The possible legal safeguards against any abuses ought to take into consideration the importance of the principle of freedom of communication for all official purposes, which should be matched with the genuine abidance by the relevant rules of international law, including those relating to the explicit limitations concerning the content of the diplomatic bag, as provided for in the 1961 Vienna Convention and well-established by international practice.

162. An essential legal feature related to the formal characteristics of the diplomatic bag is the requirement for visible external marks indicating the character of the diplomatic bag, such as special labels attached to the bag and the individual packages constituting the bag, with the inscription "diplomatic mail" or some other external indications. Usually the diplomatic bag is wax-sealed as a kind of sign of its authenticity and a safeguard against being opened before its delivery to its final destination. The packages constituting the diplomatic bag could be numbered in conformity with the official document accompanying the bag.

163. As was pointed out above (para. 108), the regular (professional) diplomatic courier, the diplomatic courier *ad hoc* and the captain of a ship or commercial aircraft

<sup>158</sup> *Yearbook* . . . 1968, vol. II, pp. 149–150, document A/CN.4/203 and Add.1–5. It may be noted that, as in article 28 of the 1969 Convention on Special Missions, the expression "diplomatic bag" was not used here in order to prevent any possibility of confusion with the bag of the permanent diplomatic mission (*ibid.*, para. (6) of the commentary to art. 27).

<sup>159</sup> *Yearbook* . . . 1971, vol. II (Part One), pp. 302 and 318, document A/84 iO/Rev. I, chap. II, sect. D.

<sup>160</sup> See footnote 115 above.

entrusted with a diplomatic bag are provided with an official document indicating their status and the number of packages constituting the diplomatic bag. In fact, this official document also serves as a proof of the character and destination of the diplomatic bag. It is, therefore, a formal requirement for the legal status of the bag.

164. It is the treatment of the diplomatic bag by the authorities of the receiving State or by the transit State that constitutes, indeed, the core of its legal status. It should be the subject of more detailed examination in order to elaborate specific draft articles on a comprehensive legal regime of the diplomatic bag. At this stage of the study and for the purpose of the definition of the term "diplomatic bag", we propose to identify briefly the main legal features determining the legal status of the bag, and in particular its treatment by the receiving State or the transit State.

165. The principle of inviolability of the official correspondence is of foremost significance for the legal status of the diplomatic bag. The confidential nature and the secrecy of the diplomatic mail has been considered a legitimate interest of the State deserving special treatment and legal protection. The direct legal consequence of the principle of the inviolability of the official correspondence is the rule according to which the diplomatic bag shall not be opened or detained and shall be exempt from any kind of inspection or control, directly or through sophisticated technical devices. These rules constitute a legal guarantee for the unimpeded and safe delivery of the bag and at the same time serve as preventive safeguards against any attempt to disclose the confidential character of the bag and its content by technical means, even without opening the bag itself. The inviolability of the diplomatic bag, including its adequate protection and all other preventive measures aimed at safeguarding its secrecy, are legal obligations incumbent upon the receiving or the transit State. Those States also have the duty to provide the necessary facilities and offer a preferential treatment of the diplomatic bag in order to ensure its speedy delivery to the appropriate consignee.

166. These rules on the inviolability of the bag, its legal protection and preferential treatment through facilities, privileges and immunities accorded by the receiving or the transit State, which are embodied in article 27 of the 1961 Vienna Convention, are common to the other multilateral conventions on diplomatic law concluded under the auspices of the United Nations. They reflect the relevant customary rules of international law and constitute the legal regime of the diplomatic bag generally recognized by national legislation and State practice. Thus the legal regime of inviolability of the diplomatic bag under the provisions of the 1961 Vienna Convention is identical to the regime applicable to the bag of the consular posts, special missions, permanent missions of States to international organizations and delegations to international organs and international conferences, with one exception: that which is envisaged by paragraph 3 of article 35 of the 1963 Vienna Convention, and which will be indicated below.

167. Paragraph 3 of article 35 of the 1963 Vienna Convention, while reiterating the general rule that "the

consular bag shall be neither open nor detained", sets out an exception, to the effect that if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the official correspondence, documents or articles intended exclusively for official use, they may request that the bag be opened in their presence by an authorized representative of the sending State and if this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

168. It may be pointed out at the outset that this exception—as was already mentioned earlier (see para. 146 above)—is a restriction, which constitutes an important deviation from the principle of free communication for all official purposes, affecting the inviolability of the consular bag. It should be further noted that it is the only instance when a restrictive provision of such a character was embodied in a multilateral convention in the field of diplomatic law concluded under the auspices of the United Nations, since it was not followed by the 1969 Convention on Special Missions and the 1975 Vienna Convention. On the other hand, the restriction introduced by the 1963 Vienna Convention in the exceptional cases envisaged by paragraph 3 of Article 35, creates a kind of dichotomy in the otherwise coherent and uniform régime relating to the status of all other kinds of bags used by States for official purposes.

Therefore, a preliminary question could be raised as to whether, in the further elaboration of the draft articles on the status of the diplomatic bag, it would be advisable to opt towards the uniform rule contained in article 27 of the 1961 Vienna Convention and reiterated by the relevant provisions of the 1961 Convention on special missions and the 1975 Vienna Convention, or to accept as a basis the alternative solution stipulated in article 35, paragraph 3, of the 1963 Vienna Convention. In the latter option, delicate legal problems of a general nature would arise regarding the concordance of the specific provisions on the status of the diplomatic bag with the unequivocal provisions contained in international treaties, which are the legal basis of the present draft articles. Such a lack of concordance would become absolutely evident if the articles were confined primarily to the legal status of the diplomatic bag under the 1961 Vienna Convention. If this were the case, then the provisions of article 27 of the 1961 Vienna Convention should apply to the determination of the legal status of the diplomatic bag, and on that basis to the regime of the bags under the other two conventions of 1969 and 1975, leaving the consular bag aside as a special case or submitting specific draft articles relating to the consular bag as an exceptional case.<sup>161</sup> These are possible

<sup>161</sup> It is interesting to note that in some bilateral consular conventions concluded in the last few years there are explicit provisions which differ from the provision of paragraph 3 of article 35 of the 1963 Vienna Convention with regard to the possibility for opening the consular bag. They stick, rather, to the rule of article 27 of the 1961 Vienna Convention. For example the Consular Convention between Poland and Austria of 2 October 1974 stipulates that the consular bag shall not be subject to being opened, to control or detention (Austria, *Bundesgesetzblatt für die Republik Österreich* (Vienna), No. 122 (18 July 1975), p. 1633, document No. 383); see on this subject

(Continued on next page.)

solutions of the problem, on which the Commission may find it convenient to express its views.

169. Nevertheless, with a view to examining the possible impact on the legal status of the diplomatic bag of the exceptional rule introduced by the 1963 Vienna Convention, it is proposed to identify briefly some of its essential aspects and to indicate problems that may arise in its implementation when the procedure contemplated in paragraph 3 of article 35 is applied. It is well known that the opening of the diplomatic bag in exceptional cases is not a mere hypothetical or theoretical problem but an approach that has been suggested in order to avoid possible abuses of the bag which sometimes may affect important interests of the receiving State, including security and other legitimate considerations.

170. Article 35, paragraph 3 of the 1961 Vienna Convention sets out certain conditions and specific requirements for the opening of the bag. First of all, it stipulates that the competent authorities of the receiving State may request that the bag be opened only when they have evidence or serious reasons to believe that the content of the bag is not in conformity with its official functions recognized by international law and contains something other than the official correspondence, documents or articles intended exclusively for official use. This challenge of the legitimate character of the bag may be based on presumption or evaluation of the circumstances which are difficult to be predetermined by any objective criteria or strict regulations. Therefore, they might be susceptible to genuine error or be suspected as an attempt to break the secrecy of the content of the bag. In addition, in some cases serious differences may appear in the interpretation of the expression "articles intended exclusively for official use", even if an effort were made to suggest an indicative list of such articles. Thus, the subjective aspects of the expression "serious reasons to believe" may give rise to opposing perceptions and disputes which may not favour the safe and unimpeded delivery of the diplomatic bag. Most of these difficulties would remain even if the opening and inspection of the bag were limited only to the checking of the physical contents of the packages constituting the bag and not to trying to ascertain the official character of the papers or the articles, whether or not they correspond to the notion of "documents and articles intended exclusively for official use". In our submission, if the authorities of the sending State were to undertake an inspection equal to scrutinizing of or acquainting themselves with the content of the bag in order to prove that it contains articles that do not exclusively relate to the official functions of the diplomatic mission, that might indeed jeopardize the principle of the freedom of communication. The definition of the preventive measures against an arbitrary action on the part of the receiving State may be as difficult as the prevention of possible abuses by the sending State if the use of the

diplomatic bag does not rely on good faith and mutual trust.

171. The second important requirement within the framework of paragraph 3 of article 35 refers to the right of the competent authorities of the receiving State to request that the consular bag be opened in their presence by an authorized representative of the sending State. This provision also could raise practical problems, relating to the duration of the detention pending the appointment and arrival of the authorized persons representing the competent authorities of the receiving State and the representative of the appropriate mission, as well as some other problems indicated *inter alia* in the report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (hereinafter called Working Group) submitted by the Special Rapporteur to the thirty-first session of the Commission in 1979 in his capacity as Chairman of that group.<sup>162</sup> Some of them could find a satisfactory solution through appropriate rules, while others by their nature may inevitably cause impediments and delays in the delivery of the diplomatic bag.

172. The third important provision of paragraph 3 of article 35 envisages an alternative contingency when the request by the competent authorities of the receiving State is refused by the authorities of the sending State. In this case, the bag shall be returned unopened to its place of origin. This appears to be a solution which, while taking into account the legitimate concern of the receiving State, does not induce direct harm to the secrecy of the bag. However, in some circumstances, due to the lack of immediate transport means for the return of the bag or for other technical reasons, the bag in practice may be detained, pending its dispatch back, and in any case its delivery will be prevented.

173. In the light of the above considerations of legal and practical nature, the Special Rapporteur, while seeking advice and guidance by the Commission on the questions raised, suggests that the elaboration of the draft articles on the legal status of the diplomatic bag should proceed on the basis of the relevant provisions of article 27 of the 1961 Vienna Convention. A procedure for opening the bag, if considered at all, ought to be limited only to the status of the consular bag as provided for by paragraph 3 of article 35 of the 1963 Vienna Convention.

(ii) *Some specific features relating to the legal status of the diplomatic bag not accompanied by diplomatic courier*

174. The elements determining the legal status of the diplomatic bag as identified in the preceding paragraphs

(Footnote 161 continued.)

*Yearbook . . . 1979*, vol. II (Part Two), p. 180 (item 15(a), sect. 2(a) of the report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier).

<sup>162</sup> See the report of the Working Group, item 14, sect. 2(b) and item 15, (a), sect. 2(a), in *Yearbook . . . 1979*, vol. II (Part Two), pp. 179 and 180. Among the questions raised in connection with the opening of the bag, constituting an indicative list, were listed the admissibility of examining the bag, the procedure to be followed, including the procedure in the case of non-appearance of one or the other of the officials, the purpose of checking of the contents, problems of delay which may hinder diplomatic communications, including the duration of the detention, etc.

are also inherent in the status of the diplomatic bag not accompanied by a courier, namely the diplomatic bag entrusted to the captain of a ship or a commercial aircraft who is not considered to be a diplomatic courier, or a diplomatic bag dispatched through postal channels as a shipment or an air freight, and therefore not entrusted to the captain of the ship or the aircraft. The rules relating to the function, content, external characteristics and the treatment due to the diplomatic bag in general, are applicable also to the diplomatic bag not accompanied by a diplomatic courier, whether ordinary (professional) or *ad hoc* courier. Taking into consideration the fact that the diplomatic bag is dispatched as a postal parcel, shipment or air freight, the requirement for an accompanying official document indicating the number of packages could not be applicable in the form envisaged by paragraph 5 of article 27 of the 1961 Vienna Convention and the relevant provisions of the other multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations. In that case the postal documents, the documents for the consignment on ship or the document for the air freight may indicate the official character of the parcel containing diplomatic mail.

175. The most important legal feature of the non-accompanied diplomatic bag, as in the case of the diplomatic bag accompanied by courier, is its legal protection and special preferential treatment by the sending and the transit State. It should be emphasized at the outset that there has been a firm and generally agreed principle, supported by well-established State practice, to the effect that the provisions applied to the legal status of the diplomatic bag accompanied by diplomatic courier should also be relevant for the status of the diplomatic bag not accompanied by such courier. That means that the non-accompanied diplomatic bag shall not be opened or detained and shall be given the same legal protection and accorded the same facilities, privileges and immunities as are granted to the bag accompanied by diplomatic courier. The fact that such a diplomatic bag is not under the direct custody of a diplomatic courier requires an even greater measure of protection and preferential treatment in order to ensure its unimpeded and safe delivery. The principle of equal treatment was acknowledged on several occasions by the Commission<sup>163</sup> and in written comments on the topic under consideration by Governments of the United Nations.<sup>164</sup> In many bilateral treaties it has been explicitly stipulated that official bags dispatched through postal channels by air mail or surface mail shall be inviolable "and shall enjoy all other privileges which are granted to official mail in accordance with the generally accepted

principles of international law",<sup>165</sup> or that they "shall enjoy all the immunities customarily granted [by the contracting States] to official mails, and shall be inviolable".<sup>166</sup> This treatment of the non-accompanied diplomatic bag assimilated to the regime of the diplomatic bag accompanied by diplomatic courier, is reflected in a considerable number of bilateral agreements<sup>167</sup> concluded mostly prior to, and in some instances after, the multilateral conventions under the auspices of the United Nations.

176. As was already pointed out in the present reports, the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations contain identical provisions stipulating that the diplomatic bag, as well as the consular bag and the bags of the other missions and delegations of the sending State, may be entrusted to the captain of a ship or a commercial aircraft. Therefore, in this part of the report are indicated only some specific matters relating to the employment of a captain of a ship or an aircraft with the transportation and delivery of the bag.

177. The first question is whether the reference to the captain in the existing conventions is to be interpreted *stricto sensu*, or whether the bag could be entrusted to another authorized member of the crew. The Special Rapporteur submits that the bag could be entrusted also to another authorized member of the crew who may be charged with such a mission by the captain of the ship or the aircraft. However, the prevailing practice has been more in favour of entrusting the bag to the highest ranking officer of the ship or the aircraft with a view to underlining the importance attached to the function of carrying the official mail of the sending State.<sup>168</sup>

<sup>163</sup> See para. 2(e) of the Exchange of Notes between Brazil and Venezuela constituting an administrative agreement for the exchange of official correspondence by air mail (supplementary to the Agreement of 3 June 1919), Caracas, 30 January 1946 (United Nations, *Treaty Series*, vol. 65, pp. 112 and 114).

<sup>164</sup> See para. 3 of Exchange of Notes constituting an agreement between the United Kingdom of Great Britain and Northern Ireland and Mexico for the transmission of diplomatic correspondence between London and Mexico City, London, 27 September 1946 (*ibid.*, vol. 91, p. 162).

<sup>165</sup> See for example the Exchange of Notes between the Government of the United Kingdom and the Government of Norway concerning the transmission by post of diplomatic correspondence, Oslo, 23 December 1946 and 15 January 1947 (*ibid.*, vol. 11, pp. 188–189 and 191); Exchange of Notes between Ecuador and Brazil constituting an agreement for the exchange of diplomatic correspondence by air mail in special diplomatic bags, Quito, 15 November 1946 and 31 May 1947 (*ibid.*, vol. 72, pp. 30 and 32) in which it is stipulated that the diplomatic bags "shall be inviolable and not liable to inspection and shall enjoy the privileges accorded to Cabinet mail". There are similar agreements between the United Kingdom and the Netherlands on the exchange through postal channels of postage of diplomatic bags containing non-confidential correspondence, The Hague, 30 November 1951 (*ibid.*, vol. 123, p. 177); between the United Kingdom and the Dominican Republic, London, 1 and 9 August 1956 (*ibid.*, vol. 252, p. 121); between Brazil and Argentina, Rio de Janeiro, 6 July 1961 (*ibid.*, vol. 657, p. 117).

<sup>166</sup> Suggestions of such a character were advanced during the earlier consideration of this issue and, most recently, in the preliminary examination of the present topic. See, for example, the written

(Continued on next page.)

<sup>163</sup> See item 15 of the report of the working group, *ibid.*, pp. 180–181.

<sup>164</sup> See the written comments of the USSR (*ibid.*, sect. 2(b) of the report, p. 180), and the written comments of the Federal Republic of Germany (*Yearbook . . . 1979*, vol. II (Part One), pp. 223–224, document A/CN.4/321 and Add.1–7, and *Yearbook . . . 1979*, vol. II (Part Two), p. 180 (item 15(a), sect. 2(f) of the report of the Working Group).

178. The second question which could arise is whether the bag must necessarily be entrusted to the captain of a ship flying the flag of the sending State or to the captain of a commercial aircraft of an airline company of the sending State. Here again, it could be pointed out that usually this is the case, but at the same time there are some instances when for practical convenience the official bag is entrusted to the captain of a ship or a commercial aircraft which is not under the jurisdiction of the sending State.

179. Another question relating to the status of the captain entrusted with the official bag is whether the personal inviolability and other immunities accorded to the professional diplomatic courier and the diplomatic courier *ad hoc* could be extended to the captain or the authorized member of the crew only during the duration of the journey until the bag is handed over to the authorized member of the mission of the receiving State.<sup>169</sup> In answering this question, the Special Rapporteur holds the view that in all multilateral conventions concluded under the auspices of the United Nations there is an explicit provision to the effect that the captain to whom the bag is entrusted shall not be considered to be a diplomatic or any other kind of courier. Consequently, according to these clear provisions, the captain cannot enjoy the immunities granted by the receiving State to the diplomatic and other official couriers. Perhaps the only feasible rule in this case would be to provide that any measure which the receiving State might possibly adopt with respect to the person of the captain should not affect the status of the bag, its inviolability and legal protection, or its safe and speedy delivery. It could be further suggested on this point that any measure which the receiving State might adopt against an official bag should not be extended to the captain of a ship or a commercial aircraft to whom the bag was entrusted, since the captain is independent of the bag itself.<sup>170</sup>

180. Another important condition for the accomplishment of the mission of the captain regarding the safe delivery of the bag entrusted to him is the procedure provided for the transmission of the bag. Article 27, paragraph 7 of the 1961 Vienna Convention stipulates that the mission of the receiving State to whom the bag is addressed may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft. The captain is not supposed to deliver the bag to the consignee at the premises of the mission. His

function is to take care of the custody and transportation of the bag until an authorized port of entry according to the flight schedule. His duty is confined to the handing over of the bag to the authorized member of the receiving mission "directly and freely" at the airport. Such a procedure requires the access of the authorized member of the mission to the airfields, which could be done only by special arrangement with the competent authorities of the receiving State. A specific provision relating to such an arrangement is not embodied in the text of article 27, though it may stem from paragraph 7 referring to the right of the authorized member of the receiving mission "to take possession of the diplomatic bag directly and freely from the captain of the aircraft", which presupposes a direct access to the apron of the airfields and to the aircraft itself. We find such additional provision on the access to the ship or the aircraft, incorporated in paragraph 7 of article 35 of the 1963 Vienna Convention, and since then included also in the relevant provisions of the 1969 Convention on Special Missions (art. 28, para. 8) and the 1975 Vienna Convention (art. 27, para. 7 and art. 57, para. 8). The Special Rapporteur submits that in the appropriate draft article there should be a somewhat more elaborated provision regarding the handing over of the bag to the representative of the receiving mission with the necessary facilities for access to the ship or the aircraft in order to ensure the taking of direct and free possession of the bag. In this sense, there were some suggestions advanced by certain states in their written comments,<sup>171</sup> which deserve due consideration. As a matter of fact, arrangements to this effect already exist in State practice and national regulations.

181. The dispatch of diplomatic bags through normal postal channels or overland shipment and air freight has been common practice, particularly for non-confidential correspondence and other documents and materials intended for official use. Though the four multilateral conventions in the field of diplomatic law do not contain special provisions on this kind of unaccompanied diplomatic bags, they do not prevent official communications through such means either. In this case, the elaboration of the relevant draft articles relating to the diplomatic bag not accompanied by diplomatic courier or not entrusted to the captain of a ship or a commercial aircraft ought to rely mostly on the existing bilateral treaties substantiated by State practice, and only as far as general rules are concerned, to refer to the multilateral conventions concluded under the auspices of the United Nations.

182. Before proceeding to the examination of some specific aspects of the diplomatic bag dispatched through postal channels, shipment or air freight, it should be indicated that this kind of diplomatic bag is entitled to the same régime of immunities, legal protection and preferential treatment as the diplomatic bag accompanied by diplomatic courier or entrusted to the captain of a ship or

(Footnote 168 continued.)

comments of Chile in *Yearbook* . . . 1979, vol. II (Part One), p. 220, para. 15, document A/CN.4/321 and Add.1-7, and *Yearbook* . . . 1979, vol. II (Part Two), p. 181 (item 15(b), sect. 2(d) of the report of the Working Group).

<sup>169</sup> As has already been pointed out, similar suggestions were made during the elaboration of some of the multilateral conventions, but they were rejected. More recently such a suggestion was made by Poland during the consideration of the present topic (see *Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 65th meeting, para. 57, and *Yearbook* . . . 1979, vol. II (Part Two), p. 181 (item 15(b), sect. 2(a) of the report of the Working Group).

<sup>170</sup> See in the same sense the written comments of Colombia (A/33/224, annex, pp. 4-5) and *Yearbook* . . . 1979, vol. II (Part Two), p. 182 (item 15(b), sect. 2(e) of the report of the Working Group).

<sup>171</sup> See the written comments of the USSR (A/33/224, annex, p. 2, para. 4), and *Yearbook* . . . 1979, vol. II (Part Two), p. 180 (item 15(a), sect. 2(b) of the report of the Working Group).

a commercial aircraft. This principle has found general recognition in a number of bilateral treaties and in State practice.<sup>172</sup> During the preliminary consideration of this topic at the Sixth Committee of the General Assembly and in written comments by Governments, the view was expressed that diplomatic bags sent by post should be treated in the same way as diplomatic bags accompanied by courier and be granted the legal protection provided for in article 27 of the 1961 Vienna Convention.<sup>173</sup> Indeed, there is no reason whatsoever to treat differently the diplomatic bags dispatched by post or as a shipment or airfreight, performing the same official functions envisaged by international law. Taking into consideration the official functions of the bag, the receiving State is bound to grant it the same facilities for safe and speedy delivery as are granted to the diplomatic bag accompanied by diplomatic courier or entrusted to the captain of a ship or an aircraft.

183. Among the specific aspects of the legal status of the diplomatic bag sent by postal channels as air mail or surface mail parcels and the diplomatic bag dispatched through overland shipment and air freight, [inherent in this kind of diplomatic bag], reference should be made to the requirements for the identification of the official character of such a bag, the measures for the safety of forwarding the parcels and the procedure and preferential treatment for the direct and swift delivery. It is suggested to provide special markings and other visible signs which would allow the easy recognition of the diplomatic bag among other postal parcels or consignments, in order to ensure its preferential treatment. As far as the security and safety of the bag is concerned, many of the existing bilateral agreements contain certain requirements for appropriate seals and technical devices, including the use of locks and padlocks, safety bolts and the establishment of maximum dimensions in weight or size for facilitating the safety and unimpeded forwarding. Some bilateral agreements also envisage an agreed time-table for dispatch and receipt of the bag. Considering the measures intended to facilitate the exchange of diplomatic bags through postal parcels, shipments or air freight, special emphasis should be made on the provisions for accelerating customs clearance, or exemption from customs formalities and inspection. On the basis of established State practice, the present draft articles may attempt to elaborate the relevant provisions applied specifically to the diplomatic bag dispatched by postal channels or other means. At this stage of the work on the topic, and for the purpose of proposing a definition of the diplomatic bag, it might be sufficient to indicate the main features of the status of this kind of diplomatic bag,

without entering into a detailed elaboration of the possible requirement or procedure for the use of such a diplomatic bag and for ensuring that diplomatic bag sent by post, overland shipment or airfreight should arrive quickly and safely at its destination. In this connection, as was suggested in the written comments by some Governments, it might be appropriate to request again the advice and assistance of the Universal Postal Union (UPU).<sup>174</sup>

(iii) *Definition of the term "diplomatic bag" and other bags used by States for official communications*

184. Taking into consideration the main elements determining the legal status of the diplomatic bag and the specific features of the diplomatic bag not accompanied by diplomatic courier and in the light of the relevant provisions of article 27 of the 1961 Vienna Convention, the following working definition could be suggested for the purpose of the present draft articles:

"'Diplomatic bag' means all packages containing official correspondence, documents or articles exclusively for official use, which bear visible external marks of their character, used for communications between the sending State and its missions abroad or between those missions, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function."

185. This definition is not meant to be exhaustive on all substantive elements regarding the content, external characteristics and treatment of the diplomatic bag in general, and the diplomatic bag not accompanied by diplomatic courier in particular. Each one of these items deserve special consideration in order to elaborate specific draft articles. It is the view of the Special Rapporteur that the definition of the term "diplomatic bag" should contain only an indication of the legal components of the notion which, as a whole, define the essential characteristics of the bag. Such a definition may provide the basis for the examination of the specific aspects of the status of the bag with a view to suggesting relevant draft articles.

186. The proposed definition could be used *mutatis mutandis* as a starting point for the definition of the consular bag, the bag of special missions, permanent missions to international organizations or delegations to

<sup>172</sup> The agreement between Brazil and Venezuela, for example, explicitly provides in article 2, para. (f), that the diplomatic mail sent by post shall enjoy security and inviolability and all other privileges which are granted to official mail in accordance with the generally accepted principles of international law (see footnote 165 above). Similar provisions are contained in most of the other agreements mentioned above (footnotes 166–167).

<sup>173</sup> See the written comments of Switzerland in *Yearbook ... 1979*, vol. II (Part One), p. 225, document A/CN.4/321 and Add.1–7, and *Yearbook ... 1979*, vol. II (Part Two), pp. 180–181 (item 15(a), sect. 2(h) of the report of the Working Group).

<sup>174</sup> It may be advisable to address such a request to the Executive Council of the UPU, pursuant to decision C.42 of May 1976 of the Lausanne Congress, taking into account the development of the study of this problem by the Commission since then. As was mentioned in the written comments of Colombia (A/33/24, annex, pp. 5–7), the Executive Council of the UPU, at the request of the United Nations Secretariat, approved a questionnaire which was sent out to all postal administrations. The answers received were briefly summarized in five points. It was not agreed to include in the Acts of UPU any provision relating to diplomatic correspondence free of charge, while a positive view was expressed regarding the use of international postal services for handling diplomatic bags and regarding the international carriage of diplomatic mail, being governed by bilateral or multilateral agreements "which have so far been applied without difficulty".



international organs or international conferences, since it contains all the essential elements envisaged by the relevant provisions of the four multilateral conventions in the field of diplomatic law regarding the appropriate official bag (diplomatic, consular or bags of the missions and delegations.) There is also a possibility of introducing as a working hypothesis the global notion of "official bag" embracing all kinds of bags used by States for official communication, on the understanding that such a term should not eliminate the use of the specific denominations for different bags, which have acquired legal certainty and wide recognition in State practice.

### 3. DEFINITION OF OTHER TERMS USED FOR THE PURPOSES OF THE PRESENT DRAFT ARTICLES

187. The examination of the main constitutive elements of the notions of the diplomatic courier and the diplomatic bag constitutes only part, though the essential part, of the study of the definitional problems inherent in the nature of the present draft articles. As was pointed out above (para. 54), there is another category of terms, embodied in the existing multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations, which have acquired legal certainty and confirmation in State practice. Therefore the Special Rapporteur would suggest to use them directly or by reference to the respective conventions as legal definitions for the purposes of the present draft articles. They constitute a long list of terms, to which could be added some other terms that, in the form of legal definitions, could not be found in the multilateral conventions referred to above.

188. In order to introduce these terms in a more concise way, it is proposed to present them under three main headings, namely (a) definitions referring to the term "State", such as "sending State", "receiving State", "host State", "transit State" and "third State"; (b) definitions referring to the terms "mission" and "delegation", such as "permanent diplomatic mission" or simply "diplomatic mission", "consular post", "special mission", "permanent mission", "permanent observer mission", "delegation", "delegation to an organ", "delegation to a conference", "observer delegation", "observer delegation to an organ" and "observer delegation to a conference"; and (c) definitions referring to other terms, such as "international organization", "international organ" and "international conference". In all instances, the relevant provisions of the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations shall be utilized as the main source for the legal definition of the respective terms to be used in the present draft articles. It is interesting to note that the greatest number of such definitions are found in the 1969 Convention on Special Missions and, particularly, in the 1975 Vienna Convention, while the 1961 Vienna Convention does not contain a special article on the use of terms. Perhaps this is an indication of the evolving modern pattern of legislative technique, which is attaching greater significance to provisions carrying definitions of the terms used in a particular treaty for the purposes of application or interpretation of that treaty.

#### (a) Definition of the terms "sending State", "receiving State", "transit State", "third State" and "host State"

189. A definition of the term "sending State" is contained only in the 1975 Vienna Convention (art. 1, para. 1(16)), referring to the State which sends a mission to an organization, or a delegation to an organ or to a conference, or an observer delegation to an organ or a conference. It is obvious that this definition could be of little use for the purposes of the present draft articles.

190. Some bilateral treaties<sup>175</sup> in the field of diplomatic law also contain definitions of the term "sending State" closely adapted to their subject-matter and therefore of no direct use for the topic under consideration.

191. The same could be said with regard to definitions of the term "sending State" considered in some research drafts of the Harvard Law School in the field of diplomatic<sup>176</sup> or consular relations.<sup>177</sup>

192. The term "sending State" for the purpose of the present articles should designate the State which is employing a courier and is dispatching a diplomatic bag, accompanied or not accompanied by diplomatic courier, to its missions abroad or to other States or international organizations, and to whom those missions are sending back the diplomatic bag. The definition could therefore simply refer to the State employing diplomatic courier and sending diplomatic bag. It could also in more elaborated manner indicate the State dispatching to its missions abroad or to other States and international organizations a diplomatic bag accompanied or not accompanied by diplomatic courier.

193. A definition along the lines of the preceding paragraph could be applied *mutatis mutandis* to all other kinds of couriers and bags, i.e. consular couriers and consular bags, as well as couriers and bags of special missions, permanent missions to international organizations and delegations to international organs and conferences.

194. As far as the definition of the term "receiving State" is concerned, none of the multilateral conventions in the field of international law concluded under the auspices of the United Nations and only a few of the bilateral conventions contain such definitions. In the case of the latter, like the definition of the term "sending State", they could not serve as a basis for a definition to be applied in the present draft articles due to the same reasons. This conclusion is equally valid with regard to the

<sup>175</sup> See for instance article 2, para. (1) of the Convention relating to consular officers between the United States of America and the United Kingdom of 6 June 1951 (United Nations, *Treaty Series*, vol. 165, p. 124). The definition contained therein cannot be of direct use, since it is very closely attached to the context of that Convention and, under the term "sending State", refers to "the High Contracting Party by whom the consular officer is appointed, or all the territories of that party to which the Convention applies".

<sup>176</sup> Harvard Law School, *Research in International Law*, part I. "Diplomatic Privileges and Immunities" (*op. cit.*), p. 42.

<sup>177</sup> *Ibid.*, part II. "The Legal Position and Functions of Consuls" (*op. cit.*), p. 193.



relevant provisions of the Harvard Law School research drafts.<sup>178</sup>

195. The term "receiving State" under the present draft articles should indicate the State on whose territory are situated the diplomatic mission, consular post, permanent mission or special mission, as well as the State in whose territory a session of an international organ takes place or an international conference is convened, and to where the diplomatic bag of the sending State is addressed.

196. Such a definition of the term "receiving State" may apply to all kinds of couriers and bags used by States for official communications.

197. The definition of the term "host State" contained in the 1975 Vienna Convention (art. 1, para. 1, subpara. (15)) could very well be adapted to the present draft articles and therefore could be used in its entirety.

198. There is no definition as such of the term "transit State" in the four multilateral conventions concluded under the auspices of the United Nations. However, article 40, paragraph 3 of the 1961 Vienna Convention and the respective provisions of the other three conventions<sup>179</sup> related to the obligations of third States provide that third States "shall accord to official correspondence and other official communications *in transit*\* . . . the same freedom and protection as is accorded by the receiving State." Furthermore, it is stipulated therein that "They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags *in transit*\* the same inviolability and protection as the receiving State is bound to accord". In such a case the *transit State*, under this provision, is the "third State" through whose territory and with whose consent the official bag passes *en route* to the receiving State. In our view, the *transit State* should be defined as such and not merely be assimilated to third State, i.e. a State which is neither a sending nor a receiving State. In normal circumstances the transit State is known in advance, according to the established itinerary and, when required, a transit visa is provided for the courier to cross its territory, whereas a third State is the State which only in exceptional conditions could be involved, usually in the occurrence of *force majeure* or some fortuitous event.

199. Thus, for the purposes of the present draft articles, the term "transit State" would mean a State through whose territory and with whose prior consent the courier accompanying a diplomatic bag or a diplomatic bag not accompanied by diplomatic courier passes *en route* to the receiving State. The transit State has with regard to the diplomatic courier and the diplomatic bag, whether accompanied or not accompanied by diplomatic courier, the same obligations regarding the legal protection and treatment of the courier and the bag, including the facilities, privileges and immunities to be granted in the performance of their official functions.

200. As has been pointed out, the four multilateral conventions concluded under the auspices of the United Nations contain specific provisions with respect to the duties of *third States*. Normally by third State is meant a State not directly involved in certain legal relationships. For the purpose of the present draft articles, under the term "third State" should come a State which is neither a sending nor a receiving nor a transit State and which yet, in some exceptional circumstances, may be affected by the functioning of official communications in which normally only the sending, the receiving and possibly the transit State may be involved. This would be the case contemplated in paragraph 4 of article 40 of the 1961 Vienna Convention and the relevant provisions of the other three multilateral conventions,<sup>180</sup> as a result of *force majeure* or fortuitous event, such as forced landing of an aircraft, breakdown of the means of transport, natural disaster forcing a sudden deviation from the original itinerary or a situation of distress which compels the courier to stop over at a port of entry of a given State which was not foreseen.

201. In accordance with article 40, para. 4, of the 1961 Vienna Convention and the relevant provisions of the other three conventions, the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag in normal circumstances by the receiving State or the transit State shall be granted also by the third State when the courier or the bag are on its territory due to *force majeure*. This general rule may require further elaboration in the draft articles, but for the purposes of the draft article on the use of terms it would be sufficient to point out that the term "third State" means any State, except the sending State, the receiving State or the transit State, on whose territory the courier and the bag are compelled to be present due to *force majeure* or fortuitous event.

202. The 1975 Vienna Convention contains, in article 1, para. 1, subpara. (15), the following definition of the term "host State":

"host State" means the State in whose territory:

- (a) the Organization has its seat or an office, or
- (b) a meeting of an organ or a conference is held.

203. The Special Rapporteur submits that this definition could be adapted to the present draft articles without any change.

(b) *Definition of the terms "diplomatic mission", "consular post", "special mission", "permanent mission", "permanent observer mission", "delegation to an organ", "observer delegation to an organ", "delegation to a conference" and "observer delegation to a conference"*

204. The meaning of the term "diplomatic mission" (or "permanent diplomatic mission") stems from the relevant provisions of the 1961 Vienna Convention and may be introduced as formulated in article 1, subpara. (b) of the 1969 Convention on Special Missions.

<sup>178</sup> See footnotes 176 and 177 above.

<sup>179</sup> See art. 54, para. 3 of the 1963 Vienna Convention; art. 42, paras. 3 and 4, of the 1969 Convention on Special Missions, and art. 81, para. 4 of the 1975 Vienna Convention.

<sup>180</sup> See art. 54, para. 4, of the 1963 Vienna Convention; art. 42, para. 5 of the 1969 Convention on Special Missions; and art. 81, para. 5, of the 1975 Vienna Convention.

205. The term "consular post", which comprises any consulate-general, consulate, vice-consulate, or consular agency, could be used as it stands in article 1, subpara. (a), of the 1963 Vienna Convention and article 1, subpara. (c) of the 1969 Convention on Special Missions.

206. The term "special mission", referring to a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a special task, as contained in article 1, subpara. (a), of the 1969 Convention on Special Missions could also be introduced in the present draft articles without any modification.

207. Regarding the terms "permanent mission", "permanent observer mission", "delegation to an organ", "observer delegation to an organ", "delegation to a conference" and "observer delegation to a conference", they could also be taken unchanged from the relevant provisions of article 1, subpara. 1 of the 1975 Vienna Convention.

(c) *Other terms used for the purposes of the present draft articles*

208. Under the term "international organization", it is suggested to include all intergovernmental organizations, of a universal or regional character, with more comprehensive or specialized functions and powers, both within and outside the institutional system of the United Nations. In this case, the proposed definition would be based on the provision of article 1, para. 1, subpara. (1) of the 1975 Vienna Convention and would be wider in scope than the "international organization of a universal character" to which that Convention is confined.

209. Regarding the term "organ", we suggest adopting the definition contained in article 1, para. 1, subpara. (4) of the 1975 Vienna Convention.

210. For the term "conference", we suggest adopting a notion which would embrace international conferences of States convened by States or by international organizations. In this case the scope of the term would be wider than the provision of article 1, para. 1, subpara. (5) of the 1975 Vienna Convention, which is limited only to conferences of States convened by or under the auspices of an international organization. The Special Rapporteur is of the view that such a limitation could not be justified for the purpose of the present draft articles.

4. TEXT OF THE PROPOSED DRAFT ARTICLE  
ON THE USE OF TERMS

211. Taking into consideration the comments and suggestions made on various definitional problems and in particular on the use of terms for the purposes of the present draft articles, the Special Rapporteur would like to submit to the Commission for examination and approval the following draft article:

*Article 3. Use of terms*

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending

State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the diplomatic mission, consular post or other missions and delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State facilities, privileges and immunities in the performance of his official functions;

(2) "diplomatic courier *ad hoc*" means an official of the sending State entrusted with the function of diplomatic courier for special occasion only, who shall cease to enjoy the facilities, privileges and immunities accorded by the receiving or the transit State to a diplomatic courier, when he has delivered to the consignee the diplomatic bag in his charge;

(3) "diplomatic bag" means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions or other missions or delegations, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function;

(4) "sending State" means a State dispatching a diplomatic bag, with or without a courier, to its diplomatic mission, consular post, special mission or other missions or delegations, wherever situated, or to other States or international organizations;

(5) "receiving State" means a State on whose territory:

(a) a diplomatic mission, consular post, special mission or permanent mission is situated, or

(b) a meeting of an organ or of a conference is held;

(6) "host State" means a State on whose territory:

(a) an organization has its seat or an office, or

(b) a meeting of an organ or a conference is held;

(7) "transit State" means a State through whose territory and with whose consent the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

(8) "third State" means any State other than the sending State, the receiving State and the transit State;

(9) "diplomatic mission" means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(10) "consular post" means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(11) "special mission" means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a special task;

(12) "mission" means, as the case may be, the permanent mission or the permanent observer mission;

(13) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

(14) "permanent observer mission" means a mission of permanent character, representing a State, sent to an international organization by a State not a member of that organization;

(15) "delegation" means, as the case may be, the delegation to an organ or the delegation to a conference;

(16) "delegation to an organ" means the delegation sent by a State to participate on its behalf in the proceedings of the organ;

(17) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

(18) "observer delegation to an organ" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the organ;

(19) "delegation to a conference" means the delegation sent by a State to participate on its behalf in the proceedings of the conference;

(20) "observer delegation to a conference" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the conference;

(21) "international organization" means an inter-governmental organization;

(22) "organ" means:

(a) any principal or subsidiary organ of an international organization, or

(b) any commission, committee or subgroup of any such organ, in which States are members;

(23) "conference" means a conference of States.

2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag" may apply also to consular courier and consular courier *ad hoc*, to couriers and *ad hoc* couriers of special missions and other missions or delegations, as well as to the consular bag and the bags of special missions and other missions and delegations of the sending State.

3. The provisions of paragraphs 1 and 2 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

### C. General principles underlying the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations

212. The formulation of certain fundamental principles of international law underlying the existing rules of modern diplomatic law with special reference to the legal status of the diplomatic courier and the diplomatic bag, has been suggested throughout the work on the present topic. The feasibility of such a formulation was indicated in the preliminary reports submitted to the Commission by the

working groups and the working documents of the Secretariat since the early stage of the examination of the topic, and during the discussions the Sixth Committee of the General Assembly.<sup>181</sup> The preliminary report submitted to the Commission by the Special Rapporteur<sup>182</sup> also dealt with this matter. It was generally agreed that the enunciation of such general principles would be useful for the purpose of the present draft articles.

213. In accordance with the plan of work suggested by the Special Rapporteur in the present report, at this stage it would suffice to present these draft articles on a purely preliminary basis as tentative formulations (see para. 12 above). This may provide an early opportunity for a general exchange of views, while deferring the substantive and detailed examination to a later stage when the content of the draft articles had been specified.

214. It is therefore proposed to introduce, under the heading of part I of the present draft articles, "General provisions", the draft text of the three general principles, namely: (a) the principle of freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags; (b) the principle of respect for international law and the laws and regulations of the receiving and the transit State and (c) the principle of non-discrimination and reciprocity. These three principles are interrelated and set out the basic legal framework for an effective regime of the diplomatic courier and the diplomatic bag. Their interplay also leads to a proper balance between the requirements for safe and speedy delivery of the bag and the legitimate interests of the receiving and transit State as well as between the secrecy of the diplomatic mail and the security considerations of the receiving State.

#### 1. PRINCIPLE OF FREEDOM OF COMMUNICATION FOR ALL OFFICIAL PURPOSES EFFECTED THROUGH DIPLOMATIC COURIERS AND DIPLOMATIC BAGS

215. The principle of freedom of communication for all official purposes has been universally recognized to constitute the legal foundation of modern diplomatic law. It should also be considered as the core of the legal régime of diplomatic couriers and diplomatic bags. The preponderant impact of this principle on the legal aspects of diplomatic intercourse was rightly identified as "the most important of all the privileges and immunities accorded under international law."<sup>183</sup> The significance of free communication for all official purposes takes a prominent place in the four multilateral conventions concluded under the auspices of the United Nations and in many other bilateral and multilateral treaties in the field of diplomatic

<sup>181</sup> In addition to document A/CN.4/WP.5, the reports of the working groups and working documents of the Secretariat are reproduced essentially in *Yearbook* ... 1978, vol. II (Part Two), pp. 138-144, paras. 137-144; *Yearbook* ... 1979, vol. II (Part One), pp. 213 *et seq.*, document A/CN.4/321 and Add.1-7; *Yearbook* ... 1979, vol. II (Part Two), pp. 170-184, paras. 153-164.

<sup>182</sup> *Yearbook* ... 1980, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/335.

<sup>183</sup> See Denza, *op. cit.*, p. 119.

law.<sup>184</sup> With regard to the topic under consideration, it is very indicative that in the four multilateral conventions the provisions relating to the status of the courier and the bag are placed under the heading "freedom of communication" and are introduced as "appropriate means" for its operation.

216. The object and purpose of the principle of freedom of communication and its scope of application determine the legal basis of the rights and obligations of the sending and receiving State with respect to the use of couriers and bags as instruments of diplomatic intercourse. First of all, the application of the principle of freedom of communication entitles the sending State and its missions abroad to maintain free communications with all appropriate means, including the employment of diplomatic courier and dispatching of diplomatic bag for communications between the missions, or between the sending State and other States or international organizations. Secondly, the principle of free communication provides the legal basis for the inviolability and legal protection of the diplomatic bag, placing upon the receiving or the transit State the obligation to grant certain facilities, privileges and immunities in favour of the diplomatic courier and the diplomatic bag in the performance of their official function.

217. In the light of these observations, the Special Rapporteur would like to submit to the Commission for preliminary consideration the following draft article:

**Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags**

**1. The receiving State shall permit and protect free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts and other missions or delegations as well as between those missions, consular posts and delegations, wherever situated, or with other States or international organizations, as provided for in article 1.**

**2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article.**

<sup>184</sup> As was pointed out, article 27 of the 1961 Vienna Convention reflected in a well established rule of international customary law with respect to the freedom of communication and was the model provision for the relevant articles in the other multilateral conventions concluded under the auspices of the United Nations. The principle of freedom of communication was embodied in multilateral conventions outside the framework of the United Nations, such as the Interamerican Convention regarding Diplomatic Officers adopted by the Sixth International Conference of American States, signed at Havana on 20 February 1928, which stipulates, in article 15, that "States should extend to diplomatic officers every facility for the exercise of their functions and especially to the end that they may freely communicate with their Governments". (League of Nations, *Treaty Series*, vol. CLV, p. 269.)

**2. PRINCIPLE OF RESPECT FOR INTERNATIONAL LAW AND THE LAWS AND REGULATIONS OF THE RECEIVING AND THE TRANSIT STATE**

218. It may be pointed out at the outset that there is no specific provision in the four multilateral conventions regarding the obligation of the courier or the sending State, when using diplomatic couriers and bags, to respect the laws and regulations of the receiving State or the transit State. Nor is any explicit provision found in those conventions on the duty to respect international law, though this could be implied, taking into consideration their text as a whole, including the preamble of each one of them, where in general terms reference is made to the duties of States to respect the rules and principles of international law. Of course article 41, para. 1, of the 1961 Vienna Convention stipulates that "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. . . ." Identical provisions are contained in the other multilateral conventions concluded under the auspices of the United Nations.<sup>185</sup> In those cases, the diplomatic or other couriers should be considered within the expression "all persons enjoying such privileges and immunities." Nevertheless, during the consideration of this item in the Commission<sup>186</sup> and in the Sixth Committee,<sup>187</sup> as well as in comments of some Governments,<sup>188</sup> it was suggested that a draft article be submitted on the duty to respect international law and the laws and regulations of the receiving and the transit State.

219. The duty to respect the rules of international law and the laws and regulations of the receiving State and the transit State is an essential correlative rule of the freedom of communication, including the facilities, privileges and immunities granted by those States to diplomatic couriers or bags of the sending State on their territory. In this way the required balance could be established between the interests of the sending State for safe and unimpeded delivery of the bag and the security and other legitimate considerations of the receiving and the transit States deriving from their sovereignty. The principle of respect for the rules of international law and the laws and regulations of the receiving State is an important legal safeguard against the abuse of the privileges and immunities accorded to foreign officials, including diplomatic couriers. Therefore, this general principle could be

<sup>185</sup> See art. 55, para. 1, of the 1963 Vienna Convention; art. 47, para. 1, of the 1969 Convention on Special Missions, and art. 77, para. 1, of the 1975 Vienna Convention.

<sup>186</sup> See *Yearbook . . . 1980*, vol. I, pp. 262 and 363, 1634th meeting, para. 23 (Mr. Yankov) and para. 34 (Mr. Reuter); pp. 281-282, 1637th meeting, paras. 2-3 (Mr. Schwebel) and para. 7 (Mr. Francis).

<sup>187</sup> See *Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 41st meeting, para. 58 (Czechoslovakia).

<sup>188</sup> In its written comments, Chile stated that "there is no reason why the principle [of respect for the laws and regulations of the receiving State] should not be reiterated in the future rules concerning the diplomatic courier." (*Yearbook . . . 1979*, vol. II (Part One), p. 220, para. 16, document A/CN.4/321 and Add.1-7).

instrumental for the establishment of certain rules of conduct which will have not only moral value but legally binding force.<sup>189</sup>

220. Within the scope of the duty to respect the rules of international law and the laws and regulations of the receiving or the transit State in the use of diplomatic courier and diplomatic bag, several substantive obligations of the sending State and the courier employed by that State could be identified.

221. First of all should be singled out the duty to respect the rules of international law in general and the rules of diplomatic law in particular. This obligation may be interpreted to refer primarily to international customary law and international treaties establishing general rules. It can refer also to rules of international law applicable specifically to the conduct of diplomatic intercourse. In this connection, of foremost importance is the principle of non-interference in the domestic affairs of the receiving or the transit State and the respect for their sovereignty and self-determination. Article 41, para. 1 of the 1961 Vienna Convention and the identical provisions in the other multilateral conventions explicitly stipulate that persons enjoying diplomatic privileges and immunities have the duty not to interfere in the internal affairs of the receiving State. This rule should apply also to the status of the diplomatic courier. The fact that such a rule has already been embodied in a number of multilateral<sup>190</sup> and bilateral agreements relating to diplomatic intercourse, may provide the ground for the elaboration of similar rules applicable to the régime governing the functions of the diplomatic courier as well.

222. The duty on the part of the diplomatic courier to observe the established legal order in the receiving or the transit State may also relate to a wide range of obligations regarding the maintenance of law and order, regulations in the field of public health and the use of public services and transport means or regulations with respect to hotel accommodation and the requirements for registration of foreigners, as well as regulations with respect to driver's licence, etc. While the diplomatic courier is accorded certain facilities, privileges and immunities exclusively for the performance of his official functions, he could not be

exempt from the existing rules and regulations enforced in the public interest. It is suggested that certain provisions along these lines could be contemplated in the present draft articles.

223. The four multilateral conventions contain specific rules stipulating that the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the pertinent provisions of those conventions or by other rules of international law or any special agreements in force between the sending and the receiving State.<sup>191</sup> This rule could be adapted to the status of the diplomatic courier by introducing a draft provision which would not allow the temporary residence of the diplomatic courier to be used for activities incompatible with general international law and diplomatic law embodied in the relevant conventions and other treaties in force.

224. Within the obligations of the diplomatic courier with respect to the receiving and the transit State should be mentioned the duty stipulated in article 41, para. 2, of the 1961 Vienna Convention and the identical provisions on this matter in the other multilateral conventions, which require that the diplomatic agents conduct all official business with the receiving State with or through the Ministry for Foreign Affairs of the receiving State. Such a rule could be applied to a diplomatic courier as well, though in most instances matters relating to diplomatic communications may not be taken directly by the courier, but either through the competent authorities of the sending State or, on behalf of it, by its mission in the territory of the receiving State. Another obligation of the diplomatic agent, provided in article 42 of the 1961 Vienna Convention and the other multilateral conventions concluded under the auspices of the United Nations, is the rule which does not permit a professional or commercial activity of the diplomatic agent for personal profit. This rule should also be applied to the diplomatic courier and to this effect special provision could be included in the present draft articles.

225. In the light of the above considerations regarding the duty to respect international law and the laws and regulations of the receiving or the transit State, the Special Rapporteur submits for examination and approval the following draft article:

**Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State**

**1. Without prejudice to his privileges and immunities, it is the duty of the diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.**

**2. The diplomatic courier also has a duty not to interfere in the internal affairs of the receiving and the transit State.**

<sup>189</sup> It may be noted that the international law doctrine in the past was more inclined to conceive the respect of the laws of the receiving State as a moral duty or courtesy on the part of a diplomat (see Denza, *op. cit.*, pp. 263–264). At the same time there were some authors, who, while admitting that the privileges and immunities accorded to diplomatic agents exempt them from the laws and regulations of the receiving State, considered that they had the duty to respect the law and order in the receiving State. According to Vattel, for instance: “Cette indépendance du Ministre Etranger ne doit pas être convertie en licence: Elle ne, le dispense point de se conformer dans ses actes extérieurs, aux usages et aux lois du pays, dans tout ce qui est étranger à l’objet de son caractère: il est indépendant; mais il n’a pas droit de faire tout ce qu’il lui plaît.” (E. de Vattel, *Le droit des gens ou Principes de la loi naturelle* [1758], Book 4, chap. VII, para. 93, *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. II, p. 327).

<sup>190</sup> See, for example, article 12 of the Havana Convention regarding Diplomatic Officers (1928), which reads: “Foreign diplomatic officers may not participate in the domestic or foreign politics of the State in which they exercise their functions”. (See footnote 184 above.)

<sup>191</sup> See art. 41, para. 3 of the 1961 Vienna Convention, art. 55, para. 2 of the 1963 Vienna Convention, art. 47, para. 2 of the 1969 Convention on Special Missions and art. 77, para. 3 of the 1975 Vienna Convention.

**3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations or by other rules of general international law or by any special agreements in force between the sending State and the receiving or the transit State.**

### 3. PRINCIPLE OF NON-DISCRIMINATION AND RECIPROCITY

226. The principle of non-discrimination and reciprocity is one of the general principles underlying the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations. It stems from the fundamental principle of sovereign equality of States. The application of this principle with regard to diplomatic agents leads to the establishment of a viable and coherent regime governing diplomatic intercourse. The intrinsic cohesion between non-discrimination and reciprocity in the treatment of diplomatic agents, in general, and diplomatic couriers, in particular, contributes to the attainment of a sound ground for a viable legal framework of rules governing the régime of the courier and the bag. Although sometimes it is maintained that States usually attach greater importance to reciprocity than to non-discrimination,<sup>192</sup> it cannot be denied that the best results with regard to the enhancement of such a régime are the integrity and effective balance between these two aspects of the general principle relating to the status of the diplomatic agents and the diplomatic couriers. Of course, the interplay between the treatment of non-discrimination and the treatment of reciprocity should always be considered in its realistic and dynamic perspective, taking into consideration the state of relationships between the sending State and the receiving or the transit State.

227. The principle of non-discrimination and reciprocity as embodied in article 47 of the 1961 Vienna Convention and in the relevant provisions of the other multilateral conventions<sup>193</sup> concluded under the auspices of the United Nations stipulates that in the application of the provisions of the Convention, States shall not discriminate as between different States. It is suggested that this basic rule should find its expression in the present draft articles relating to the status of the diplomatic courier and the diplomatic bag, as well as the other couriers and bags used by States for all official purposes in communicating with their missions abroad or with other States and international organizations.

228. While article 47, paragraph 1 and the other relevant provisions in three other multilateral conventions

lay down the general principle of non-discrimination based upon the sovereign equality of States, paragraph 2 of the same article, introduces some exceptions which shall not be regarded as discrimination. The first exception allows a restrictive application of the provisions of the conventions, based on reciprocity. This option reflects the inevitable impact of the state of relations between the sending and the receiving State. However, there should be some criteria or requirements for tolerable restrictions. This requirement was introduced for the first time in a treaty provision by the 1969 Convention on Special Missions. Article 49, paragraph 2(b) of that Convention established special provision of tolerable modifications, by stipulating that States may modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their special missions, provided that such a modification is not incompatible with the object and purpose of the Convention and does not affect the enjoyment of the rights or the performance of the obligations of third States. In our submission, this safeguard provision is very pertinent for maintaining a certain international standard and stability regarding the scope of the facilities, privileges and immunities granted to the diplomatic missions and their personnel and the maximum restrictions which are permissible.

229. The second exception envisaged by article 47, paragraph 2(b) of the 1961 Vienna Convention refers to the case where, by custom or agreement, States may extend to each other more favourable treatment than is required by the provisions of the Convention. Such a more favourable regime established between the States concerned should not constitute a discrimination with respect to other States whose treatment is within the standard established by the Convention or on the basis of reciprocity. In this case again—this time in a positive sense—through the operation of reciprocity, States may establish more favourable treatment between themselves.

230. The Special Rapporteur is of the view that the provisions of the multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations that concern the principle of non-discrimination and reciprocity could be adapted to the régime of the diplomatic courier and the diplomatic bag, as well as to all other couriers and bags.

231. In the light of the observations and suggestions made on the principle of non-discrimination and reciprocity, the Special Rapporteur would like to submit to the Commission, for consideration and approval, the following draft article:

#### **Article 6. Non-discrimination and reciprocity**

**1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.**

**2. However, discrimination shall not be regarded as taking place:**

**(a) where the receiving State applies any of the provisions of the present draft articles restrictively because of a restrictive application of that provision to its**

<sup>192</sup> See in this sense Denza, *op. cit.*, p. 283.

<sup>193</sup> See art. 72 of the 1963 Vienna Convention, art. 49 of the 1969 Convention on Special Missions and art. 83 of the 1975 Vienna Convention. While the provisions of the 1961 Vienna Convention, the 1963 Vienna Convention and the 1969 Convention contain reference to both non-discrimination and reciprocity, article 83 of the 1975 Vienna Convention contains only one paragraph which reads: "In the application of the provisions of the present Convention no discrimination shall be made as between States."

**diplomatic couriers and diplomatic bags in the sending State;**

**(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.**

### **Conclusion**

232. With the submission of the draft articles on the three general principles underlying the four multilateral

conventions in the field of diplomatic law concluded under the auspices of the United Nations, the present report has completed the presentation of draft articles within part I, "General Provisions", relating to the scope of the present draft articles (arts. 1 and 2), the use of terms (art. 3) and general principles (arts. 4, 5 and 6).

233. In accordance with the plan of work suggested in the present report, and if approved by the Commission, the next reports should deal with part II of the draft articles: Status of the diplomatic courier, including the status of the diplomatic courier *ad hoc* and the captain of a ship or a commercial aircraft carrying a diplomatic bag; part III: Status of the diplomatic bag, including the diplomatic bag not accompanied by diplomatic courier; and part IV: Other provisions (Miscellaneous provisions).





## CHECK-LIST OF DOCUMENTS OF THE THIRTY-THIRD SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/336	Provisional agenda	Mimeographed. For the agenda as adopted, see <i>Yearbook ... 1981</i> , vol. II (Part Two), chap. I, para. 10.
A/CN.4/337	Filling of casual vacancies (article 11 of the Statute). Note by the Secretariat	Reproduced in the present volume (p. 1).
A/CN.4/337/Add.1	<i>Idem</i> . Addendum to the note by the Secretariat: list of candidates and <i>curriculum vitae</i>	Mimeographed.
A/CN.4/338 and Add.1-4	Comments and observations of Governments on the draft articles on succession of States in respect of matters other than treaties, adopted by the Commission at its thirty-first and thirty-second sessions	Reproduced in vol. II (Part Two), annex I.
A/CN.4/339 and Add.1-8	Comments and observations of Governments and principal international organizations on articles 1 to 60 of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the Commission at its twenty-sixth, twenty-seventh, twenty-ninth, thirtieth and thirty-first sessions	<i>Idem</i> , annex II.
A/CN.4/340 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Third report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	Reproduced in the present volume (p. 125).
A/CN.4/341 and Add.1 [and Add.1/Corr.1]	Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur	<i>Idem</i> (p. 43).
A/CN.4/342 and Add.1-4	Comments and observations of Governments on part I of the draft articles on State responsibility for internationally wrongful acts	<i>Idem</i> (p. 71).
A/CN.4/343	Jurisdictional immunities of States and their property. Information and materials submitted by Governments. Part I: Government replies to the questionnaire	Reproduced in the United Nations Legislative Series, <i>Materials on Jurisdictional Immunities of States and their Property</i> (Sales No. E/F 81.V.10).
A/CN.4/343/Add.1	<i>Idem</i> . Part I: Materials submitted by Governments together with their replies to the questionnaire	
A/CN.4/343/Add.2	<i>Idem</i> . Part III: Materials submitted by Governments who have not replied to the questionnaire	
A/CN.4/343/Add.3 and 4	<i>Idem</i> . Part I: Addenda	
A/CN.4/344 [and Corr.1 and 2]	Second report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	Reproduced in the present volume (p. 79)
A/CN.4/345 and Add. 1-3	Thirteenth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur	<i>Idem</i> (p. 3).
A/CN.4/346 and Add.1 and 2	Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	<i>Idem</i> (p. 103).
A/CN.4/347 [and Corr.1 and 2] and Add.1 and 2	Second report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem</i> (p. 151).
A/CN.4/L.326	Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly	Mimeographed.
A/CN.4/L.327	Draft articles on treaties concluded between States and international organizations or between international organizations. Texts proposed by the Drafting Committee: articles 1, 2 (except for para. 1, subparas. (d) and (h)), 3, 4, and 6 to 18	Texts reproduced in the summary record of the 1681st meeting ( <i>Yearbook ... 1981</i> (vol. I), paras. 6 <i>et seq.</i> ).
A/CN.4/L.327/Add.1	<i>Idem</i> : revised texts of article 2, para. 1, subpara. (c), and articles 7, 9 and 17	See summary record of the 1692nd meeting (vol. I), paras. 1-8.
A/CN.4/L.327/Add.2	<i>Idem</i> : article 2, para. 1, subpara. (d), and articles 5 and 19 to 26	Texts reproduced in the summary record of the 1692nd meeting (vol. I), paras. 10 <i>et seq.</i>
A/CN.4/L.328	Draft articles on succession of States in respect of State property, archives and debts. Texts proposed by the Drafting Committee: articles 1 to 3, 3 <i>bis</i> , 3 <i>ter</i> , 4 to 17, 17 <i>bis</i> , and 18 to 23	<i>Idem</i> , 1692nd meeting (vol. I), paras. 50 <i>et seq.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.328/Add.1	<i>Idem</i> : articles G to K and A	<i>Idem</i> , 1694th meeting, (vol. I), paras. 29 and 32.
A/CN.4/L.328/Add.2	<i>Idem</i> : articles 3 <i>quater</i> , L and B to F	<i>Idem</i> , paras. 34 <i>et seq.</i>
A/CN.4/L.329	Draft report of the International Law Commission on the work of its thirty-third session: chapter I	Mimeographed. The report originally appeared as <i>Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 10</i> (A/36/10 and Corr.1). The final text is reproduced in volume II (Part Two).
A/CN.4/L.330 and Add.1–6	<i>Idem</i> : Chapter II	<i>Idem</i> .
A/CN.4/L.331 and Add.1 [and Add.1/Corr.1] and Add.2–3	<i>Idem</i> : Chapter III	<i>Idem</i> .
A/CN.4/L.332	<i>Idem</i> : Chapter IV	<i>Idem</i> .
A/CN.4/L.333	<i>Idem</i> : Chapter V	<i>Idem</i> .
A/CN.4/L.334	<i>Idem</i> : Chapter VI	<i>Idem</i> .
A/CN.4/L.335	<i>Idem</i> : Chapter VII	<i>Idem</i> .
A/CN.4/L.336 [and Corr.1] and Add.1 and 2	<i>Idem</i> : Chapter VIII	<i>Idem</i> .
A/CN.4/L.337	Jurisdictional immunities of States and their property: texts of articles 7 to 10, proposed by the Special Rapporteur on 9 June 1981	Reproduced in vol. II (Part Two), chap. VI, footnotes 668–671.
A/CN.4/L.338	Draft report of the Commission on the work of its thirty-third session: annexes	Mimeographed.
A/CN.4/SR.1643 to SR.1697	Provisional summary records of the 1643rd to 1697th meetings of the International Law Commission	Mimeographed. The final text is reproduced in volume I.



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