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**Second report on State responsibility, by Roberto Ago, Special Rapporteur -
the origin international responsibility**

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STATE RESPONSIBILITY

[Agenda item 4]

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

The origin of international responsibility

[Original text: French]

[20 April 1970]

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* The translation for the French terms "*fait illicite international*" and "*fait internationalement illicite*", provisionally established by the Secretariat, was "international illicit act". However, during the discussion of this report at the twenty-second session of the International Law Commission the English-speaking members of the Commission expressed their preference for the term "internationally wrongful act", already used in previous reports. Accordingly, the term "internationally wrongful act" has been used throughout in the final edition of the present report.

Introduction

1. When presenting to the International Law Commission, at its twenty-first session,¹ his first report on the international responsibility of States (A/CN.4/217 and Add.1),² containing a review of previous work on the

¹ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 104, 1011th meeting.

² *Ibid.*, vol. II, p. 125. The Special Rapporteur also submitted, as an annex to this report, the main texts drafted during the previous work on codification. The Commission also had before it two documents relating to the topic of State responsibility published by the Secretariat in 1964: (a) a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (*Yearbook of the International Law Commission, 1964*, vol. II, p. 125, document A/CN.4/165); (b) a digest of the decisions of international tribunals relating to State responsibility (*ibid.*, p. 132, document A/CN.4/169).

codification of this topic, the Special Rapporteur stated that his intention was to provide the Commission with a general conspectus of that work so that it could study the past and derive from it some useful guidance for its future work. The main aim was to avoid, in the future, the obstacles which in the past had prevented the codification of this branch of international law.

2. In this context the Special Rapporteur was concerned to illustrate some of the most serious difficulties encountered when dealing with the topic of international responsibility and to bring out the reasons for those difficulties as they emerge from an examination of the various

Each of these documents was accompanied by a supplement bringing it up to date: see *Yearbook of the International Law Commission, 1969*, vol. II, p. 114, document A/CN.4/209 and p. 101, document A/CN.4/208, respectively.

attempts at codification made hitherto under the auspices of official bodies, in particular the League of Nations and the United Nations itself. On concluding this review the Special Rapporteur drew attention to the ideas which had guided the International Law Commission since the time when, having had to recognize that its previous efforts had reached a deadlock, it had decided to resume the study of the topic of responsibility from a new viewpoint; in particular, he summarized the methodological conclusions reached by the Sub-Committee on State Responsibility, created in 1962, and later by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the basis of which the Commission decided to take up the work of codification again and try to achieve some positive results.

3. After this introduction, the International Law Commission discussed the Special Rapporteur's first report in detail.³ All the members of the Commission present at the twenty-first session participated fully in the discussion. Replying to comments and summing up the debate, the Special Rapporteur gave an account of the views of members and in doing so was able to note that there was a great identity of ideas in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposes to draw up. The Commission's conclusions were subsequently set out in chapter IV of the report on its twenty-first session,⁴ which was devoted to State responsibility. The summary records show that these conclusions were in the main favourably received by the members of the Sixth Committee of the General Assembly, who referred to the problem of State responsibility in their comments on the International Law Commission's report.⁵

4. The criteria laid down by the Commission, on the basis of which the draft articles contained in this report have been prepared, and by which future reports will also be guided, may be summarized as follows.

5. (A) Adhering to the system it has always adopted hitherto for all the topics it has undertaken to codify, the Commission intends to confine its study of international responsibility for the time being to the responsibility of States. Nevertheless, it does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States; but the overriding need to ensure clarity in the examination of the topic, and the organic nature of the draft, are obvious reasons for deferring consideration of these other questions.

6. (B) While recognizing the importance, alongside that of responsibility for internationally wrongful acts, of questions relating to responsibility arising out of the performance of certain lawful activities—such as spatial and nuclear activities—the Commission believes that questions in this latter category should not be dealt

with simultaneously with those in the former category. Owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp. The Commission will therefore proceed first to consider the topic of the responsibility of States for internationally wrongful acts. It intends to consider separately the topic of responsibility arising from lawful activities, as soon as progress with its programme of work permits.

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

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

9. Having laid down these directives, the Commission is now in a position to consider, in succession, the many and diverse questions raised by the topic as a whole. The Special Rapporteur therefore proposes, in the first phase of the work, to focus his examination on the subjective and objective conditions for the existence of an internationally wrongful act. The first task, which may seem limited in scope, but which is particularly delicate because

³ *Ibid.*, vol. I, 1011th, 1012th, 1013th and 1036th meetings.

⁴ *Ibid.*, 1969, vol. II, p. 233, document A/7610/Rev.1, paras. 80-84.

⁵ See *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd-1111th and 1119th meetings.

of its possible implications, consists in formulating the basic general principles; it is to this specific issue that the present report is devoted. Once these principles have been established, the next step will be to deal with all the questions relating to the imputability of the State, as a subject of international law, of the conduct (action or omission) in particular circumstances, of certain persons, certain groups or certain entities. It will also be necessary to determine in what conditions the action or omission thus imputed to the State can be regarded as constituting a violation of an international legal obligation and thus having the constituent elements of an internationally wrongful act which, as such, generates State responsibility at the inter-State level. All this would be followed by an examination of the questions arising in connexion with the various circumstances which, may possibly result in the conduct imputed to the State not being wrongful: *force majeure* and act of God, consent of the injured State, legitimate application of a sanction, self-defence and state of necessity. After that, it will be possible to go on to the second phase of the work, that covering the content, forms and degrees of international responsibility.

10. In accordance with the decisions taken at the twenty-first session, the successive reports on this subject will be so conceived as to provide the Commission with a basis for the preparation of draft articles, with a view to the eventual conclusion of an international codification convention. It seemed advisable as from this report to adopt the following method: to specify the questions arising in connexion with each of the points successively considered and then to state the differences of opinion which have appeared regarding them and the ways in which they have in fact been settled in international life. Reference will therefore be made to the most important cases which have arisen in diplomatic practice and international jurisprudence. Here, a certain disparity may be noted between the different questions, owing to the fact that there are a great many precedents in some cases, but relatively few in others. In each case, too, the positions taken by international law writers will be mentioned, having particular regard to the most recent trends in different countries. In order to avoid overburdening the report, however, the references will generally be confined to the views of the very numerous writers who have dealt specifically with the points in question.⁶ On the basis of this material the Special Rapporteur will indicate the reasons which, in his opinion, militate in favour of a particular solution, and conclude with the text of the draft article he proposes to the Commission as a basis for discussion. To make the work which will have to be completed during the first phase of the study more easily understandable, all the draft articles proposed will be reproduced together at the end.

11. One final remark seems appropriate. Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which,

⁶ The Special Rapporteur intends to supply the Commission with a separate document containing as complete and up-to-date a bibliography as possible on international responsibility.

in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed "primary", as opposed to the other rules—precisely those covering the field of responsibility—which may be termed "secondary", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules. Now the statement of primary rules often calls for the drafting of a great many articles, not all of which necessarily require very extensive commentaries. Responsibility, on the other hand, comprises relatively few principles, which often need to be formulated very concisely. But the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter. On the contrary, on every point there may be a whole host of complex questions, which must all be examined, since they affect the formulation to be adopted. It should come as no surprise, therefore, that the present report contains very long passages dealing with a whole series of problems, followed by a few short articles.

Chapter I

General rules

I. THE INTERNATIONALLY WRONGFUL ACT AS A SOURCE OF RESPONSIBILITY

12. One of the principles most deeply rooted in the theory of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a legally wrongful act entails the responsibility of that State in international law. In other words, whenever a State is guilty of an internationally wrongful act against another State, international responsibility is established "immediately as between the two States", as was held by the Permanent Court of International Justice in the *Phosphates in Morocco* case.⁷ Moreover, as stated by the Italian-United States Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947,⁸ no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law".⁹

13. A justification for the existence of this fundamental rule has usually been found in the actual existence of an international legal order and in the *legal* nature of the obligations it imposes on its subjects.¹⁰ For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea

⁷ *Phosphates in Morocco* case (Preliminary Objections), 14 June 1938, *P.C.I.J.*, series A/B, No. 74, p. 28.

⁸ United Nations, *Treaty Series*, vol. 49, p. 167.

⁹ *Armstrong Cork Company Case*, 22 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No.: 65.V.4), p. 163.

¹⁰ Among the authors of classic works on the subject, see D. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, F. Lumachi, 1902), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. II, t. 1, pp. 25 and 62, and *Corso di diritto internazionale*,

of sovereignty, one is forced to deny the existence of an international legal order. The Swiss Government pointed this out in its reply to point II of the request for information addressed to Governments by the Preparatory Committee for the 1930 Conference for the Codification of International Law:

“... the actual basis of the reciprocal responsibility of States lies in the actual existence of an international juridical order and in the need which States experience to observe certain rules of conduct *inter se*”.¹¹

Others prefer to think that, in the international order, State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States.¹² But whatever its justification may be, the important thing to note here is that the fundamental rule, despite certain variations in its formulation, is expressly recognized, or at least clearly assumed by doctrine and practice unanimously.¹³

14. As regards the meaning and scope of the correlation thus established between a wrongful act and responsibility

4th ed. (Padua, CEDAM, 1955), vol. I, p. 384; P. Schoen, “Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen”, *Zeitschrift für Völkerrecht* (Breslau, J.U. Kern's Verlag [Max Müller, 1917], Ergänzungsheft 2, Bd. X, p. 16; K. Strupp, “Das völkerrechtliche Delikt”, *Handbuch des Völkerrechts* (Stuttgart, Verlag von K. Kohlhammer, 1920), Bd. III, 1st abt., pp. 4 *et seq.*

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

¹¹ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 24. The Swiss Government's reply was based on a quotation from Anzilotti.

¹² Cf. Ch. de Visscher, “La responsabilité des Etats”, *Bibliotheca Visseriana* (Leyden, E.J. Brill, édit., 1924), t. II, p. 90. See also C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 5-6.

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

¹³ Belief in the existence of the general rule whereby responsibility attaches to any internationally wrongful act by a State was clearly expressed in point II of the above mentioned request for information drawn up by the Preparatory Committee for the 1930 Conference. The same conviction also emerges from almost all the replies from Governments. Moreover, the Third Committee of the Conference unanimously approved article 1, which laid down that:

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

ity, Grotius had already observed that in the law of nations, too, *maleficium* was an independent source of legal obligations.¹⁴ Translated into terms of modern legal technique, this amounts to saying that internationally wrongful acts by States create new international legal relations characterized by subjective legal situations distinct from those which existed before the acts took place. The fact that the legal relations between States established as a result of an internationally wrongful act are new relations has been pointed out both by jurists whose writings are now legal classics¹⁵ and by authors of recent works.¹⁶

15. Notwithstanding this unanimous recognition of the principle, there are serious differences of opinion on the definition of the legal relations created by an internationally wrongful act and the legal situations which occur in these relations. One conception, which may be considered classical in international law doctrine and which proceeds from certain theoretical premises—though it has some solid support in judicial decisions and State practice—describes the legal relations deriving from an internationally wrongful act in one single form: that of an obligatory bilateral relationship established between the State which committed the act and the injured State, in

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

¹⁴ H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Amsterdam, MDCCXX), lib. II, cap. XVII, pp. 462 *et seq.*

¹⁵ D. Anzilotti, *Corso di diritto internazionale (op. cit.)*, p. 383: “Al fatto illecito, cioè, in generale parlando, alla violazione di un dovere internazionale, si collega così il sorgere di un nuovo rapporto giuridico, tra lo Stato al quale è imputabile il fatto di cui si tratta [...] e lo Stato verso cui sussisteva il dovere inadempito.” [The wrongful act, that is to say, generally speaking, the violation of an international obligation, is thus accompanied by the appearance of a new legal relationship between the State to which the act is imputable [...] and the State with respect to which the unfulfilled obligation existed] (Translation by the United Nations Secretariat.)

¹⁶ W. Wengler, *Völkerrecht* (Berlin, Springer Verlag, 1964), Bd. 1, p. 499: “Völkerrechtliche Unrechtsfolgen in Gestalt der Entstehung neuer konkreter Rechtspflichten, die durchweg den Völkerrechtverletzer direkt oder indirekt schlechter stellen sollen, als dies vorher der Fall war, liegen durchweg vor (...)” [Unquestionably the consequences of an internationally wrongful act which take the form of the creation of new and concrete legal obligations always aim, directly or indirectly, to place the author of the violation of international law in a more unfavourable situation than the one existing previously (...)]. G.I. Tunkin, *Droit international public - Problèmes théoriques* (Paris, A. Pédone, 1965), p. 220: “La violation par l'Etat du droit international engendre certains rapports juridiques”, [The violation by the State of international law gives rise to certain legal relations] and *Teoria mezhdunarodnogo prava* (Moscow, 1970), p. 470: “Naruszenie gosudartsvom mezhdunarodnogo prava porozhdaet opredelennye pravavogo otnoshenia” [The violation by the State of international law gives rise to the definition of legal relations]. E. Jiménez de Aréchaga, *International Responsibility - Manual of Public International Law* (London, published by Sorensen, 1968), No. 9, p. 533: “Whenever a duty established by any rule of international law has been breached by act or omission, a new legal relationship automatically comes into existence.”

which the obligations of the former State to make reparation—in the wide sense of the term, of course—is set against the subjective right of the latter State to require such reparation.¹⁷ In a community like the international community, in which the relations between States and the community as such are not legally organized, the creation of an obligatory relationship of this nature would appear

¹⁷ Article 36 of the Statute of the International Court of Justice, which, on this point, reproduces unchanged the corresponding provisions of the Statute of the Permanent Court of International Justice, provides that the Court may have jurisdiction with respect to an internationally wrongful act only in order to establish the existence of such an act and to determine the nature and extent of the reparation to be made. On this basis, conduct that is wrongful under international law has been judged by the Permanent Court of International Justice to give rise to a duty of the State concerned to make reparation for the injury caused; this was held as early as Judgement No. 1 of 17 August 1923 in the S.S. "Wimbledon" case (*P.C.I.J.*, series A. No. 1, pp. 30 and 33). The same Court later defined its basic attitude in the matter in its Judgements No. 8 of 26 July 1927 (Jurisdiction) and No. 13 of 13 September 1928 (Merits) in the Case concerning the factory at Chorzów (*P.C.I.J.*, Series A. No. 9, p. 21 and No. 17, p. 29). In the second of these judgements, the Court observed that:

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

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

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

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

It should, however, be noted that although international jurisprudence and State practice undoubtedly justify the conclu-

to be the only effect that can be attached to the wrongful act.¹⁸

16. This view does not admit of the possibility of a real sanction which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Although it recognizes that a coercive act may become applicable following a wrongful act, it does so only as a means of enforcement intended to ensure, by coercion, that the recalcitrant State fulfils its obligations, and not as a "sanction" in the proper sense of term, i.e. having a punitive purpose.¹⁹ In conclusion, international responsibility is said to be characterized by the legal relationship created by the wrongful act:²⁰ an obligatory relationship in which the restoration or compensa-

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

¹⁸ This is the well-known theory of Anzilotti (*Teoria generale...* [*op. cit.*], pp. 62 *et seq.*, and 81-82; *La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers* (Paris, A. Pédone, 1906), reprinted in *Scritti...* [*op. cit.*], p. 161; *Corso...* [*op. cit.*], pp. 385-386). A similar view is maintained in works dealing specifically with the subject although some of them are already rather old (P. Schoen, *op. rit.*, p. 22 and 122-123; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* [*op. cit.*], p. 217; Ch. de Visscher, *op. cit.*, pp. 115-116; C. Eagleton, *op. cit.*, p. 182; R. Laës, "Die Rechtsfolgen völkerrechtliche Delikte", Institut für internationales Recht an der Universität Kiel, *Erste Reihe Vorträge und Einzelschriften* (Berlin, Verlag von Georg Stilke, 1932), Heft 18, pp. 19-20; etc.); but the same view is also to be found, with the normal variations from one writer to another, in recent treatises and monographs: for example, G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens and Sons Ltd., 1957), vol. 1, pp. 568 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts* 2nd ed. (Berlin, Walter de Gruyter und Co., 1960), Bd. I, pp. 337 *et seq.*; D.P. O'Connell, *International Law* (London, Stevens and Sons Ltd., 1965), vol. II, pp. 1019 *et seq.*; and E. Jiménez de Aréchaga, *International Responsibility...* (*op. cit.*), pp. 533, 564 *et seq.*

¹⁹ It follows that when the advocates of this theory deal, for example, in general international law, with an institution such as reprisals—whether peaceful or armed—they tend not to regard them as a form of sanction which may, as such, have its own punitive and repressive purpose, as is so well indicated by the term "retaliation" in English, but only as a means of coercion used to secure performance, or restoration of the impaired right, or reparation for the damage sustained. See, for example, K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 195 *et seq.*, and *Eléments du droit international public: universel, européen et américain* (Paris, Les Editions internationales, 1930), vol. I, p. 345; Ch. de Visscher, *op. cit.*, p. 117; and G. Balladore Pallieri, "Gli effetti dell' atto illecito internazionale", *Rivista di Diritto Pubblico—La Giustizia Amministrativa*, Rome, January 1931—IX, fasc. 1, pp. 64 *et seq.*

²⁰ P. Reuter ("Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1961-II* [Leyden, Sijthoff, 1962], pp. 584 *et seq.*) emphasizes this aspect of the theory, which he calls "l'unité de la théorie de la responsabilité". In his view, "l'absence d'une distinction entre la responsabilité pénale et la responsabilité civile n'est en droit international que la conséquence de l'absence d'autorité ayant pour fonction propre de défendre les intérêts communs". [The absence of any distinction between criminal responsibility and civil responsibility in international law is essentially the result of the absence of an authority responsible for protecting the common interests.] (Translation by the United Nations Secretariat.)

tion aspects may be accompanied by punitive aspects, without the distinction being easy to make and having more than a theoretical interest.²¹

17. Another view, put forward by certain writers on essentially theoretical grounds, leads to a position almost diametrically opposed to that just described, despite the fact that it, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees in an act of coercion not only the sole possible form of sanction, but also the sole legal consequence following directly from the wrongful act. The obligation to make reparation is—and this, according to this view, is true in any system of law—no more than a subsidiary duty placed between the wrongful act and the application of measures of coercion

²¹ The unity of the theory which regards the creation of an obligatory relationship as the sole consequence of an internationally wrongful act is not affected by the fact that some writers refer to a penal aspect of responsibility in connexion with the particular characteristics which the content of the offending State's obligation may sometimes have and which are designated by the term "satisfaction". In reality, a separate term is used here to distinguish a form of moral reparation from a reparation which is essentially economic in character. On this point, see P.-A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (thesis, Geneva University), 1952.

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

by the law in municipal law, and in international law by a possible agreement between the offending State and the injured State. Accordingly, general international law would not regard the wrongful act as creating any obligatory relationship between the offending State and the injured State, but would authorize the latter to react to the wrongful act of the former by applying to it a sanction in the proper sense of the term.²²

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

²² This view has been progressively developed by H. Kelsen. "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna, von Julius Springer, 1932), Bd. XII, Heft 1, pp. 545-546, and 568-569; *Principles of International Law* 2nd ed. (New York, Holt, Reinhart and Winston, Inc., 1966), pp. 18-19; and "Théorie du droit international public", *Recueil des cours...*, 1953-III (Leyden, Sijthoff, 1955), pp. 19 *et seq.*, and 29 *et seq.* The sanctions provided for by classical general international law are, according to Kelsen, reprisals and war; in applying them, the injured State acts as an organ of a decentralized international community. The United Nations Charter, on the other hand, gives—in Kelsen's opinion—a monopoly of force to the Organization. Kelsen's ideas were taken up by A. Carlebach (*Le problème de la faute et sa place dans la norme du droit international* [Paris, Librairie générale de droit et de jurisprudence, 1962], pp. 2 *et seq.*). P. Guggenheim (*op. cit.*, p. 63) takes the same view in principle, but adopts a much more realistic approach. This writer, too, considers that the obligation to make reparation is not the "sanction" for the offence and that neither is it the consequence of a wrongful act under general international law. He regards reparation as an obligation to be agreed upon by special treaty. However, differing from Kelsen's opinion on this point, Guggenheim considers that the State has an obligation to submit its claim before resorting to measures of coercion such as war or reprisals. It should also be noted that according to this writer—and, incidentally to Kelsen also—acts of coercion carried out under international law cannot be regarded as "penalties" in the penal law sense, because they lack the "retributive and preventive" character of a penalty and do not differ from enforcement measures (*ibid.*, p. 83).

the use of force, is nevertheless characterized by the fact that its purpose is, in part at least, to impose a penalty. Such a purpose is not the same as an attempt to secure by coercion the fulfilment of the obligation or restoration of the right infringed or compensation for the injury.²³

19. For those who hold this view it is therefore obviously correct to describe as a "subjective right" the particular legal situation of the injured subject whereby it can legitimately require reparation: this legal situation is the logical concomitant of the obligation placed on the author of the wrongful act. This is not true, however, of the other legal situation which consists in the possibility of legitimately applying a sanction and which should rather be described as a "legal faculty". In the first case, a new obligatory legal relationship is established as a result of the wrongful act; in the second case there is also a new relationship, but it is clearly of a different kind. Consequently, in so far as an internationally wrongful act is described as an act giving rise in law to international responsibility, the general term responsibility (still according to this view) should be understood to mean the situation of a subject of international law confronted either with the right of another subject to claim reparation from it, or with the faculty of another subject to impose a sanction on it—in the sense given to these terms above.²⁴

²³ On the existence, in international law, of sanctions proper (meaning repressive acts which in this sense have an undeniably penal character), see in particular R. Ago, "Le délit international", *Recueil des cours...*, 1939-II (Paris, Librairie du Recueil Sirey, 1947), pp. 527 *et seq.*; C. Th. Eustathiades, "Les sujets...", *Recueil des cours...* (op. cit.), pp. 442 *et seq.*, and 448-449; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 363. G.I. Tunkin (*Droit international...* [op. cit.], pp. 202 *et seq.*, "Alcuni nuovi problemi della responsabilità dello Stato nel diritto internazionale", Istituto di Diritto Internazionale e Straniero della Università di Milano, *Comunicazioni e Studi* [Milan, A. Giuffrè, 1963], t. XI (1960-1962), pp. 16 *et seq.*, and *Teoria...* [op. cit.], pp. 447 *et seq.*) criticizes the notion of a penal responsibility of the State as it emerges from certain works by Pella and others and, on this point, follows A.N. Trainin (*Zashchita mira i borba s prestupleniyami protiv chelovechestva* [Moscow, Izdatelstvo Akademii Nauk, 1956], pp. 41 *et seq.*). Nevertheless, Tunkin (*Droit international...* [op. cit.], pp. 224 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi* [op. cit.], pp. 45 *et seq.*, and *Teoria...* [op. cit.], pp. 476 *et seq.*) draws a clear distinction, in connexion with the legal relations resulting from the internationally wrongful act, between sanctions and the mere obligation to make reparation for damage, and severely criticizes the older theory which disregards sanctions. On this basis he is willing, though not without some reservations, to use the terms "material" responsibility and "political" responsibility to designate the two possible kinds of consequence of a wrongful act. On this point it may therefore be said that Tunkin's opinion comes very close to that stated above and that the question whether or not an international penal responsibility exists becomes merely a matter of terminology.

²⁴ This view was formulated by the author of the present report in his early research on international responsibility. See R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 426-427 and 524 *et seq.* The same idea is put forward by C. Th. Eustathiades, "Les sujets...", *Recueil des cours...* [op. cit.], pp. 429 *et seq.*, by A.P. Sereni (*Diritto internazionale* [Milan, A. Giuffrè 1962], t. III, pp. 1541-1542), and by G. Morelli (op. cit., pp. 356 *et seq.* and 361 *et seq.*). Substantially analogous opinions are to be found in L. Oppenheim, (op. cit., pp. 356 *et seq.*), A. Verdross (op. cit., pp. 398 *et seq.*, 424 *et seq.*, and 647 *et seq.*), G. Dahm (*Völkerrecht* [Stuttgart, W. Kohlhammer Verlag, 1961], Bd. III, pp. 265 *et seq.*), W. Wengler (op. cit.), pp. 499 *et seq.*, and 503), and D.B. Levin (*Orvetstvennost gosudarstv v sovremenom mezhdunarodnom prave* [Moscow, Izdatelstvo Mezhdunarodnye otnosheniya, 1966], pp. 9-10).

20. The above-mentioned position of principle amounts in the last analysis to drawing a parallel between the reaction of the international legal order to a wrongful act and the reaction of other legal orders. It is nevertheless recognized that in international law, unlike municipal law, no clear distinction has been established between acts of coercion according to whether their purpose is to impose a sanction in the true sense of the term or to compel the author of the wrongful act to fulfil his obligations. These two aspects, though in theory distinct and clearly identifiable in certain specific cases, are often combined and blended in a single action. Similarly, the holders of this view themselves observe that international law—because of the nature of the international community and its members rather than because of any alleged but non-existent primitive character of international law—has not worked out a distinction between civil and penal offences comparable to that established in municipal law.²⁵

21. It is not easy, therefore, to distinguish clearly defined classes of wrongful acts, some of which only give the injured State the right to claim reparation from the guilty State, while others also give it the "legal faculty" to impose a sanction upon that State. What can be said is that modern international law has tended progressively to deny the faculty of resorting to measures of coercion as a reaction against less serious wrongful acts, in particular those of a purely economic nature; more generally speaking, it must be recognized that there is also a clear tendency to restrict the injured State's faculty of resorting to sanctions unilaterally.²⁶ What seems to emerge clearly from the practice of States is the existence of an order of priority between the two possible consequences of an internationally wrongful act, in the sense that the claim for reparation must as a rule precede the application of the sanction, even where recourse to a sanction would be permissible in principle.²⁷ By offering adequate reparation—that is to say, by eliminating the consequences of its wrongful conduct as far as possible—the guilty State should normally be able to avoid the sanction. Of course, this principle does not preclude recognition of the fact that there may be exceptional cases in which the faculty of reacting against an internationally wrongful act by applying a sanction must necessarily be immediately exercisable and cannot be made conditional on a prior attempt to obtain reparation which, *a priori*, has no real prospect of success.²⁸ According to some writers, more-

²⁵ R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 530-531.

²⁶ On this point see G. Dahm, op. cit., p. 266; W. Wengler, op. cit., pp. 504 *et seq.*

²⁷ This principle has been given clear expression in international practice and judicial decisions, especially in the arbitral award of 31 July 1928 in the case concerning the responsibility of Germany for damage caused in the Portuguese colonies in South Africa (Naulilaa incident) (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No.: 1949.V.1), pp. 1027-1028). For an account of the practice, see L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Librairie du Recueil Sirey, 1938), pp. 36 *et seq.*

²⁸ For examples of cases in which this situation may arise, especially where a state of war exists, see R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 526 *et seq.*; P. Guggenheim, op. cit., pp. 65-66.

over, there are cases in which a State held to be guilty of very serious wrongful acts may have to face both sanctions and an obligation to make reparation.²⁹

22. In spite of the divergence of the views described above, the different conceptions of responsibility nevertheless coincide in agreeing that every internationally wrongful act creates new legal relations between the State committing the act and the injured State. As has already been pointed out, this in no way precludes the establishment of other relations between the former State and other subjects of international law. What must be ruled out, it appears, at least at the present stage in international relations, is the idea that as a result of an internationally wrongful act general international law can create a legal relationship between the guilty State and the international community as such, just as municipal law creates a relationship between the person committing an offence and the State itself. International law can have no such effect, so long as it does not recognize a personification of the international community as such. But this situation has certainly not prevented international treaty law from providing that in certain cases a particular internationally wrongful act may be the source of new legal relations, not only between the guilty State and the injured State, but also between the former State and other States or, especially, between the former State and organizations of States.³⁰ The development of international organization, as early as the League of Nations but more particularly with the United Nations, has led to consideration of the possibility that a State committing an internationally wrongful act of a certain kind and of a certain importance might be placed in a new legal relationship not only with the injured State, but also with the Organization. It might thus be subject to the faculty or even the duty of the Organization and its members to react against the internationally wrongful conduct by applying sanctions collectively decided upon.

23. In connexion with this last point, attention must also be drawn to the growing tendency of certain writers to single out, within the general category of internationally wrongful acts, certain kinds of acts which are so grave and so injurious, not only to one State but to all States, that a State committing them would be automatically held responsible to all States. It is tempting to relate this view³¹ to the recent affirmation of the Interna-

²⁹ This view is supported especially by G. I. Tunkin ("Alcuni nuovi problemi...", *Comunicazioni e Studi* (op. cit.), p. 38) and by D.B. Levin (*Otvetstvennost gosudarstv...* (op. cit.), p. 115).

³⁰ On this question see the comments of Guggenheim (op. cit., pp. 99 et seq.), Eustathiades ("Les sujets...", *Recueil des cours...* (op. cit.), p. 433), Seveni (op. cit., pp. 1514-1542), Wengler (op. cit., pp. 500, 506 et seq., and 580 et seq.) and Tunkin (*Droit international...* (op. cit.), pp. 191 and 220 et seq., "Alcuni nuovi problemi...", *Comunicazioni e Studi* (op. cit.), pp. 39 et seq., and *Teoria...* (op. cit.), pp. 430 and 470 et seq.), and the remarks of Mr. Ushakov during the discussion on the first report at the twenty-first session of the Commission (*Yearbook of the International Law Commission, 1969*, vol. I, p. 112, 1012th meeting, paras. 37-39).

³¹ It has been particularly developed in Soviet doctrine, where D.B. Levin ("Problema otvetstvennosti v nauke mejdunarodnogo prava" *Izvestia, Akademii Nayk SSSR*, No. 2, 1946, p. 105, and "Ob otvetstvennosti gosudarstv v sorremennom mezhdunarodnom prave", *Sovetskoe gosudarstvo i pravo*, Moscow, No. 5,

tional Court of Justice, in its judgment of 5 February 1970 in the case concerning the Barcelona Traction, Light and Power Company, Limited, that there are certain international obligations which are obligations *erga omnes*, that is to say, obligations to the whole international community. In the terms used by the Court:

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".³²

Ideas of this kind may perhaps be worth studying in detail, for the writers concerned do not always seem to be quite clear whether, in such cases, the relationship established with States in general would originate in a rule of general and customary international law or in a rule of treaty law, and whether it would be a relationship with States *ut singuli* or with States as members of an international organization which would alone be competent to decide on the action to be taken. In any event, these views are of particular interest, inasmuch as they reveal a trend towards incipient personification of the international community and are a factor which will make it possible gradually to outline a concept of "crime" in international law, within the general context of the internationally wrongful act. This idea appears, moreover, to be confirmed by the second paragraph of the first of the Principles of international law concerning friendly relations and co-operation among States contained in the draft declaration approved by the Drafting Committee

May 1966, pp. 75 and 76a) distinguishes between "simple violations of international law and international crimes which undermine its very foundations and most important principles". He identifies as such "genocide, aggression and colonial oppression". G.I. Tunkin (*Droit international...* (op. cit.), pp. 220 et seq., "Alcuni nuovi problemi...", *Comunicazioni e Studi* (op. cit.), pp. 39 et seq., and *Teoria...* (op. cit.), pp. 472 et seq.), who refers in this connexion to the opinions of certain older writers such as Heffter and Bluntschli, especially stresses threats to peace, breaches of the peace and acts of aggression.

In the same context reference may be made to the nineteenth principle of the declaration contained in the draft resolution submitted by the Government of Czechoslovakia at the seventeenth session of the United Nations General Assembly, during the discussion on principles of international law concerning friendly relations and co-operation among States (*Official Records of the General Assembly, Seventeenth Session, Annexes*, agenda item 75, document A/C.6/L.505). The principle is worded as follows:

"The principle of State responsibility

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

This formulation, indeed, not only shows a distinction between the acts which may incur the responsibility of the State, but implicitly contains the idea of a difference between the legal relations established in the two cases.

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

³² For a summary in French, see *L'URSS et les pays de l'Est* (Paris, Editions du C.N.R.S., 1967), vol. VIII N° 2, pp. 340 et seq.

³² *I.C.J. Reports 1970*, p. 32.

of the Special Committee and adopted by the latter in 1970. This paragraph reads: "A war of aggression constitutes a *crime* against the peace, for which there is responsibility under international law."³³

24. If the various questions that arise concerning the legal relations which result from an internationally wrongful act and thus enter into the concept of international responsibility, and the existing differences of opinion about them, have been discussed in the preceding paragraphs, it is not because of any conviction that the Commission will have to take a position on these questions from the beginning of its work, when formulating the basic general rule on State responsibility. It is believed that this rule should be stated as concisely as possible and that in presenting it the Commission should not set out to distinguish different classes of wrongful acts and their consequences. The principle to be established from the outset is the unitary principle of responsibility, which it should be possible to invoke in every case. The reason for going into the details mentioned above is that it is thought necessary for the Commission to bear in mind, throughout its work on this topic, the extremely complex nature of the notion of responsibility for an internationally wrongful act—with respect to which, incidentally, the claims of progressive development of international law may assert themselves, alongside those of codification pure and simple, more forcefully than they do with respect to other notions.

25. The Commission will, of course, have to take a position on all these questions, as it decided after discussing the first report on State responsibility at its twenty-first session;³⁴ the time to do so will be in the second phase of its study of the topic, when it will have to define the content, forms and degrees of State responsibility for an internationally wrongful act. However, it is by no means impossible that the implications of these questions may already become apparent, to some extent, in the first phase, devoted to determining the notion of the internationally wrongful act as an act generating the international responsibility of a State, and indeed, when formulating the basic rule on responsibility for an internationally wrongful act, the Commission will already have to take this fact into account and adopt a text which is simple enough to avoid prejudging, one way or another, the questions it will have to settle later. But in its commentary to the rule it adopts, the Commission might well point out that it is using the term "international responsibility" to mean, globally and without taking a position, all the forms of new legal relationship which may be established in international law by a State's wrongful act—irrespective of whether they are limited to a relationship between the State which commits the wrongful act and the State directly injured, or extend to other subjects of international law as well, and irrespective of whether they are centred on the guilty State's obligation to restore the rights of the injured State and to repair

the damage caused, or whether they also involve the faculty of the injured State itself, or of other subjects, of imposing on the guilty State a sanction permitted by international law.

26. With regard to the other expression the Commission will have to use in stating the basic rule on international responsibility, i.e. that denoting the type of act generating responsibility to which the present draft refers, a question of terminology may arise. It is well known that the terms used in the practice and the literature of different countries are not the same and that different words are sometimes used in the same language, though all of them are qualified by the adjective "international".³⁵ Thus, writers in French sometimes speak of a "délit" and sometimes of an "acte illicite" or "fait illicite".³⁶ Similarly, Italian writers sometimes use the term "delitto", but more often "atto illecito" or "fatto illecito".³⁷ The literature in Spanish uses the terms "delito", "acto ilícito" and "hecho ilícito".³⁸ In English writers we find the terms "tort", "delict", "delinquency", "illegal conduct", "illegitimate", "illegal",

³³ On these questions of terminology see, in particular, I. von Münch, *Das Völkerrechtliche Delikt in der Modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, P. Keppler, 1963), pp. 11 *et seq.*

³⁶ The expression "délit international" is used by G. Scelle (*Précis de droit des gens — Principes et systématique* (Paris, Librairie du Recueil Sirey, 1934), part II, p. 61). It is to be found in the replies of some Governments (Switzerland, Netherlands) to the various points of the request for information sent to Governments by the Preparatory Committee for the 1930 Conference (League of Nations, *Bases of Discussion... (op. cit.)*, pp. 13 and 65), and also in the French texts of foreign writers such as: K. Strupp, *Eléments... (op. cit.)*, pp. 325 *et seq.*; R. Ago, "Le délit international", *Recueil des cours... (op. cit.)*, pp. 415 *et seq.*; Th. C. Eustathiades, "Les sujets...", *Recueil des cours... (op. cit.)*, pp. 419 *et seq.* The term "acto illicite", is used by H. Kelsen ("Théorie...", *Recueil des cours... [op. cit.]*, pp. 16 *et seq.*) as the French equivalent of the German "Unrecht" and the English "delict". The term "acte illicite" is preferred by P. Guggenheim (*op. cit.*, pp. 1 *et seq.*) and by P. Reuter (*op. cit.*, pp. 585 and 590). The term "fait illicite" is used by J. Basdevant ("Règles générales du droit de la paix", *Recueil des cours... 1936-IV* (Paris, Librairie du Recueil Sirey, 1937), pp. 665 *et seq.*), by J. L'Huillier (*Eléments de droit international public* [Paris, Editions Rousseau et Cie, 1950], pp. 354 *et seq.*) and by Ch. Rousseau (*Droit international public* (Paris, Librairie du Recueil Sirey, 1953), p. 361).

³⁷ D. Anzilotti, (*Corso... (op. cit.)*, pp. 384 *et seq.*) speaks of "fatti illeciti internazionali". So do R. Ago ("Illecito commissivo e illecito omissivo nel diritto internazionale", *Diritto internazionale* (Milan, Istituto per gli Studi di Politica Internazionale, 1938), pp. 9 *et seq.*) and G. Morelli (*op. cit.*, pp. 340 *et seq.*). G. Balladore Pallieri (*op. cit.*, *loc. cit.*), A.P. Sereni (*op. cit.*, pp. 1503 *et seq.*) and R. Quadri (*Diritto internazionale pubblico*, 5th ed. [Naples, 1968], pp. 584 *et seq.*) speak of "atti illeciti".

³⁸ S. Planas Suárez (*Tratado de Derecho Internacional Público* [Madrid, Mijos de Reus, 1916], t. I, p. 167) and A. Ulloa (*Derecho internacional publico*, 4th ed. (Madrid, Ediciones Iberoamericanas, S.A., 1957), t. II, p. 258) prefer "hechos ilicitos"; J. Garde Castillo ("El acto ilícito internacional", *Revista española de derecho internacional* (Madrid, Consejo Superior de Investigaciones Científicas, 1950), vol. III, No. 1, pp. 121 *et seq.*) uses "acto ilícito"; Podesta Costa (*Manual de derecho internacional publico* (Buenos Aires, 1947), pp. 200 *et seq.*) uses "hechos lesivos"; L.M. Moreno Quintana and C.M. Bollini Shaw (*Derecho internacional público-Sistema nacional del derecho y política internacional* (Buenos Aires, Ediciones Librería del Colegio, 1950), p. 166) use "delito internacional". In the Portuguese literature, H. Accioly (*Tratado de direito internacional público* (Rio de Janeiro, Imprensa Nacional, 1933), t. I, p. 288) uses the term "acto ilícito".

³³ See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18 (A/8018)*, p. 64.

³⁴ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 233, document A/7610/Rev. 1, para. 81.

"unlawful" or "wrongful" "act" and "act or omission".³⁹ German writers speak of "Unrecht", "Delikt" and "unerlaubte Handlung".⁴⁰ In the French translations of Russian writers we find expressions such as "délit international", "action" and "inaction" "illégal" and "illégitime".⁴¹ And this list could be extended further.

27. In view of this multiplicity of terms, it seems desirable that the Commission should adhere to the terminology employed hitherto and continue to use, in French, the expression "fait illicite international", which is usually preferable to "délit" or other similar terms, as they may sometimes take on a special shade of meaning in certain systems of municipal law. The expression "fait illicite" also seems preferable to "acte illicite", mainly for the practical reason that illicit conduct often takes the form of an omission, and this is not properly conveyed by the word "acte", the etymology of which suggests the idea of action. From the point of view of legal theory, this preference seems even more justified, since the French term "acte" is ordinarily used to denote the exercise of a power, i.e. a manifestation of will intended to produce the legal consequences determined by this will, which certainly does not apply to illicit conduct.⁴² The same reasons probably make it preferable to use the term "hecho ilícito" in Spanish. In English, the expression used previously as the equivalent of the French "fait illicite" has been "wrongful act". The English-speaking members of the Commission will say whether they still find this term the most appropriate. It is obvious, in any event, and almost goes without saying, that the choice of one particular term rather than another does not affect the determination of the conditions for, and characteristics of,

³⁹ For the term "tort", see G. Schwarzenberger (*op. cit.*, pp. 562 *et seq.*); for "delict", see H. Kelsen (*Principles... (op. cit.)*, p. 6 *et seq.*) and A. D. McNair (*International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 207); for "delinquency", see L. Oppenheim (*op. cit.*, pp. 338 *et seq.*); for "illegal conduct", see C. Eagleton, (*op. cit.*, p. 6); for "illegitimate act", see A. Ross, (*A Textbook of International Law* (London, Longmans, Green and Co., 1947), p. 242; for "illegal act", see C. C. Hyde (*International Law chiefly as Interpreted and Applied by the United States*, 2nd ed. [Boston, Little, Brown and Co., 1947], vol. 2, p. 884) and I. Brownlie (*Principles of Public International Law* (Oxford, Clarendon Press, 1966), p. 354); for "unlawful act", see B. Cheng (*op. cit.*, pp. 170 *et seq.*); for "unlawful act or omission", see E. Jiménez de Aréchaga (*op. cit.*, p. 534); and for "wrongful act or omission", see F. V. García Amador ("State Responsibility...", *Recueil des cours... (op. cit.)*, p. 377) and C. F. Amerasinghe (*State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), p. 39).

⁴⁰ The term "Unrecht" is that used by Kelsen ("Unrecht...", *Zeitschrift... (op. cit.)*, pp. 481 *et seq.*), Verdross (*op. cit.*, pp. 372 *et seq.*) and Wengler (*op. cit.*, pp. 489 *et seq.*). Strupp ("Das völkerrechtliche Delikt", *Handbuch... (op. cit.)*, pp. 4 *et seq.*) and most of the older German writers, followed, among the most modern, by von Münch (*op. cit.*, pp. 11 *et seq.*) and G. Dahm (*op. cit.*, pp. 177 *et seq.*), prefer the term "Delikt". The expression "unerlaubte Handlung" is used by F. Klein (*Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Vittorio Klostermann, 1941), p. 2).

⁴¹ The term "délit" is used by Levin ("Ob otvetstvennosti...", *Sovetskoe... (op. cit.)*, p. 339 of the French summary); the terms "acte illégal" ("nepravomerno deistvie") and "inaction illégitime" ("nepravomerno bezdeistvie") by Tunkin (*Droit international... (op. cit.)*, p. 192, and *Teoria... (op. cit.)*, p. 431).

⁴² In this connexion, see R. Ago, "Le délit international", *Recueil des cours... (op. cit.)*, pp. 438 *et seq.*

an act generating international responsibility, with which most of the articles on this first part of this report will be concerned.

28. In arbitration cases and legal literature some definitions of the basic rule on international responsibility are to be found which, though the terms vary, all contain the statement that there can be no responsibility in international law without a prior wrongful act.⁴³ Formulations of this kind should be avoided, so as not to convey the erroneous impression that, in the Commission's opinion, responsibility can arise only from a wrongful act. Although, as is mentioned above (paragraph 6), the Commission has decided to devote itself for the time being solely to international responsibility for wrongful acts,⁴⁴ it has nevertheless generally recognized the existence of cases in which States may incur international responsibility by the performance of lawful acts. This is a point which several members of the Commission have stressed.⁴⁵ Hence, it is necessary to adopt a formula which, though stating that an internationally wrongful act is a source of responsibility, does not lend itself to an interpretation that would automatically exclude the existence of another possible source of international responsibility.

29. One final comment must be made, before passing on to the proposed formulation of the basic rule on the international responsibility of States. The normal situation which arises as the result of an internationally wrongful act involves the creation of international responsibility borne by the State which has committed the wrongful act. There are, however, some special cases—usually called cases of vicarious responsibility, or responsibility for acts of others—which constitute an exception to the normal situation mentioned above. In these cases the responsibility arising from a particular wrongful act does not attach to the State which committed the act, because it is not free to determine its conduct in the sphere in which the wrongful act was committed. The responsibility then attaches to another State, which is in a position to control the action of the first State and to restrict its freedom.

⁴³ On two occasions, for example, the Mexico United States General Claims Commission, set up under the Convention of 8 September 1923 stated that: "Under international law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard" (Case of *Dickson Car Wheel Company* [July 1931], United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1.), p. 678. For a statement in similar terms, see also the case of the *International Fisheries Company* [July 1931] *ibid.*, p. 701).

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

⁴⁴ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 233, document A/7610/Rev. 1, para. 83.

⁴⁵ In particular Mr. Ruda, Mr. Ramangasoavina, Mr. Tammes, Mr. Albónico, Mr. Eustathiades and Mr. Castañeda.

These special situations should be studied separately and should probably be covered by a special rule. In formulating the general rule on responsibility, however, care will have to be taken not to adopt a text which might later be contradicted by the very existence of a special rule. It therefore seems preferable to provide, in general, that every internationally wrongful act gives rise to international responsibility, without specifying that this responsibility necessarily attaches to the State which commits the wrongful act.

30. In conclusion, in view of all the above considerations, the Special Rapporteur proposes that the basic rule on international responsibility should be formulated as follows:

Article I

*The internationally wrongful act
as a source of responsibility*

Every internationally wrongful act by a State gives rise to international responsibility.

II. CONDITIONS FOR THE EXISTENCE
OF AN INTERNATIONALLY WRONGFUL ACT

31. Having stated the basic general rule that every internationally wrongful act is a source of international responsibility, it is now necessary to determine, in correlation with that rule, the prerequisites for establishing the existence of an internationally wrongful act. For this purpose, the following two elements are usually distinguished, both of which must be present:

(a) An element generally called a *subjective element*, consisting of conduct which must be attributable, not to the individual or group of individuals which has actually engaged in it, but to a State as a subject of international law. This is what is meant by conduct or behaviour *imputable* to a State.

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

32. These two elements are clearly recognizable, for example, in the passage already cited from the judgement of the Permanent Court of International Justice in the *Phosphates in Morocco Case*, in which the Court explicitly connects the creation of international responsibility with the existence of an

“act being attributable to the State and described as *contrary to the treaty right [s] of another State*”.⁴⁶

They are also to be found in the arbitral award in the *Dickson Car Wheel Company* case, delivered in July 1931 by the Mexico/United States of America General Claims Commission, where the required condition for a State to incur international responsibility is stated to be the fact “that an unlawful international act be *imputed*, to it, that

⁴⁶ *Phosphates in Morocco Case* (Preliminary Objections), 14 June 1938, P.C.I.J., series A/B, No. 74, p. 28. [Italics supplied by the Special Rapporteur.]

is, that there exist a *violation of a duty imposed by an international juridical standard*”.⁴⁷

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

“There can be no question of a State's international responsibility unless it can be proved that the State *has violated one of the international obligations incumbent upon States under international law*.”⁴⁸

33. In the literature of international law, the combined facts that a certain conduct is imputable to a State as a subject of international law and that conduct constitutes a violation of an international obligation of that State are generally considered to be the essential elements for recognition of the existence of a wrongful act giving rise to an international responsibility. Among the older formulations, that of Anzilotti remains a classic;⁴⁹ among the more recent, those by Sereni,⁵⁰ Levin,⁵¹ Amerasinghe⁵²

⁴⁷ United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678. [Italics supplied by the Special Rapporteur.]

⁴⁸ League of Nations, *Bases of Discussion...* (op. cit.), p. 21. [Italics supplied by the Special Rapporteur.]

⁴⁹ *Teoria generale...* (op. cit.), p. 83:

“La responsabilità nasce dall'*ingiusta violazione del diritto altrui* e genera l'obbligo della riparazione in quanto sia collegata con un soggetto agente, sia cioè è imputabile a questo, presa la parola *imputabilità* nel significato generale di termine che unisce il fatto o l'omissione illecita all'autore.”

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

⁵⁰ *Diritto internazionale* (op. cit.), p. 1505:

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

[There are, therefore, two constituent elements of the internationally wrongful act: (A) a conduct by a subject of international law; (B) the violation of an international obligation manifested in that conduct] (Translation by the United Nations Secretariat).

⁵¹ French summary of “*Ob otvetstvennosti...*” (op. cit.), [see foot-note 31 above], p. 340:

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

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

⁵² C. F. Amerasinghe, op. cit., p. 37. In stating the first three of the four conditions he considers necessary for the existence of State responsibility for an injury to an alien, Amerasinghe expresses himself as follows:

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

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

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

and Jiménez de Aréchaga⁵³ are notable for the distinctness with which they state the rule. But generally speaking it may be said that most writers are substantially in agreement on this point, irrespective of the period in which they were writing.⁵⁴

34. In the analysis of each of these two elements—namely, on the one hand the imputability of some particular conduct to the State as subject of international law and on the other the failure to fulfil an international obligation incumbent on the State, which that conduct must constitute—various aspects stand out, for some of which specific criteria have been established in general international law. The following will be devoted to a detailed examination of these aspects. They will deal, in particular, with the conditions under which international law permits some particular conduct to be imputed to a State in the different cases that may occur, and the conditions for establishing, again in the different possible cases, that the violation of an international obligation has been brought about by that conduct. However, in order to define in principle the conditions for the existence

⁵³ E. Jiménez de Aréchaga, *op. cit.*, p. 534. The first two of the three elements which this author considers essential for the establishment of international responsibility are summarized as follows:

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

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

⁵⁴ See, among many other writers: Ch. de Visscher, *op. cit.*, pp. 90-91; R. Ago, “Le délit international”, *Recueil des cours...* (*op. cit.*), pp. 441 *et seq.*, 450 *et seq.*; J. G. Starke, “Imputability of International Delinquencies”, *The British Year Book of International Law, 1938* (London, Oxford University Press), p. 106; C. Th. Eustathiades, “Principes généraux de la responsabilité internationale des Etats”, *Etudes de droit international, 1929-1959* (Athens, Klissiannis, 1959), t. 1, p. 515, and “Les sujets...”, *Recueil des cours...* (*op. cit.*), p. 422; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans, Green and Co., 1938), p. 22; A. Ross, *op. cit.*, p. 242; J. L’Huillier, *op. cit.*, p. 354; J. Garde Castillo, *op. cit.*, p. 124; G. Morelli, *op. cit.*, pp. 342 *et seq.*; Ch. Rousseau, *op. cit.*, p. 361; P. Guggenheim, *op. cit.*, pp. 1-2 and 4-5; B. Cheng, *op. cit.*, p. 170; T. Meron, “International Responsibility of States for Unauthorized Acts of their Officials”, *The British Year Book of International Law, 1958* (London, Oxford University Press, 1959), pp. 86-87; G. Schwarzenberger, *A Manual of International Law*, 4th ed. (London, Stevens and Sons Ltd, 1960), vol. 1, p. 163; P. Reuter, *op. cit.*, p. 585.

Some of these authors and others cited previously add a further element to the two constituent elements of an internationally wrongful act suggested here. This will be discussed later. It should also be noted that in some of the works mentioned the concept of the “wrongful act” is used to denote the objective element which must be combined with the subjective element if international responsibility is to exist. In reality, the subjective element is also a condition for the existence of an internationally wrongful act, not an extraneous condition for the creation of responsibility by a wrongful act.

In opposition to the principle according to which the possibility of attributing to the State the conduct of a person or group of persons is a decisive element for the purpose of considering that conduct as an internationally wrongful act, see A. Soldati, *La responsabilité des Etats dans le droit international* (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 75 *et seq.* Certain reservations regarding the applicability in international law of the notion of imputability are expressed by R. Quadri, *op. cit.*, pp. 586 *et seq.*, and by I. Brownlie, *op. cit.*, p. 356.

of an internationally wrongful act, certain aspects of the two elements in question must first be considered and clearly brought out, so that they can be formulated in a manner which will not be open to criticism. In the same connexion and with the same end in view, the question must also be raised whether these are the only two elements required for the existence of a wrongful act in international law or whether others are also necessary. We must therefore dwell for a moment here on these preliminary considerations.

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

36. Even apart from this hypothesis, moreover, there are many cases in which an international delinquency consists in an omission, and whenever international jurisprudence has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used with reference to active conduct.⁵⁵ Similarly, the States which replied to point V of the request for information submitted to them by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930) expressly or implicitly recognized the principle that the responsibility of a State can be involved by the omissions as well as by the actions of officials,⁵⁶ and this principle is confirmed in the articles adopted by the third Committee of the Conference on first reading.⁵⁷ Finally, it can be said that the principle has been accepted

⁵⁵ The international responsibility of a State for a wrongful omission was explicitly affirmed by the International Court of Justice in the *Corfu Channel Case*. After specifying that “the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them” and noting that Albania “neither notified the existence of the minefield nor warned the British warships of the danger they were approaching”, the Court concluded that: “These grave omissions involve the international responsibility of Albania” [Italics supplied by the Special Rapporteur] [*Corfu Channel Case (Merits)*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, pp. 22-23]. See also the arbitral award of 10 July 1924 in the *Affaire relative à l’acquisition de la nationalité polonaise*: United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

⁵⁶ League of Nations, *Bases of Discussion...* (*op. cit.*), pp. 70 *et seq.*

⁵⁷ See *Yearbook of the International Law Commission, 1956*, vol. II, pp. 225-226 (articles 6, 7, 8), document A/CN.4/96, annex 3.

without question by writers⁵⁸ and explicitly or implicitly adopted in all the private codification drafts.⁵⁹ Thus, since this point is not disputed, there is no need to dwell on it further, except perhaps to stress that it seems particularly advisable to state expressly, in the statement of conditions for the existence of an internationally wrongful act, that internationally wrongful conduct imputed to a State can equally well be an omission as an action.

37. What is meant by stipulating the "imputability" of particular conduct to a State as a requirement for that conduct to be qualified as an internationally wrongful act? As Anzilotti already stressed in his first work on the subject, where international responsibility is concerned, the term "imputability" has no other meaning than the general meaning of a term linking the wrongful action or omission with its author.⁶⁰ To speak of imputation to a State, therefore, merely indicates that the international legal order must be able to regard the action or omission concerned as an act of the State, if it is to be allowed further to assume the creation of those new subjective legal situations which, as we have seen, are covered by the over-all, synthetic expression "international responsibility of States". And since the State, as a legal entity, is not physically capable of conduct,⁶¹ it is obvious that all that can be imputed to a State is the

act or omission of an individual or of a group of individuals, whatever its composition may be.⁶²

38. That being so, the essential question concerning imputability is when and how it can occur. The problems which arise consist precisely in determining what individual conduct can be regarded, for the purposes with which we are concerned, as the conduct of the State, and in what conditions such conduct must have taken place. The many difficult problems involved will be analysed in detail in due course; for the time being, a general outline would seem to be sufficient. The first point to be

⁵⁸ For studies concerning the specific character of the delict of omission in international law, see: R. Ago "Illecito commissivo . . .", *Diritto internazionale (op. cit.)*, pp. 9 et seq.; P. A. Zannas, *La responsabilité internationale des Etats pour les actes de négligence* (Montreux, Imprimerie Ganguin et Laubscher S. A., 1952); G. Perrin, "L'agression contre la Légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris, A. Pédone, 1957), t. LX, pp. 410 et seq.; D. Levy, "La responsabilité pour omission et la responsabilité pour risque en droit international public", *Revue générale de droit international public* (Paris, A. Pédone, 1961), t. LXV, pp. 744 et seq.

⁵⁹ See article I of the resolution on "international responsibility of States for injuries on their territory to the person or property of foreigners", adopted by the Institute of International Law in 1927 (*Annuaire de l'Institut de droit international, 1927 (session de Lausanne)*) (Paris, A. Pédone), t. III, p. 330; *Yearbook of the International Law Commission, 1956*, vol. II, p. 227, document A/CN.4/96, annex 8); article 1 of the draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Karl Strupp in 1927 (*ibid.*, 1969, vol. II, p. 151, document A/CN.4/217 and Add. 1, annex IX); article 1, para. 2, of the draft convention prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 (*ibid.*, p. 149, annex VIII); article 1 of the draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961 (*ibid.*, p. 142, annex VII); article II of the Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared by the Inter-American Juridical Committee in 1962 (*ibid.*, p. 153, annex XIV), etc.

⁶⁰ D. Anzilotti, *Teoria generale . . . (op. cit.)*, pp. 83 and 121. The same author also stresses that the meaning given to the term "imputability" in international law by no means corresponds to that sometimes attached to it in municipal law, when imputability denotes the state of mind of the agent as a basis for responsibility.

⁶¹ "States can act only by and through their agents and representatives" (Advisory Opinion No. 6, of February 3rd 1923, on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, *P.C.I.J.*, series B, No. 6, p. 22).

⁶² See M. Marinoni, *La responsabilità degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale* (Rome, Arthenaem, 1913), pp. 33 et seq.: "Gli Stati, come le così dette persone giuridiche, non possono non ricorrere all'opera di individui, la cui attività debba giuridicamente valere per gli Stati medesimi [. . .]. Nella realtà fisica non v'è un ente Stato [. . .], ma vi sono soltanto azioni, voleri di individui, che l'ordine giuridico può far valere per un soggetto di diritto diverso da quella persona fisica che li ha posti in essere" [States, like so-called legal entities, cannot but have recourse to the action of individuals, whose activities must be legally attributable to the States themselves [. . .]. In physical reality, there is no entity "State" [. . .], but only actions and expressions of will of individuals, which the legal order can attribute to a subject of law other than the physical person who is their author] (Translation by the United Nations Secretariat); K. Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . (op. cit.)*, pp. 35-36: "Denn der Staat [. . .] bedarf physischer Personen [. . .], deren Wollen und Handeln in der physisch-natürlichen Welt Akte von Individuen, in der juristischen solche der Gesamtheit, d. h. des Staates, sind". [For the State [. . .] requires physical persons [. . .] whose will and conduct in the physical-natural world are acts of individuals, but in the legal world are acts of the whole community, i.e. the State.] (Translation by the United Nations Secretariat); D. Anzilotti, *Corso . . . (op. cit.)*, p. 222: "ci sono atti e volizioni d'individui che valgono giurudicamente come atti e volizioni dello Stato, perchè il diritto li imputa allo Stato, ossia ne fa il presupposto di doveri e di diritti dello Stato" [There are actions and expressions of will of individuals which are in law deemed to be actions and expressions of will of the State, because the law imputes them to the State, i.e. makes them the origin of duties and rights of the State] (Translation by the United Nations Secretariat); H. Kelsen, "Unrecht . . .", *Zeitschrift . . . (op. cit.)*, p. 496-497; *Principles . . . (op. cit.)*, p. 117; and "Théorie . . .", *Recueil des cours . . . (op. cit.)*, p. 88: "L'Etat est responsable des violations du droit international qui sont le résultat de comportements individuels pouvant être interprétés comme des comportements de l'Etat. Il faut donc que les comportements de certains individus puissent être imputés à l'Etat" [The State is responsible for violation of international law resulting from individual conduct which can be interpreted as being the conduct of the State. Accordingly, the conduct of certain individuals must be imputable to the State.] (Translation by the United Nations Secretariat); and p. 78: "Quand nous disons de l'acte d'un individu déterminé qu'il est un acte de l'Etat nous imputons cet acte à une personne distincte de l'individu qui l'a accompli, à une personne qui se trouve, pour ainsi dire, derrière lui" [When we say of the act of a particular individual that it is an act of the State, we impute this act to a person other than the individual who committed it, to a person who is, so to speak, behind him.] (Translation by the United Nations Secretariat); T. Perassi, *Lezioni di diritto internazionale*, Part. 1 (Rome, Edizioni Italiane, 1942 [reprint of the 1941 edition], p. 97: "Un ente [. . .] in tanto può assumere la qualità di soggetto in un ordinamento giuridico in quanto mediante l'attitudine naturale di volere ed agire di determinati uomini si ponga come unità operante, cioè come unità a cui sono riferite come proprie una volontà ed una azione". [An [. . .] entity may assume the character of a subject of a legal order in so far as, through the natural disposition of certain men to will and act, it becomes an operative unity, that is to say, a unity to which are attributed a will and action of its own] (translation by the United Nations Secretariat).

made is that imputation to the State is necessarily, because of the very nature of the State, a legal connecting operation which has nothing in common with a link of natural causality.⁶³ One can sometimes speak of natural causality in reference to the relationship between the action of an individual and the result of that action, but not in reference to the relationship between the person of the State and the action of an individual.⁶⁴

39. The second point to be made is that the State to which an individual's conduct is imputed is the State as a person, a subject of law, and not the State in the sense of a legal order or system of norms. This is true not only, and *a fortiori*, of an imputation under international law, but also of an imputation under municipal law. It is because of the failure to maintain a clear distinction between these two notions that difficulties have arisen in this connexion, even if only of a theoretical nature.⁶⁵

⁶³ D. Anzilotti (*Corso . . . [op. cit.]*, p. 222) points out that: "L'imputazione giuridica si distingue così nettamente del rapporto di causalità; un fatto è giuridicamente proprio di un soggetto, non perchè prodotto o voluto da questo, nel senso che tali parole avrebbero nella fisiologia o nella psicologia, ma perchè la norma glielo attribuisce" [Legal imputation is thus clearly distinguishable from causal relationship; an act is legally deemed to be that of a subject of law not because it has been committed or willed by that subject in the physiological or psychological sense of those words, but because it is attributed to him by a rule of law.] (Translation by the United Nations Secretariat). See also J. G. Starke, *op. cit.*, p. 105: "The imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State"; C. Th. Eustathiades, "Les sujets . . .", *Recueil des cours . . . (op. cit.)*, p. 422: "Cette imputation est le résultat d'une opération logique effectuée par une règle de droit, donc un lien juridique" [This imputation is the result of a logical operation effected by a rule of law, and is therefore a legal relationship.] (Translation by the United Nations Secretariat); and W. Wengler, *op. cit.*, pp. 425 and 490: "[. . .] die Völkerrechtsnorm eindeutig nur von einem bestimmten Menschen durch dessen eigenes Verhalten befolgt oder verletzt werden kann" [(. . .) in any case, a rule of international law can be complied with or infringed only by the individual behaviour of a particular person] (Translation by the United Nations Secretariat).

⁶⁴ There are no activities of the State which can be called "its own" from the point of view of natural causality as distinct from that of legal attribution; it should be noted that this applies at the municipal as well as at the international level. In describing the State as a real entity—and it is such an entity, like any other legal person—one must nevertheless avoid the error of giving an anthropomorphic picture of the collective phenomenon, in which the individual-organ would have his personality absorbed and annulled in the whole and would be an inseparable part of it, rather like an organ of the human body. It is by reference to a picture of this kind that Quadri (*op. cit.*, pp. 393 *et seq.*) would like to replace the "legal" operation of connecting the individual action to the State by a simply material and natural recognition. For Wengler (*op. cit.*, p. 39), the "Zurechnung" (imputation) is a normative technical process.

⁶⁵ It should be noted that the identification of the legal person with a legal order led writers such as M. Kelsen ("Über Staatsunrecht", *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* [Vienna, Alfred Hölder, K.U.K. Hof- und Universitäts-Buchhändler, 1914], Bd. 40, p. 114) and W. Burckhardt (*Die völkerrechtliche Haftung der Staaten* [Berne, Paul Haupt, Akadem. Buchhandlung vorm. Max Drechsel, 1924], pp. 10 *et seq.*) to conclude that a wrongful act cannot be imputed to the legal person which is the expression of the unity of the special legal order that constituted that person. Kelsen ("Unrecht . . .", *Zeitschrift für öffentliches Recht (op. cit.)*, p. 500) later tried to overcome the difficulty by saying that an act of an organ of the partial legal order of the State, although necessarily lawful as

At the same time, it should be emphasized that the imputation to the State which is in question here is imputation to the State as a person under international law and not as a person under municipal law.

40. The last and most important of the three preliminary points to be made at this stage is that an individual's conduct can be imputed to a State as an internationally wrongful act only by international law. It is quite unthinkable that the operation of connecting an action or omission with a subject of international law so as to produce consequences in the sphere of international legal relations should take place in a framework other than that of international law itself.⁶⁶ The imputation of an act to the State as a subject of international law and the imputation of an act to the State as a person under municipal law are two entirely distinct operations which are necessarily governed by two different systems of law. It is possible and even normal that for such purposes international law should take account of the situation existing in municipal law, although we shall have to see in what sense and to what extent. But in any event, this taking into account of municipal law would simply be an instrument employed by the international legal order to perform an operation falling entirely within that order. We shall have occasion to see that many of the specific difficulties met with in connexion with imputation are due to an insufficiently clear grasp of this point. Its importance as a principle should be noted here and now.

regards that order, could be imputed to the State as a wrongful act by a total legal order such as the international order. All this seems both artificial and unrealistic. The internal legal order can perfectly well impute the conduct of an organ to the person of the State as a wrongful act; that person is the creation of that order and as a person has subjective legal situations like any other subject.

⁶⁶ Anzilotti, who in his earlier works seemed to uphold the idea that, in all cases, an individual's conduct should be imputed to the State solely by municipal law, later became a firm supporter of the opposite view. See *Corso . . . (op. cit.)*, p. 224.

For the same approach, see J. G. Starke, *op. cit.*, pp. 106-107; T. Perassi, *op. cit.*, p. 98; R. Ago, "Le délit international", *Recueil des cours . . . (op. cit.)*, pp. 461-462; A. Ross, *op. cit.*, p. 251; C. Th. Eustathiades, "Les sujets . . .", *Recueil des cours . . . (op. cit.)*, p. 417; K. Furgler, *Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der Praxis der Vereinigten Staaten und der Schweiz* (Zürich, Polygraphischer Verlag, 1948), pp. 19-20; G. Morelli, *op. cit.*, p. 184; P. Reuter, *La responsabilité internationale*, Paris, 1956-1957, p. 87; T. Meron, *op. cit.*, p. 87; A. P. Sereni, *op. cit.*, p. 1506; J.-P. Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, Librairie générale de droit et de jurisprudence, 1966), p. 119.

Kelsen's particular conception of the State and legal persons in general also led him to maintain in principle ("Théorie . . .", *Recueil des cours . . . (op. cit.)*, p. 88) that "la question de savoir si un acte accompli par un individu est un acte étatique, c'est-à-dire imputable à l'Etat, doit être examinée sur la base de l'ordre juridique national" [The question whether an act performed by an individual is an act of State, i.e. imputable to the State, must be considered on the basis of the national legal order]. (Translation by the United Nations Secretariat). However, in his more recent writing Kelsen too has sought to lay particular stress on the possibility of regarding imputation in international law as being based on international law: see *Principles . . . (op. cit.)*, pp. 197 and 198, note 13: "It remains true, however, that international law may, and does, also determine that certain acts are to be considered as acts of state, and therefore to be imputed to the state, even though the acts in question cannot be imputed to the state on the basis of national law."

41. The second condition for the existence of an internationally wrongful act was defined at the beginning of this section: the conduct imputed to the State must constitute a breach by that State of an international obligation incumbent upon it. This is what is called the *objective* element of the internationally wrongful act, the specific element which distinguishes it from the other acts of the State to which international law attaches legal consequences. The contrast between the State's actual conduct and the conduct required of it by law constitutes the essence of the wrongfulness. The wrongful act is above all a breach of a legal duty, a violation of an obligation, and it is precisely this kind of act which the legal order considers, as we saw earlier, for the purpose of attaching responsibility to it, i.e. of making it a source of new obligations and, more generally, of new legal situations whose common characteristic is that they are unfavourable to the subject to which the act in question is imputed. If we bear in mind the link between the condition and the result, between the breach of an obligation and the incurring of further obligations or of sanctions as a consequence of that breach, we shall see that, in a sense, the rules relating to State responsibility are complementary to other substantive rules of international law—to those giving rise to the legal obligations which States may be led to violate.⁶⁷

42. It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is represented by the violation of an international obligation incumbent upon the State. In its judgement on the jurisdiction in the Case concerning the Factory at Chorzów,⁶⁸ to which reference has already been made, the Permanent Court of International Justice used the

⁶⁷ This idea was clearly expressed by various members of the International Law Commission (in particular, Mr. Tammes and Mr. Eustathiades) during the discussion of the first report on State responsibility. It is reflected in paragraph 80 of the report on the work of the twenty-first session (*Yearbook of the International Law Commission, 1969*, vol. II, p. 233, document A/7610/Rev.1).

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

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

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

⁶⁸ Case concerning the factory at Chorzów (Jurisdiction), Judgement No. 8 of 26 July 1927. *P.C.I.J. series A*, No. 9, p. 21.

words "breach of an engagement". It employed the same expression in its subsequent judgement on the merits of the case.⁶⁹ The International Court of Justice referred explicitly to the Permanent Court's words in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.⁷⁰ In its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* the court held that "refusal to fulfil a treaty obligation" involved international responsibility.⁷¹ In the arbitration decisions, the classic definition is the one referred to above (see foot-note 43 and para. 32 above) which was given by the Mexico-United States General Claims Commission in the *Dickson Car Wheel Company Case*:

"Under international law, apart from any convention, in order that a State may incur responsibility, it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard."⁷²

43. In State practice, expressions such as "non-execution of international obligations", "acts incompatible with international obligations", "breach of an international obligation" and "breach of an engagement" are common; they recur frequently in the replies by Governments, particularly on point III of the request for information addressed to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law.⁷³ Moreover, the article 1 unanimously adopted at the first reading by the Third Committee of the Conference contains these words: "any failure . . . to carry out the international obligations of the State".⁷⁴ Similar terminology was used in article 1 of the preliminary draft prepared in 1957 by Mr. Garcia Amador as the Special Rapporteur on State responsibility. This speaks of "some act or omission [. . .] which contravenes the international obligations of the State".⁷⁵ Those words are also to be found in article 2 of the revised preliminary draft prepared in 1961.⁷⁶

44. The same consistency of terminology is to be found in the draft codifications of State responsibility prepared by private individuals and institutions. Article 1 of the draft code prepared by the Japanese Association of International Law in 1926 lays down that a State is

⁶⁹ Case concerning the factory at Chorzów (Merits), Judgement No. 13 of 13 September 1928. *P.C.I.J. series A*, No. 17, p. 29.

⁷⁰ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949. *I.C.J. Reports 1949*, p. 184.

⁷¹ *Interpretation of peace treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion of 18 July 1950. *I.C.J. Reports 1950*, p. 228.

⁷² *Dickson Car Wheel Company Case* (July 1931). United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678 [Italics supplied by the Special Rapporteur]. See also the decision in the *Affaire relative à l'acquisition de la nationalité polonaise* (10 July 1924): *ibid.*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

⁷³ League of Nations, *Bases of Discussion* . . . (op. cit.), pp. 25 et seq., 30 et seq., 33 et seq.; and *Supplement to vol. III* (op. cit.), pp. 3 et seq.

⁷⁴ See *Yearbook of the International Law Commission, 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

⁷⁵ *Ibid.*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

⁷⁶ *Ibid.*, 1961, vol. II, p. 46, document A/CN.4/134 and Add. 1.

responsible in the case of an act or default constituting a violation of an international duty incumbent upon the state;⁷⁷ article I of the resolution adopted by the Institute of International Law at Lausanne in 1927 speaks of "any action or omission" of the State contrary to its international obligations;⁷⁸ article 1 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht mentions the violation by a State of an obligation towards another State under international law;⁷⁹ and article 1 of the draft prepared by Strupp in 1927 refers to acts of the responsible State which conflict with its duties to the injured State.⁸⁰ Lastly, as far as the literature is concerned, the expression "breach of an international obligation"⁸¹ or equivalents such as "violation of an obligation established by an international norm",⁸² "failure to carry out an international obligation",⁸³ "act" or "conduct conflicting with" or "contrary to an international obligation",⁸⁴ and "breach of a duty" or of an "international legal duty",⁸⁵ are by far the most prevalent phrases in the language of the leading authors.

45. In view of this evidence of the consistency in language, it is scarcely necessary to stress the desirability of using expressions such as "failure to carry out an obligation" or "breach of an international obligation" to designate the objective element of an internationally wrongful act, in preference to the expressions "breach of a rule" or "breach of a norm of international law" employed by some authors⁸⁶ and occasionally mis-

⁷⁷ Draft code of international law adopted by the Kokusaiho Gakkwai (International Law Association of Japan) in co-operation with the Japanese branch of the International Law Association. See *Yearbook of the International Law Commission, 1969*, vol. II, p. 141, document A/CN.4/217 and Add. 1, annex II.

⁷⁸ *Ibid.*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

⁷⁹ *Ibid.*, 1969, vol. II, p. 149, document A/CN.4/217 and Add. 1, annex VIII.

⁸⁰ *Ibid.*, p. 151, annex IX.

⁸¹ See J. G. Starke, *op. cit.*, p. 106; H. Kelsen, *Principles . . . (op. cit.)*, p. 196; K. Furgler, *op. cit.*, p. 16; G. Morelli, *op. cit.*, p. 347; G. Schwarzenberger, *A. Manual . . . op. cit.*, pp. 162-163; B. Cheng, *op. cit.*, pp. 170-171; F. V. García Amador, "State Responsibility . . ." *Recueil des cours . . . (op. cit.)*, p. 376; A. Schüle, *op. cit.*, p. 336; P. Reuter, "Principes . . ." *Recueil des cours . . . (op. cit.)*, p. 599; A. P. Sereni, *op. cit.*, pp. 1506 and 1512; C. F. Amerasinghe, *op. cit.*, pp. 37 *et seq.*, 41 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 534. See also the working documents submitted to the Sub-Committee on State Responsibility of the International Law Commission in 1962-1963 by Mr. Tsuruoka and Mr. Ago (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 247 and 251).

⁸² See P. Guggenheim, *op. cit.*, p. 1.

⁸³ See J. Basdevant, *op. cit.*, p. 671; Ch. de Visscher, *op. cit.*, p. 91; Ch. Rousseau, *op. cit.*, p. 361; and the working paper submitted by Mr. Yasseen in 1962 (*Yearbook of the International Law Commission, 1963*, vol. II, p. 250).

⁸⁴ See R. Ago, *Le délit international*, *Recueil des cours . . . (op. cit.)*, pp. 441 and 445; J. L'Huillier, *op. cit.*, p. 359; R. Monaco, *Manuale di diritto internazionale pubblico* (Turin, Unione Tipografico-Editrice Torinese, 1960), p. 359.

⁸⁵ See D. Anzilotti, *Teoria generale . . . (op. cit.)*, p. 111, and *Corso . . . (op. cit.)*, pp. 385-386; C. C. Hyde, *op. cit.*, p. 882; L. Oppenheim, *op. cit.*, pp. 337-338; G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. (Milan, 1962), p. 245; H. Accioly, *op. cit.*, p. 249; A. Ulloa, *op. cit.*, p. 251; G. Dahm, *op. cit.*, p. 178; S. R. Patel, *A Textbook of International Law* (London, Asia Publishing House, 1964), p. 103.

⁸⁶ See K. Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . (op. cit.)*, pp. 6, 8-9, and *Eléments . . . (op. cit.)*, p. 327; P. Schoen, *op. cit.*, p. 21.

employed by others as equivalents of the former.⁸⁷ The rule is law in the objective sense. Its function is to attribute in certain conditions subjective legal situations—rights, faculties, powers and obligations—to those to whom it is addressed. It is these situations which, as their global appellation indicates, constitute law in the subjective sense; it is in relation to these situations that the subject's conduct operates. The subject freely exercises or refrains from exercising its subjective right, faculty or power, and freely fulfils or violates its obligation, but it does not "exercise" the rule and likewise does not "violate" it. It is its duty which it fails to carry out and not the principle of objective law from which that duty flows. This does not mean that the obligation whose breach is the constituent element of an internationally wrongful act must necessarily flow from a rule, at least in the proper meaning of that term. The obligation in question may very well have been created and imposed upon a subject by a particular legal act, a decision of a judicial or arbitral tribunal, a decision of an international organization, etc. The breach of an obligation of this character and origin is just as wrongful under international law as failure to carry out an obligation established by a rule proper; and it would be totally artificial to ascribe the obligation in question to the rule which lays down certain particular proceedings as separate sources of international obligations.⁸⁸

46. On the other hand, it seems perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others.⁸⁹ The Permanent Court of International Justice, which normally uses the expression "breach of an international obligation", spoke of an "act [. . .] contrary to the treaty right of another State" in its judgment in the *Phosphates in Morocco Case*.⁹⁰ The correlation between a legal obligation on the one hand and a subjective right on the other

⁸⁷ This was the case in Anzilotti's earlier works: *Teoria generale . . . (op. cit.)*, p. 84, and *La responsabilità internazionale . . . (op. cit.)*, p. 170. The same formula is also to be found in A. Verdross ("Règles générales du droit international de la paix", *Recueil des cours . . . 1929-V* [Paris, Librairie Hachette, 1931], pp. 463 *et seq.*), G. Balladore Pallieri (*Diritto internazionale pubblico (op. cit.)*, pp. 245-246), J. Garde Castillo (*op. cit.*, pp. 126-127), P. Guggenheim (*op. cit.*, p. 3), A. Schüle (*op. cit.*, pp. 329-330), A. P. Sereni (*op. cit.*, p. 1503), and D. B. Levin (*Otvetsvennost gosudarstv . . . (op. cit.)*, p. 51).

⁸⁸ Quite apart from this, as far as the characterization of the wrongful act is concerned, the idea of the breach of a rule might also be misleading because there are cases of the invalid exercise of a faculty or power which have nothing to do with a wrongful act, but which nevertheless consist essentially in conduct which is at variance with what the rule would require to produce certain legal effects. In this connexion, see R. Ago, "Le délit international", *Recueil des cours . . . (op. cit.)*, pp. 434 and 441-442; and G. Morelli, *op. cit.*, p. 347.

⁸⁹ The equivalence in international law between failure to carry out a legal duty and violation of a subjective right of others is noted by D. Anzilotti (*Teoria generale . . . (op. cit.)*, pp. 83, 91 *et seq.*, and 121); G. Balladore Pallieri, (*Gli effetti . . .*, *Rivista di Diritto Pubblico . . . (op. cit.)*, p. 66, and *Diritto internazionale pubblico (op. cit.)*, p. 245), R. Ago ("Le délit international", *Recueil des cours . . . (op. cit.)*, p. 441), G. Morelli (*op. cit.*, p. 347), and A. P. Sereni (*op. cit.*, p. 1514).

⁹⁰ *Phosphates in Morocco Case* (Preliminary objections), 14 June 1938. See *P.C.I.J.*, series A/B, No. 74, p. 28.

admits of no exception; as distinct from what is said to be the situation in municipal law, there are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another subject or subjects, or even, for those who take a view referred to in the previous section, of the totality of the other subjects of the law of nations. This must be borne in mind in seeking a precise interpretation of the definition proposed here of the conditions for the existence of an internationally wrongful act.

47. It is sometimes asked whether there should not be an exception to the rule that the characteristic of the internationally wrongful act consists of a failure by the State to carry out an international obligation incumbent upon it. This train of thought is prompted by the idea that in certain circumstances the abusive exercise of a right could amount to internationally wrongful conduct and thereby generate international responsibility. In other words, if, as some maintain, it is true that international law, like the municipal law of certain countries, recognizes the theory of abuse of rights, does this mean that in some cases the characteristic element of an internationally wrongful act is conduct based on a subjective right and not conduct conflicting with a legal obligation?

48. It is a well-known fact that a really clear statement on the doctrine of abuse of rights has never been made in international decisions; this is understandable in view of the dangers which both an absolute denial and a general affirmation of the principle could entail. The Permanent Court of International Justice did no more than make very guarded allusions to the theory, and in any case excluded its application to the cases contemplated and indicated in general that abuse of rights could not be presumed.⁹¹ The theory of abuse of rights has also been explicitly contested in certain well-known dissenting opinions.⁹² As regards the more recent decisions, Reuter's commentary contains a very apt summary of the criterion underlying them: "The decisions refer to the notion as a warning in cases in which they do not rely on it, whereas if they relied on the notion they would probably refrain from mentioning it."⁹³ The only clear formulation of the need to carry over the condemnation of abuse of rights into international law is that of Judge Alvarez in some

of his dissenting opinions.⁹⁴ Among the authors, the idea of the application of the theory of abuse of rights to international law has found and continues to find both firm supporters⁹⁵ and determined opponents.⁹⁶

49. However, as far as the present work of the International Law Commission is concerned, there seems to be no compelling reason for taking a position on this theory, on its possible justifications and the grounds for them, on its alleged advantages for the development and progress of international law, or on the dangers it would entail for the security of international law. In actual fact, the problem of abuse of rights has no direct influence on the determination of the premises of international responsibility. The question is one of substance, concerning the existence or non-existence of a "primary" rule of international law—the rule whose effect is apparently to limit exercise by the State of its rights, or, as others would maintain, its capacities, and to prohibit their abusive exercise. Clearly, therefore, if it was recognized that existing international law should accept such a limitation and prohibition, the abusive exercise of a right by a State would inevitably constitute a violation of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others or of unduly encroaching upon their sphere of competence. If the existence of an internationally wrongful act was recognized in such circumstances, the constituent element would still be represented by the violation of an obligation and not by the exercise of a

⁹⁴ *I.C.J. Reports 1949*, p. 48; *ibid.*, 1950, p. 15; *ibid.*, 1951, p. 149; *ibid.*, 1952, p. 128 and 133.

⁹⁵ See in particular N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours . . .*, 1925-I (Paris, Librairie Hachette, 1926), pp. 77 *et seq.*; S. Trifu, *La notion de l'abus de droit dans le droit international* (Paris, Domat-Montchrestien, 1940); van Bogaert, *Het Rechtsmisbruik in het Volkenrecht* (Antwerp, 1948); van der Molen, *Misbruik van Recht in het Volkenrecht—Opstellen op het gebied van Recht, Staat en Maatschappij* (Amsterdam, 1949), pp. 266 *et seq.*; M. Sibert, *Traité de droit international public* (Paris, Librairie Dalloz, 1951), t. II, p. 205 and 283; A.-Ch. Kiss, *L'abus de droit en droit international* (Paris, Librairie générale de droit et de jurisprudence, 1953), especially pp. 179 *et seq.*; and F. V. García Amador, "State Responsibility . . .", *Recueil des cours . . .* (*op. cit.*), pp. 376 *et seq.*, and fifth report on State responsibility (*Yearbook of the International Law Commission*, 1960, vol. II, pp. 57 *et seq.*, document A/CN.4/125, paras. 66 *et seq.*).

⁹⁶ Among many others, see M. Scerni, *L'abuso di diritto nei rapporti internazionali* (Rome, Anonima Romana Editoriale, 1930); A. Cavaglieri, *Corso di diritto internazionale*, 3rd ed. (Naples, 1934), p. 508; H. J. Schlochauer, "Die Theorie des abus de droit im Völkerrecht", *Zeitschrift für Völkerrecht* (Breslau, J. U. Kern's Verlag, 1933), Bd. XVII, pp. 373 *et seq.*; and, among the more recent writers, G. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law", *The Grotius Society: Transactions for the Year 1956: Problems of Public and Private International Law* (London, The Grotius Society, 1957), vol. 42, pp. 47 *et seq.*; J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Neuchâtel, Histoire et Société d'aujourd'hui, Ed. de la Baconnière, 1958); I. Brownlie, *op. cit.*, pp. 365 *et seq.* For some circumscribed and extremely guarded approaches, see H. Lauterpacht, *The Development of International Law by the International Court* (London, Stevens and Sons Ltd., 1958), pp. 162 *et seq.*; and P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Recueil des cours . . . 1949-I* (Paris, Librairie du Recueil Sirey, 1950), pp. 250 *et seq.*

⁹¹ See the judgment in the Case concerning certain German interests in Polish Upper Silesia (Merits), 25 May 1926 (*P.C.I.J.*, series A, No. 7, pp. 30, 37-38), and the judgment in the Case of the Free Zones of Upper Savoy and the District of Gex, 7 June 1932 (*P.C.I.J.*, series A/B, No. 46, p. 167).

⁹² See the dissenting opinion of Judge Anzilotti in the Case of the Electricity Company of Sofia and Bulgaria (Preliminary Objection), 4 April 1939 (*P.C.I.J.*, series A/B, No. 77, p. 98).

⁹³ P. Reuter, "Principes . . .", *Recueil des cours . . .* (*op. cit.*), p. 600. According to the author, an example of the first case is the Arbitral Tribunal's award of 16 December 1957 in the Lake Lanoux Case (for the text, see United Nations, *Reports of International Arbitral Awards*, vol. XII [United Nations publication, Sales No.: 1963.V.3], pp. 285 *et seq.*), and of the second, the judgment of the International Court of Justice of 12 April 1960 in the Case concerning right of passage over Indian Territory (*Portugal v. India*) [Merits] (*I.C.J. Reports 1960*, pp. 36-37). There is also an incidental reference to the subject by the International Court of Justice in its judgment of 18 December 1951 in the *Fisheries Case (United Kingdom v. Norway)* [*I.C.J. Reports 1951*, p. 142].

right.⁹⁷ Consequently, a reference to a failure to carry out an international legal obligation seems quite sufficient to cover even the hypothesis we have just been discussing. It seems unnecessary either to provide for an alleged exception or, in a draft on the international responsibility of States, to provide an article concerning a problem which does not relate specifically to responsibility.⁹⁸

50. On the other hand, there is a further point which it may be useful to take into consideration in defining the conditions for the existence of an internationally wrongful act. An act of this kind has been said to consist, in essence, of conduct attributable to a State and constituting a failure by that State to carry out an international obligation. Two separate cases can, however, arise. On some occasions, the conduct in itself may suffice to constitute a failure to carry out an international obligation incumbent upon the State: a refusal by the State's legislative organs to pass an act which the State, by treaty, has specifically undertaken to adopt, an attack by one country's armed forces upon the territory of another country with which the former maintains peaceful relations, a refusal by a coastal State to allow the vessels of another country friendly passage through its territorial waters in peacetime, an inspection of a foreign country's diplomatic bag by a Customs official, an unauthorized entry by police into the premises of a foreign embassy, a denial of justice to an alien by judicial organs—all these are examples of the case envisaged.

51. There are nevertheless cases in which the situation is different. The mere dropping of bombs from an aircraft which is near a hospital or historic monument does not constitute a breach of the obligation to respect the enemy's health services and cultural property; the hospital or monument in question must actually have been hit. Similarly, for a State to be chargeable with having failed in its duty to provide effective protection for the premises of a foreign embassy or to safeguard the safety of aliens present in its territory during disturbances, it is insufficient to show that the State was negligent in the matter; some external event must also have taken place, for instance, the embassy premises must have been attacked by private individuals or aliens must have been killed by a mob. Consequently, in circumstances of this kind, there must be the additional element of an external event, if the State's conduct is to be regarded as a breach of an international obligation.⁹⁹

⁹⁷ Even early on (in *Teoria generale* . . . (*op. cit.*), p. 89) Anzilotti had noted that responsibility does not flow from an excess in the exercise of the right but from the fact of acting in contravention of that right. For developments along these lines see R. Ago, "Le délit international", *Recueil des cours* . . . (*op. cit.*), pp. 443-444; B. Cheng, *op. cit.*, pp. 129 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 540.

⁹⁸ In the revised preliminary draft which he prepared in 1961, Mr. García Amador introduced a provision in article 2, paragraph 3, to the effect that "the expression 'international obligations of the State' also includes the prohibition of the 'abuse of rights', which shall be construed to mean any action contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State". See *Yearbook of the International Law Commission, 1961*, vol. II, p. 46.

⁹⁹ Wrongful acts consisting in conduct alone and wrongful acts requiring, in addition, an external event can therefore be distin-

52. In this connexion, it is not sufficient for the conduct *per se* and the event to have occurred independently of each other; there must be a link between the former and the latter such that the conduct can be regarded as the direct or indirect cause of the event. In other words, there must be a certain causal relationship between the conduct and the event, which may be natural causality, as in the simplest case, or may be in other cases a "normative" causality, in which the link is established not by nature but by a rule of law, as where the State has omitted to take the safety measures and precautions which could have prevented the occurrence of the external event (for example, an attack by private persons). No more need be said on this point for the moment, since these distinctions will require further discussion when it comes to defining the particular rules relating to the different cases of failure to carry out an international obligation. It is mentioned now because it seems useful to emphasize at this stage that a State's failure to carry out an international obligation can consist either in the conduct *per se* which is imputed to it or in the joint operation of that conduct and an external event causally linked with it.

53. One last point should be mentioned before concluding. In addition to the two elements, the subjective and the objective, that have been shown to be constituent elements of an internationally wrongful act which is *per se* a source of responsibility, reference is sometimes made to a third element, which is usually termed "damage".¹⁰⁰ There is, however, some ambiguity in such references. In some instances, those who stress the requirement that a damage should exist are in fact thinking of the requirement that an external event, should have occurred; as has been noted in the preceding paragraphs, such event must in some cases be present in addition to the actual conduct of the State if that conduct is to constitute a failure to carry out an international obligation. In the case of one of those obligations to protect and safeguard which are of special importance in international law, the event in question may be an act prejudicial to certain persons. Often, however, what those who refer to a damage have in mind is not so much a prejudice caused to a State at the international level as an injury caused to an individual at the municipal level.¹⁰¹ The importance accorded to the element of damage is thus a consequence of combining, within the framework of an analysis restricted solely to responsibility for damages to individual aliens, the consideration of the rules relating to responsibility with that of the substantive rules relating to the treatment of aliens. The essence of a State's "primary" obligations with respect to the status of aliens is that it must not injure them wrongfully by its own act. And it is clear that if the obligation itself is so defined, there can be no breach of this obligation where the individual alien has not in fact suffered any injury. Obviously, however, injury to

guished in international as well as in municipal law. See R. Ago, "Le délit international", *Recueil des cours* . . . (*op. cit.*), pp. 447 *et seq.*; G. Morelli, *op. cit.*, p. 349.

¹⁰⁰ See in particular A. V. Freeman, *op. cit.*, p. 22; A. Ross, *op. cit.*, pp. 242 and 255; K. Furgler, *op. cit.*, p. 16; P. Guggenheim, *Traité* . . . (*op. cit.*), p. 1; A. Schüle, *op. cit.*, p. 336; E. Jiménez de Aréchaga, *op. cit.*, p. 534.

¹⁰¹ This is clear in, for example, Amerasinghe, *op. cit.*, p. 55.

an individual, which is precisely what the international obligation is designed to prevent, has nothing in common with the damage which, at the strictly international level, is said to be necessary in addition to the breach of an obligation for an internationally wrongful act to exist. Such a damage can only be a damage suffered by a State.

54. As writers have frequently pointed out, it is a mistake to attempt too direct a transposition into international law of ideas and concepts of municipal law which are very obviously linked with situations peculiar to municipal law. Every breach of an engagement *vis-à-vis* another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State. As Anzilotti stated in his first work on the topic, international responsibility derives its *raison d'être* purely from the violation of a right of another State and every violation of a right is a damage.¹⁰² The extent of the material damage caused may be a decisive factor in determining the amount of the reparation to be made. But it cannot be of any assistance in establishing whether a subjective right of another State has been impaired and so whether an internationally wrongful act has occurred. It therefore seems inappropriate to take this element of damage into consideration in defining the conditions for the existence of an internationally wrongful act.

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

Article II

Conditions for the existence of an internationally wrongful act

An internationally wrongful act exists where:

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

(b) Such conduct, in itself or as a direct or indirect cause of an external event, constitutes a failure to carry out an international obligation of the State.

III. CAPACITY TO COMMIT INTERNATIONALLY WRONGFUL ACTS

56. Many writers on international law agree that, in principle, any State which is a subject of international law has what they term "delictual capacity", or capacity to commit internationally wrongful acts, since it is impos-

sible to visualize a State possessing international personality but not having international obligations; and if it has such obligations, it must logically be apt to violate as much as to carry them out.

57. We must take care, though, not to be misled by use of the word "capacity", because its employment might lead us to see an analogy between the principle that in international law every State possesses the "capacity" to commit wrongful acts and the rule in article 6 of the Vienna Convention on the Law of Treaties, which provides that "every State possesses capacity to conclude treaties".¹⁰³ Capacity to conclude treaties and "capacity" to commit internationally wrongful acts are, however, two entirely separate notions. Capacity to conclude treaties, which is the international equivalent of capacity to contract, is the most prominent aspect of a subjective legal situation, namely, the situation which, to continue using municipal law terminology, is definable as the State's "capacity to act" in international law, i.e. power of the State to perform legal acts and to produce legal effects by manifesting its will.

58. The term "delictual capacity", on the other hand, obviously denotes neither a legal power nor yet another subjective legal situation. In fact, if we reflect carefully, we shall realize the absurdity of the idea that a legal order can endow its subjects with a "capacity", in the proper sense of the term, to conduct themselves in contravention of their legal obligations. It therefore seems impossible to support the view—apparently cherished by German jurists—that delictual capacity (*Deliktsfähigkeit*) is a sub-category of the "capacity to act" (*Handlungsfähigkeit*).¹⁰⁴ The terms "delictual capacity" and "capacity to commit wrongful acts" cannot be anything more than convenient label for denoting that the subject can in fact engage in conduct contrary to an international obligation which is incumbent upon it and thereby fulfil the requisite conditions for an internationally wrongful act to be imputed to it.

59. In the light of the above comments and the consequent assumption that every State which is a subject of international law possesses "capacity" to commit internationally wrongful acts in the sense explained above, the only problem which can arise in connexion with this "capacity" is that of its possible limitations in certain particular situations. For the problem to be clearly put, it must be fully understood that the limitations concerned are limitations of the capacity to commit wrongful acts, and not limitations of the responsibility which the law attaches to such acts.¹⁰⁵ The imputation of the wrongful

¹⁰³ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 290.

¹⁰⁴ K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 21-22; F. Klein, *op. cit.*, pp. 34-35; A. Schüle, *op. cit.*, p. 330; I. von Münch, *op. cit.*, p. 130.

¹⁰⁵ The two are often confused. Anzilotti, for example, (*La Responsabilité internationale...* (*op. cit.*), p. 180), translates the German term "Deliktsfähigkeit" (i.e. capacity to commit a delict) by the expression "capacité de répondre des actes contraires au droit" [capacity to answer for acts contrary to law] (Translation by the United Nations Secretariat). There seems to be a similar confusion in Strupp, ("Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 21-22), and Dahm (*op. cit.*, p. 179).

¹⁰² D. Anzilotti, *Teoria generale...* (*op. cit.*), p. 89, and especially *Corso...* (*op. cit.*), p. 425, in which the author stresses the importance in international law of the honour and dignity of States, which are often given more weight than their economic interests, so that injury is equated in international law with the breach of an obligation. For similar views expressed by more recent writers, see G. Schwarzenberger, *A Manual...* (*op. cit.*), p. 164; A. P. Sereni, *op. cit.*, pp. 1522-1523. Even Jiménez de Aréchaga (*op. cit.*, p. 534) states that "in inter-State relations the concept of damage does not, however, have an essentially material or patrimonial character."

act and the attribution or imputation of responsibility are not identical, nor are they necessarily addressed to the same subject. Although as a general rule every internationally wrongful act committed by a State entails the latter's international responsibility, there may be cases—as we have seen already, and shall have occasion to note again—where, because of one State's situation in relation to another State, the latter answers in place of the former for an internationally wrongful act which the former has committed. Consequently, in cases of this kind, the former State manifestly possesses "delictual capacity" even if the internationally wrongful act which it commits does not entail its responsibility.

60. Can there then be any limitations of a State's international "delictual capacity" or, to put it more accurately, to its aptitude to engage in conduct which constitutes a failure to carry out an international obligation? In answering this question, it seems unnecessary to pay special attention to the situation of a State member of a federal union. In the increasingly rare cases in which we are forced to conclude that a State member of a federation may still possess some international personality because it has retained, even within very narrow limits, the capacity to make certain agreements with States outside the federation,¹⁰⁶ we should have to presume that such a state would itself be apt to carry out or violate the undertakings it has assumed in any agreements thus concluded by it. In this sense, therefore, it would possess "delictual capacity", which would, however, be restricted solely to the pertinent sphere.¹⁰⁷ This seems so self-evident—and such cases are so marginal—that there appears to be no need to refer to them explicitly in the definition of the general rule concerning a State's capacity to commit internationally wrongful acts, particularly in view of the evidence at the Vienna Conference on the Law of Treaties that federal States as a whole are firmly opposed to any

¹⁰⁶ In the Special Rapporteur's opinion, to state that a particular entity possesses international legal personality—or, in other words, is a subject of international law—is merely a concise way of describing the situation of an entity to which the international legal order attributes subjective legal situations, that is, subjective rights, faculties, powers and legal obligations. The Special Rapporteur ("Le délit international", *Recueil des cours* . . . (*op. cit.*), p. 452) is in complete agreement with Mr. Eustathiades ("Les sujets . . .", *Recueil des cours* . . . [*op. cit.*], p. 423) that international legal personality is thus to be deduced from the observed presence of subjective legal situations. But this unity of view does not extend to the possibility of deducing the international personality of a particular entity from the fact that it is held to possess international "delictual capacity", for, as emphasized above, this capacity is not a subjective legal situation. To establish that an entity possesses international personality, it must be possible to show that it has international obligations, that is, the very obligations it will then be in a position to violate. This is what would have to be conclusively demonstrated if a positive answer were to be given to the question of the possession of international personality by individuals, which is precisely what Mr. Eustathiades seeks to affirm. The Commission does not, however, have to take any decision on this point since its present task is confined to codifying the international responsibility of States.

¹⁰⁷ We do not propose to go into the question of the tribunal before which responsibility for a wrongful act committed in this precise sphere could be claimed. It need hardly be added that the point mentioned here has no bearing whatever on the question of imputability to a federal State of acts of member States, a matter which will be dealt with in determining the special rules relating to imputability.

mention of a separate international personality for member States.¹⁰⁸

61. But the problem may take different forms in relation to different situations. For reasons which vary from case to case, a State may be placed in a situation where another subject, or even other subjects, of international law are acting in its territory.¹⁰⁹ If a situation of this kind occurs, the other subject or subjects may, for purposes of their own or else because of the need to fill gaps in the organization of the territorial State, entrust certain activities pertaining to the legal order of that State to elements of their own organization. The organs of the territorial State, those through which it normally discharges its international obligations, are then set aside as regards functions which may vary in scope. This situation may arise not only in cases of the survival of one of those legal relationships of dependence which have often furnished the textbooks with classic examples of the situation described here,¹¹⁰—but which are, fortunately, now disappearing—but also, and more especially, in other cases. A particular example is that of a military occupation,¹¹¹ whether in time of war or in time of peace, whether partial or total, temporary or permanent, in brief, regardless of the title, reason and character of the occupation; nor is there any need, for the purposes with which we are concerned here, to draw any distinction based on whether the occupation is regarded as legitimate or illegitimate by international law.

62. In this kind of situation it may happen, for instance, that the occupant's courts are given jurisdiction in place of certain judicial organs of the occupied State that, the occupant replaces certain central or local administrative

¹⁰⁸ In article 5 ("Capacity of States to conclude treaties") of its draft the International Law Commission proposed the inclusion of a paragraph 2 providing that "States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down." (*Yearbook of the International Law Commission, 1966*, vol. II, p. 191, document A/6309/Rev.1). After a long discussion, the Committee of the Whole adopted this paragraph in 1968, but in 1969, at the plenary meetings of the Conference itself, certain federal States resumed their attack on this paragraph with renewed vigour and it was finally rejected, so that it does not appear in article 6 of the Vienna Convention on the Law of Treaties (see foot-note 103 above).

¹⁰⁹ To avoid complicating the analysis of such situations still further, we shall refer here only to the case in which the other subject or subjects involved are also States. But they may be subjects of a different nature, such as an insurrectionary movement or even, to take an extreme case, an international organization.

¹¹⁰ For a series of examples drawn from the practice concerning relationships of dependence in which elements belonging directly to the organization of the dominant State replace certain elements in the organization of the dependent State in the performance of their functions, see R. Ago, "La responsabilità indiretta nel diritto internazionale", *Archivio di diritto pubblico*, January-April 1936-XIV (Padua, CEDAM, 1936), vol. 1, fasc. 1, pp. 27 *et seq.*; and "Le délit international", *Recueil des cours* . . . (*op. cit.*), p. 455 *et seq.*

¹¹¹ See on this topic R. Ago, "Occupazione bellica dell'Italia e Trattato lateranense", Istituto di Diritto Internazionale e Straniero della Università di Milano, *Comunicazioni e Studi* (Milan, A. Giuffrè, 1946), t. II, pp. 168 *et seq.* In general, on the problems of responsibility resulting from a military occupation, see K. Strupp, "Das völkerrechtliche Delikt", *Handbuch* . . . (*op. cit.*), p. 114; C. Eagleton, *op. cit.*, p. 31; F. Klein, *op. cit.*, pp. 106 *et seq.*; A. Verdross, *op. cit.*, p. 390.

organs by elements belonging to its own military or civil administration, or that it entrusts frontier policing to its own forces. Many other examples could be quoted. If therefore, in exercising the activities entrusted to them within the framework of the legal order of the occupied State, these organs of the occupying State are guilty of acts or omissions in breach of an international obligation of the occupied State, those acts or omissions must be imputed to the occupant and involve its responsibility. This is clearly a direct responsibility, a responsibility for its own act.¹¹² It is scarcely necessary to add that since in these cases the organs of the occupying State are acting in place of those of the occupied State and within the framework of the latter's legal order, they are bound to act in compliance with the international obligations incumbent upon the organs of the occupied State which they are replacing.¹¹³ So the conclusion is that in cases such as those described above the territorial State is obviously deprived of part of its organization, a part which previously made it apt both to discharge and violate certain of its international obligations. Its capacity to commit internationally wrongful acts is thereby automatically curtailed to that extent.

63. The question now arises whether or not the situations which have been mentioned should be taken into account in formulating a general rule with regard to the capacity of a State to commit internationally wrongful acts. The Commission may be inclined to take a negative view, owing to the attitude which was adopted in connexion with capacity to conclude treaties when the law of treaties was considered,¹¹⁴ but some reflection seems necessary if false analogies are not to be drawn. As already pointed out (see para. 57 above), capacity to conclude treaties is a subjective legal situation, a proper legal power conferred on a State by objective law. This is not the case with what is called "capacity" to commit internationally wrongful acts, which is merely a factual condition, a material possibility of engaging in conduct contrary to, instead of consonant with, an international obligation. In connexion with the capacity of States to conclude

treaties, the Commission was quite right to take the view that the so-called cases of incapacity or even of limitation of capacity are in fact non-existent. This attitude also had a definite political connotation, since the question of incapacity to act had been discussed precisely in connexion with those relationships of dependence which had been held to be no longer acceptable under the present conditions of international society. The position is obviously quite different, however, in cases of limitation of capacity to engage in conduct contrary to legal obligations. Furthermore, these cases mainly arise in circumstances which, unfortunately, are still far from having disappeared in the practice of inter-State relations. In particular, care must be taken to avoid the mistake of thinking that a favourable attitude is being adopted towards a State which is in the position of having to suffer the presence and activities in its territory of an organization other than its own. In point of fact, an unfavourable attitude would be taken towards that State if such a situation were ignored and an internationally wrongful act were imputed to it, an act of which its organization is not guilty, because it has been committed by elements belonging to an extraneous organization. Similarly, there seems to be no reason why a State whose organs have in fact committed a wrongful act should enjoy impunity and be given a pretext for avoiding the consequences of the imputation of a wrongful act which is undisputedly its own. All these reasons tend towards the adoption of a positive solution.

64. The Commission will have ample time to take a decision on this matter after considering the various implications of the problem. The question has been raised here, and the above comments put forward, to enable it to reach a fully informed conclusion. Consequently, at the present stage, it seems appropriate that the formulation of the rule which is the subject of this section should include a paragraph whose purpose is precisely to take account of the special situations described above. The wording proposed for the formulation of the rule is therefore as follows:

Article III

Capacity to commit internationally wrongful acts

1. Every State possesses capacity to commit internationally wrongful acts.
2. This capacity may exceptionally be limited, in particular situations, by the fact that the organs of a State have been replaced, in a given sphere of activity, by those of another subject or subjects of international law acting on its territory.

¹¹² This point needs to be emphasized for the sake of distinguishing these cases from the circumstances, which can also arise in similar situations, where a State may incur *indirect* responsibility, i.e., responsibility for another's act and not its own act.

¹¹³ See R. Ago, "Occupazione bellica . . .", *Comunicazioni e Studi (op. cit.)*, p. 169.

¹¹⁴ See the discussion on this topic at the Commission's fourteenth session: *Yearbook of the International Law Commission*, 1962, vol. I, pp. 57 *et seq.*