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**Addendum - Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur -
the internationally wrongful act of the State, source of international responsibility (part 1)**

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STATE RESPONSIBILITY

[Agenda item 2]

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Addendum to the eighth report on State responsibility, by Mr. Roberto Ago*

The internationally wrongful act of the State, source of international responsibility (part I) (concluded)

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ABBREVIATIONS

C.N.R.	Consiglio Nazionale delle Ricerche (Italy)
GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILA	International Law Association
IMCO	Inter-Governmental Maritime Consultative Organization
OAS	Organization of American States
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments (through 1930)</i>
<i>P.C.I.J., Series A/B</i>	<i>Judgments, Orders and Advisory Opinions (from 1931)</i>
<i>P.C.I.J., Series C</i>	
—Nos. 1-19	<i>P.C.I.J., Acts and Documents relating to Judgments and Advisory Opinions given by the Court (through 1930)</i>
—Nos. 52-88	<i>P.C.I.J., Pleadings, Oral Statements and Documents (from 1931)</i>
S.I.O.I.	Società Italiana per l'Organizzazione Internazionale (Italy)

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the author of the present report.

* Sections 5 and 6 of chapter V of the eighth report were presented by Mr. Ago, former Special Rapporteur, after his resignation from the Commission. They complete document A/CN.4/318 and Add. 1-4, which is reproduced in *Yearbook . . . 1979*, vol. II (Part One), p. 3.

CHAPTER V

Circumstances precluding wrongfulness (*concluded*)¹

5. STATE OF NECESSITY

1. In section 4 of this chapter (*force majeure* and fortuitous event), we had occasion more than once to refer to “state of necessity” (*état de nécessité*). The purpose, of course, was not to determine then and there the meaning and scope of that concept, but rather to define, through contrast, the contours and limits of the concepts then being considered. In paragraph 103, for instance, we showed that in the most typical case of *force majeure* (where an unforeseen and unavoidable external circumstance, an irresistible “force” beyond the control of the subject taking the action, makes it materially impossible for that subject to act in conformity with an international obligation), the conduct actually adopted, which as such constitutes an act of the State, is an absolutely *involuntary* action. Similarly, in paragraph 104, we observed that in what may be considered a typical case of what is known as “fortuitous event” (where an unforeseen external circumstance makes it impossible for the person whose act is attributed to the State to realize that his conduct is different from that required by an international obligation), it is the fact that the conduct is not in conformity with the international obligation, if not the conduct itself, which is also quite involuntary and *unintentional*. On the other hand, in paragraph 102 we stated that in cases where the excuse for the State’s action or omission is a state of necessity, the “voluntary” nature of the action or omission and the “intentional” aspect of the failure to conform with the international obligation are not only undeniable, but also a logical and inherent part of the excuse given. This is so, of course, whatever the objective evaluation of such an excuse.

2. In the preceding section,² we also mentioned the criteria for differentiating between the situations usually envisaged when the term “state of necessity” is used and situations which, in different respects, but more superficially than concretely, could be considered comparable to a state of necessity. We referred to cases where the irresistible external circumstance (also at work here), while not materially forcing those acting on behalf of the State to engage, quite involuntarily, in conduct conflicting with the requirements of an international obligation of that State, nevertheless puts them in a position of such “distress” that the only way they can avert tragedy for themselves—and possibly those who may be placed in their charge—is by acting in a manner not in conformity with an international

obligation of their State. We observed that in what for us is the well-founded opinion of the majority of those few writers who have considered the question, such a case may be said to resemble *force majeure*,³ since the external circumstances at work are usually the same and their effect is to make it relatively, if not absolutely impossible to act in conformity with the international obligation. Although the conduct actually engaged in by those concerned is not entirely involuntary as in cases where it is materially and absolutely impossible to comply with the international obligation, it is voluntary more in theory than in practice, since the element of volition is “nullified” by the situation of distress of the persons taking the action. This is not the case when Governments, seeking justification for their conduct, invoke a “state of necessity”. The “necessity” then invoked is a “necessity of State”. The alleged situation of extreme peril does not take the form of a threat to the life of individuals whose conduct is attributed to the State, but represents a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc.⁴ The situation may or may not be due to a sudden unforeseen external event; it may also be the foreseeable but unavoidable consequence of factors which have long been present. The State organs then called upon to decide on the conduct of the State are definitely not in a situation likely to nullify the element of volition. To be sure, they decide what course of conduct is to be adopted to deal with the abnormal situation of peril facing the State of which they are the responsible organs, but their free will is in no way impaired. The conduct engaged in will therefore stem from a deliberate choice, fully conscious and voluntary in every respect. Obviously, then, there is a marked difference between the concept we are now considering and all those that were considered in the preceding section within the general framework of “*force majeure*”.

3. Once these points have been made concerning the distinction to be drawn between the concepts of state of necessity, *force majeure* and, *a fortiori*, fortuitous event, there is hardly any need to add that it is even

¹ For the first part (sections 1–4) of Chapter V, see *Yearbook... 1979*, vol. II (Part One), pp. 27 *et seq.*, document A/CN.4/318 and Add.1–4.

² *Ibid.*, pp. 48–49 and 59 *et seq.*, paras. 103, 129 *et seq.*

³ We think it useful again to highlight this conviction, because there are those, like L. Buza (“The state of necessity in international law”, *Acta juridica Academiae Scientiarum Hungaricae*, (Budapest, Akadémiai Kiadó, 1959) vol. I, pp. 213–214) who include in the category of “state of necessity” cases where only the members of organs acting on behalf of the State find themselves in a situation of distress.

⁴ These are examples of what is often invoked in this context as “essential” or “particularly important” interests of the State.

easier to draw such a distinction between the other "circumstances" considered earlier. There is obviously no similarity between the case in which a "state of necessity" is invoked as the alleged circumstance precluding the wrongfulness of an act of the State that is not in conformity with an existing international obligation towards another State and the case in which what is invoked as that circumstance is the "consent" of the latter State to the commission of the act in question.⁵ In a way, a State which claims to be taking action against another State because it finds itself in a state of necessity thereby indicates that it did not seek the consent of the other State in question, or that such consent, if sought, was not granted. On the other hand, there is no similarity between the case of a State which invokes a state of necessity to justify what would otherwise be wrongful conduct towards another State and the case of a State which describes its action towards another State as the legitimate application of a sanction,⁶ as a legitimate reaction to an internationally wrongful act already committed by that other State. In the case being considered, the State which is affected by the conduct allegedly adopted in a state of necessity has not committed any prior international offence, and the State engaging in conduct which it feels is prompted by "necessity" in no way expects to be considered the victim of an internationally wrongful act committed by the other State.

4. Again, in differentiating between a "state of necessity" and other situations which may be examined as circumstances likely to preclude the wrongfulness of an act of the State, it should be added that any confusion between state of necessity and self-defence should also be avoided. The latter concept will be dealt with in the following section of this chapter, when we shall see there that it is just possible to find a point of resemblance between self-defence and another "circumstance", namely, the one discussed in section 3. There is indeed a common element in the case of a State acting in "self-defence" and that of a State applying legitimate sanctions against a State which is guilty of an internationally wrongful act. In both cases, the adoption by the State of conduct which is not in conformity with the requirements of an international obligation towards another State is preceded by the commission of an international offence by the latter State. It should also be emphasized that the offence to which the State is reacting in self-defence is not just any type of internationally wrongful act, but a specific type of offence: armed aggression, the use of force in an attack against the State in question. Moreover, and this is one key element to be underlined, the purpose of the action taken in self-defence is not, or at least is not primarily, the implementation (*mise en oeuvre*) of an international responsibility. The State acting in a state

of self-defence has other, more immediate goals than that of imposing on the State with which it is at variance a "sanction" for the wrongful act committed against it, although it may also seek that end subsequently. Its immediate and basic aim is to protect itself from the aggression and its effects, to thwart the purpose of the aggression. Without wishing to anticipate by making at the current stage the points which will be made later, we shall confine ourselves here to the observation that there are no similarities between self-defence and state of necessity in this case. Admittedly, the State acting in self-defence is seeking to avert a danger threatening its existence; but this is a danger caused by the wrongful act which is an armed aggression perpetrated by a State which is being resisted through measures that, precisely because of the initial aggression, no longer constitute the breach of an international obligation. On the other hand, as stated in the preceding paragraph, when a State, in order to justify conduct not in conformity with an international obligation linking it to another State, can do no better than to allege that it acted in a "state of necessity", it has no kind of internationally wrongful act committed by the other State to adduce in its defence,⁷ and is less in a position than ever to claim that it has been the victim of an armed attack by that

⁷ As far back as 1917, C. de Visscher said:

"The existence of an unjust act, contrary to a formal rule of international law, is, we have seen, a common element that is found at the base of the law of self-defence and the law of reprisal. That element is no longer found in the state of necessity (*Notstand*).'" ("Les lois de la guerre et la théorie de la nécessité", *Revue générale de droit international public* (Paris), vol. XXIV (1917), pp. 87.)

Several years later, A. Verdross observed that "The state of necessity... is characterized by the fact that a State... violates the right of an innocent State in order to protect itself" ("Règles générales du droit international de la paix", *Recueil des cours de l'Académie de droit international de la Haye, 1929-V* (Paris, Hachette, 1931), vol. 30, pp. 488-489). More recently, M. Sørensen noted that "'state of necessity' differs from 'self-defence' in that it does not presuppose a wrongful act on the part of the other State, and the act is not necessarily directed against the person who created the danger." ("Principes de droit international public", *Recueil des cours...*, 1960-III (Leyden, Sijthoff, 1961), vol. 101, pp. 219-220). See also A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), pp. 247-248; J. L'Huillier, *Éléments de droit international public* (Paris, Rousseau, 1950), p. 370; G. Schwarzenberger, "The fundamental principles of international law", *Recueil des cours...*, 1955-I (Leyden, Sijthoff, 1956), vol. 87, p. 343; D.W. Bowett, *Self-defence in International Law* (Manchester, Manchester University Press, 1958), p. 10; Buza, *loc. cit.*, pp. 216-217; A.P. Sereni, *Diritto internazionale*, (Milan, Giuffrè, 1962), vol. III, p. 1529. See also P. Lamberti Zanardi (*La legittima difesa nel diritto internazionale* (Milan, Giuffrè, 1972), pp. 31 *et seq.*, and "Necessità" (*Diritto internazionale*), *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, pp. 898 *et seq.*) and J. Žourek ("La notion de légitime défense en droit international", *Annuaire de l'Institut de droit international*, 1975 (Basel), vol. 56, pp. 21 *et seq.* and 66), who showed that this distinction has gradually become clearer during the twentieth century with the progressive affirmation of the prohibition of the use of force and the outlawing of war.

⁵ See sect. 2 (*Yearbook ... 1979*, vol. II (Part One), pp. 30 *et seq.*, document A/CN.4/318 and Add.1-4).

⁶ See sect. 3 (*ibid.*, pp. 39 *et seq.*).

State. The latter's "innocence", in terms of respect for international law, is not called in question.

5. Some doubt may nevertheless subsist concerning the relationship between state of necessity and self-defence. A State may invoke as a circumstance precluding the wrongfulness of the conduct it has adopted towards another State the fact that it resorted to that conduct to prevent aggression, or more generally the use of force against it, by that other State. Of course, we are setting aside for the time being the question whether or not, in such a case, international law holds that such preventive conduct is not wrongful, even though it is not in conformity with an international obligation. The question that concerns us here is a purely systematic one: should this hypothesis be considered in the context of state of necessity, since at the time when the preventive action against another State is taken, the expected wrongful use of force by the latter has not, (or at least, has not yet) taken place, and the State that acts can thus only allege the necessity to protect itself against a grave and imminent danger? Or should this question, on the other hand, be considered in the context of self-defence, since it is after all the threat, if not the realization of the feared actions which is the reason for the preventive measures taken against the State whose attack is feared? In our view, the second solution is the correct one, for if it were acknowledged that the measures in question could not be wrongful, the basis for that view would still be a wrongful factor imputable to the State against which the measures are taken.⁸ Furthermore, the Charter of the United Nations refers to the threat and use of force in the same provision and provides for the same type of measures with regard to both. We shall therefore consider the hypothesis mentioned above in the next section.

6. We have thus reviewed all the differences between the concept of state of necessity and the other concepts that have been or will be considered in this chapter; in other words, we have traced the outline of the concept in question. We must now go to the heart of the matter in order to define this concept with the precision required by the particularly delicate character of the problem to be solved. Only on the basis of the results thus achieved can we correctly pose the question as to whether, in what conditions and in what situations, state of necessity may constitute a circumstance that can preclude the international wrongfulness of an act of the State.

7. In this connection, we must first clear away any vestiges of the natural law concepts that predominated longer in this area than in others and have distorted the outline of the question with which we are concerned. In particular, we must eliminate the idea, still uncon-

sciously present in some learned circles, that the problem inherent in state of necessity is that of an opposition, a conflict between two "subjective rights", one of which must inevitably be sacrificed to the other: on the one hand, the right of State X that State Y must respect by virtue of an international obligation linking it to X, and on the other, the alleged "right" of State Y, which the latter could in turn assert with regard to X. This idea originated in the nineteenth century in the belief, widespread at that time, in the existence of certain "fundamental rights of States", defined as the "right to existence" or more especially "the right of self-preservation" (*Recht auf Selbsterhaltung*), advanced by many writers as being the fundamental subjective right of any State, which should naturally take precedence over any right of a foreign State. According to this approach, any conduct on the part of the State deemed necessary to ensure the preservation of its existence was bound to be considered juridically legitimate, even if it was undeniably contrary to an international obligation of that State.⁹ The theory of "fundamental rights" of States, as then conceived, was the product of pure abstract speculation with no basis in international legal reality, and has since become outdated; in particular, the idea of a right of "self-preservation" has been completely abandoned. Traces of its existence subsist, however, as regards the question under consideration: on the one hand, the idea of an almost natural connection between the concept of necessity and that of self-preservation persisted for many years,¹⁰ while on the other hand,

⁹ See, for example, J.L. Klüber, *Droit des gens moderne de l'Europe*, 2nd ed. (Paris, Guillaumin, 1874), pp. 75-76; W.E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, Clarendon Press, 1924), pp. 322 *et seq.*; H. Wheaton, *Elements of International Law*, 6th ed. rev. by A.B. Keith (London, Stevens, 1929), vol. I, pp. 150 *et seq.*; A.W. Heffter, *Das europäische Völkerrecht der Gegenwart*, 6th ed. (Berlin, Schroeder, 1873), pp. 59 *et seq.*; A. Rivier, *Principes du droit des gens* (Paris, Rousseau, 1896), vol. I, pp. 277-278; T. Twiss, *The Law of Nations (considered as Independent Political Communities)*, rev. ed. (Oxford, Clarendon Press, 1884), pp. 178 *et seq.* During the early decades of the twentieth century, the idea of a "right of self-preservation" or "right to existence" was still regarded as the basis of the plea of necessity by writers such as A.S. Hershey, *The Essentials of International Public Law and Organisation*, 2nd ed. (New York, Macmillan, 1927), pp. 231 *et seq.*; A. Faatz, "Notwehr" und "Notstand" im Völkerrecht (Greifswald, 1919) [thesis], pp. 25 *et seq.*; C.G. Fenwick, *International Law* (London, Allen and Unwin, 1924), pp. 142 *et seq.*; E. Vitta, "La necessità nel diritto internazionale", *Rivista italiana per le scienze giuridiche* (Rome), new series, vol. XI (1936), pp. 307 *et seq.*

¹⁰ Even a writer such as Anzilotti, who contributed so effectively to the criticism and abandonment of the theory of the fundamental rights of States, continued to base the "lawfulness" of the 'act of necessity' on the fact that it was effected in the context of the freedom that the law allows its subjects to ensure their self-preservation. See "La responsabilità internazionale degli Stati a ragione dei danni sofferti da estranei", *Revue générale de droit international public* (Paris), vol. XIII, No. 2 (1906), pp. 304-305, repr. in: S.I.O.I., *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), pp. 200-203; and *Corso di diritto internazionale*, 4th ed.: S.I.O.I., *Opere di Dionisio Anzilotti*, vol. I (Padua, CEDAM, 1955), p. 418.

⁸ Verdross also views the hypothetical reaction to an unjustified threat in the context of "self-defence" (*loc. cit.*, p. 485) and observes that "the State acting in a state of necessity thus violates the right of a State by which it is neither attacked nor threatened" (*ibid.*, p. 489).

situations of necessity continued to be viewed as characterized by an alleged conflict between two international subjective rights.

8. With regard to the first point, it should be stressed that the concepts of self-preservation and state of necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other.¹¹ The idea of self-preservation, if it were to be retained at all costs despite the unpleasant memories it evokes because of the abuses to which it has given rise in the course of history, could logically win wider acceptance in one connection and more limited acceptance in another than the concept of state of necessity as a circumstance precluding the otherwise indisputable wrongfulness of an act of the State. It could be viewed as being at the origin of clearly lawful acts, an act of retaliation, for example, whose lawfulness can be established without any recourse to a "ground of necessity". Moreover, if the idea of self-preservation were to be cited as justification for certain acts of the State not in conformity with an international obligation and dictated by "necessity", the same would have to be done in the case of conduct taking the form, for example, of legitimate sanctions against a State that has committed an internationally wrongful act, or, above all, for any action taken in self-defence to resist aggression. On the other hand, it must be noted—and this is the aspect we consider the most important—that, even in cases of "necessity", the concept of self-preservation can only be used to explain actions taken with a view to averting an extreme danger threatening the very existence of the State, whereas, according to the opinion that predominates today, the concept of state of necessity can be invoked above all to preclude the wrongfulness of conduct adopted in certain conditions in order to protect an essential interest of the State, without its existence being in any way threatened.¹² The idea of self-preservation—which in fact has no basis in any "subjective right", or at least in any principle for which there is room in the field of law¹³—can therefore be decisively dismissed from our

present context, being worthless for the purpose of a definition of the "legal" concept of "state of necessity" as a circumstance which might conceivably preclude the wrongfulness of an act of the State.¹⁴

9. With regard to the second of the two points mentioned above,¹⁵ it may be noted that some adherents of the idea that state of necessity is a circumstance involving a conflict between two contrary international "subjective rights" refused to admit

be taken on grounds of self-defence, self-help or necessity, but also any breaches of international law which, otherwise, it would be impossible to justify even on the dubious level of quasi-legal terminology. Whatever, subjectively, may be the intentions of individual international lawyers, who endow self-preservation with the dignity of a legal principle, the function of this 'principle' is purely ideological. It is one of the ironies of the situation that legal 'purists' should elevate into a legal principle this category of group psychology, which as a legal principle, is devoid of any sustaining rule of international law, lacks any supporting evidence and serves merely as one of the backdoors through which to escape with a show of good conscience from the restraints imposed on instincts by international law. It is one of the purposes of the inductive method to make manifest the lack of legal foundation of any such pseudo-principle and of the sociological interpretation of international law to bring into the open the real functions which such notions are made to fulfil. Thus, it is submitted that, without any loss, the mischievous notion of 'self-preservation' is overdue for elimination from the vocabulary of the international lawyer."

¹⁴ Apart from the concept of self-preservation, there are others which it seems to us are equally incapable of being used to cast light on the distinctive features of the situation underlying a state of necessity; we are referring to the concept of self-protection and the practically synonymous concept of self-help. The latter term in particular is used by writers on English and related systems of law, sometimes to describe, in contrast to self-defence, the application of punitive or enforcement measures (Schwarzenberger, *loc. cit.*, pp. 342–343; Bowett, *op. cit.*, pp. 11 *et seq.*), and sometimes as the basis for a whole wide series of measures, ranging from retaliation to self-defence itself (G. von Glahn, *Law among Nations: An Introduction to Public International Law* (London, Macmillan, 1965), p. 498). In the Italian literature we find some writers, such as G. Morelli (*Nozione di diritto internazionale*, 7th ed. (Padua, CEDAM, 1976), pp. 335–336) and Sereni (*op. cit.*, pp. 1524 *et seq.*) who regard self-help as a special circumstance precluding wrongfulness and materializing in coercive and other acts aimed at obtaining the performance of an obligation by the obligated subject or at bringing about, in his stead, the intended result of the obligation. In our view, whatever place such a "circumstance" would supposedly fill is already occupied by the other circumstances dealt with in this chapter. Moreover, the International Court of Justice, in its judgement in the *Corfu Channel case* (*I.C.J. Reports 1949*, p. 33), did not accept the United Kingdom's argument that the minesweeping operation undertaken by its ships in Albanian territorial waters on 12 and 13 November 1946 was justified as an act of self-help. But leaving this aside, what we are particularly concerned to emphasize is that all concepts of this kind, being abstractions created in the legal literature on the basis of a motley collection of cases, can apply to a whole range of situations of which state of necessity is only one example among others. The concepts of self-protection and self-help, being even broader in their acceptance than the concept of self-preservation, are certainly not fit to be used to characterize specifically state of necessity as compared with other situations in which a State is internationally entitled to take action for its own protection.

¹⁵ Para. 7, *in fine*.

¹¹ Concerning the errors resulting from the confusion between the concepts of necessity and self-preservation in the legal writings of the nineteenth and early twentieth centuries, see, recently, I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), pp. 46 *et seq.*; Žourek, *loc. cit.*, pp. 21 and 66; and Lamberti Zanardi, "Necessità..." (*loc. cit.*), pp. 898–899.

¹² Buza (*loc. cit.*, pp. 210–211) likewise emphasizes the excessively restrictive character of a definition of state of necessity in terms of the "right of preservation" and the contrary danger that the idea of this right lends itself to dangerous extensions.

¹³ Schwarzenberger (*loc. cit.*, pp. 343 *et seq.*) effectively exposes the purely abstract nature of the formulation of a principle of self-preservation and ponders what the common denominator could be in the minds of those writers who continued to cling to such an idea. Rejecting any suggestion that this common denominator might be found in the field of law, he states:

"It is a physiological denominator: the instinct of self-preservation. ... Regrettably, it links not only action alleged to

defeat when they too were forced to agree that the notion of a genuine "subjective right" of self-preservation could not be entertained. In place of that insubstantial "right", adopting a terminology used by writers of an earlier age, such as Grotius and Vattel, to describe the right which, in their view, necessity sometimes conferred on the State over certain foreign-owned property,¹⁶ they constructed the general concept of a "right of necessity".¹⁷ It is the "subjective right" thus defined, and no less "so-called" than those it is supposed to replace, that conflicts with the "subjective right" of a foreign State which, it is argued, must yield to it. However, it seems to us that the idea of a subjective right of necessity, which may have been marginally acceptable in times when the science of law had not yet refined its concepts, is absolute nonsense today. The term "right" ("*droit*" in the subjective sense) indicates a "claim" which the law ("*droit*" in the objective sense), invoking the legal order, accords to a subject vis-à-vis other subjects, of whom he may rightfully require a specific performance or a specific conduct. When someone invokes as an excuse a situation of "necessity", what he is trying to do is to justify his attitude in denying a legitimate legal claim against him by another and not in putting forward some claim of his own against another. Anzilotti very rightly contests the assertion that a State acting under pressure of necessity is exercising a "subjective right" which entails an "obligation" on the part of the State injured by its acts; he notes that, in such a case, "necessity" simply "legitimizes" those acts, although they are contrary to an international obligation.¹⁸ And Verdross no less

rightly demonstrates that, in the situation described by the term "state of necessity", the conflict is not between two "rights" but between a "right" and a mere "interest", however vital.¹⁹

10. To sum up, the circumstance concerning which we must determine whether (and in what conditions) it may have the effect of precluding, by way of exception, the wrongfulness of certain State conduct, whether that circumstance is defined as "state of necessity" or simply "necessity", as was done in the English legal literature of an earlier age, is a factual situation in which a State asserts the existence of an interest of such vital importance to it that the obligation it may have to respect a specific subjective right of another State must yield because respecting it would, in view of that circumstance, be incompatible with safeguarding the interest in question. Thus, the crux of the problem of the merits of the "state of necessity" in international law is whether or not there are cases in which international law sanctions such an attitude—cases in which it allows the "subjective right" of a State to be sacrificed for the sake of a vital interest of the State which would otherwise be obliged to respect that right.

11. It is abundantly clear from the considerations we have so far set down that a valid reply to this question cannot be based on pre-established and preconceived criteria, whether the use of such criteria would or would not be conducive to recognition of the excuse of necessity in international legal relations. Nor do we believe that the question can be answered solely on the basis of general principles of internal law. Such principles can no doubt be of some help to us, provided, however, that it is borne in mind, firstly, that determining their existence in this matter is by no

¹⁶ H. Grotius, *De jure belli ac pacis, libri tres* [1646] (book II, chap. II, para X): *The Classics of International Law*, Carnegie Endowment for International Peace (Oxford, Clarendon, 1925), vol. II (English trans.), p. 195; and E. de Vattel, *Le droit des gens ou Principes de la loi naturelle* [1758]: *ibid.* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. II, book IV, chap. IX, para. 119. However, Rivier remarked, in connection with the "plea of necessity": "It is also called the right of necessity, but this should not mislead us as to its true nature..." (*op. cit.*, p. 278.)

¹⁷ K. Strupp ("Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, ed. F. Stier-Somlo (Stuttgart, Kohlhammer, 1920), vol. III, part 1, pp. 126 and 148, and "Les règles générales du droit de la paix", *Recueil des cours... 1934-I* (Paris, Sirey, 1934), vol. 47, p. 567) was the main proponent of a genuine "right of necessity". This term is also used by G. Cohn ("La théorie de la responsabilité internationale". This term is also used by G. Cohn ("La théorie de la responsabilité internationale", *Recueil des cours... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 317–318) and by R. Redslob (*Traité de droit des gens* (Paris, Sirey, 1950), p. 249). More recently, B. Graefrath, E. Oeser and P. A. Steiniger (*Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), p. 75) stated, in regard to necessity, that one should speak of a "right" and not merely of a circumstance excluding wrongfulness.

¹⁸ See Anzilotti, "La responsabilité internationale..." (*loc. cit.*), p. 304, where he objects to "explaining the principle in question as a conflict between two contrary and irreconcilable rights, the lesser of which must yield to the greater", and states that "what is absent in these cases is the obligatory character of a legal rule". See also, by the same author, *Corso...* (*op. cit.*), pp. 416–417, where he sets his argument against that of Strupp.

According to G. Sperduti, the possibility cannot be excluded out of hand that international law should take into consideration the situation of necessity in which a State finds itself, not only to preclude the wrongfulness of conduct not in conformity with an international obligation which that State adopted in such a situation, but also to grant it a subjective right to adopt such conduct. For this purpose, we have only to imagine that there are two rules: one which takes into consideration the situation of necessity as cause for suspending the rule containing the obligation, and a second rule, linked to the first, which would grant the State that was in such a situation the subjective right to adopt the conduct which became lawful as a result of the first rule. It is therefore solely on the basis of an analysis of the prevailing law that it can be established whether, in international law, the conduct adopted in state of necessity is conduct which is merely lawful or whether it is conduct resulting from a subjective right. (G. Sperduti, "Introduzione allo studio delle funzioni della necessità nel diritto internazionale", *Rivista di diritto internazionale* (Padua), vol. XXII (1943), pp. 101–102.)

¹⁹ Verdross, "Règles générales..." (*loc. cit.*), pp. 488–489: "The state of necessity... is characterized by the fact that a State, finding itself torn between protection of its vital interests and respect for the right of another, violates the right of an *innocent* State in order to save itself." See also Schwarzenberger, "The fundamental principles..." (*loc. cit.*), p. 343: "Thus, necessity does not give any right, but may provide a good excuse."

means as easy as one might wish,²⁰ and, secondly, that transferring them from the field of relations between individuals to that of relations between States is a dubious undertaking.²¹ Ultimately, the relevant answer for our purposes must, as always, be sought in the realities of international life. However, if we want the truth on this subject to stand out with all the clarity and objectivity that is needed to reassure us, the question itself must be put in precise and comprehensive terms; in particular, it must be confined within the bounds which necessarily belong to it—within the limits which it logically implies—because, needless to say, anyone who would have State practice and the rulings of international judicial organs grant absolute to any State claiming to be released from compliance with an international obligation even a major one, simply on the ground that it has an interest in acting in that way—an interest which, moreover, it arrogates the right unilaterally to term essential or even vital for it—must inevitably suffer a rebuff, lest the entire system of international legal relations should be annihilated. Before one could even contemplate the possibility that a situation of “necessity” might constitute a circumstance precluding the wrongfulness of conduct by a State which is not in conformity with an international obligation towards another State, the situation in question would have to be extremely serious, and irrefutably so. A number of particularly strict conditions would therefore have to be met. We shall attempt to enumerate them, assisted by the results of a long and careful study of the subject by the most authoritative writers, largely on the basis of the principles accepted in this connection by national legal systems.

12. The “excuse of necessity” may conceivably be accepted in international law only on condition that it

²⁰ For a comparative study of the concept of “state of necessity” in systems of internal law and of the conditions to which it is subject, see D.F. Díaz Palos, “Estado de necesidad”, *Nueva enciclopedia jurídica* (Barcelona, Seix, 1956), vol. VIII, pp. 904 *et seq.* For the situation in French law, see R. Rodière, “Responsabilité du fait personnel”, *Répertoire de droit civil*, 2nd ed. (Paris, Dalloz, 1975), vol. VI, pp. 8–9, and “Responsabilité pénale”, *Nouveau répertoire de droit*, 2nd ed. (Paris, Dalloz, 1965), vol. IV, pp. 185–186; in Italian law, B. Inzitari, “Necessità (Diritto privato)”, *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, pp. 852 *et seq.*, and C. F. Grosso, “Necessità (Diritto penale)”, *ibid.*, pp. 897 *et seq.*; in German law, A. Schönke, and H. Schröder, *Strafgesetzbuch: Kommentar*, 19th ed., rev. by T. Lenckner (Munich, Beck, 1978), pp. 485 *et seq.* The general concept of “state of necessity” does not seem to be familiar in the laws of the common-law countries.

²¹ Anzilotti (*Corso...* (op. cit.), p. 418) observes that “the elements of the state of necessity are less easy to define in international law than in internal law; perhaps it is not incorrect to say that any question is in substance an individual question”. On the other hand, F. von Liszt is of the view that “The ideas accepted in penal law and in private law of self defence and of necessity also apply to international law” (F. von Liszt, *Das Völkerrecht*, 12th ed. (Berlin, Springer, 1925), p. 285); and Redslob states that “The right of necessity proceeds from a conception of justice. It is affirmed, in many variations, in civil and criminal laws; it has its place in international law.” (op. cit., p. 249.)

is absolutely of an exceptional nature. It follows that the interest of a State in defeating, if need be, any subjective right of another State must in turn be one of those interests which are of exceptional importance to the State seeking to assert it. We are not, however, suggesting that the interests to be taken into account be limited to the “existence” of the State.²² The end-result of that theoretical limitation, which again was due to an erroneous identification of the concept of necessity with the concept of self-preservation, and also to certain misguided analogies with internal law, was to create a false picture of the question; cases in which a state of necessity has been invoked on the ground of an interest of the State other than the preservation of its very existence have in the long run been more frequent and less controversial than others. To put it more simply, one should say that what is involved is an “essential”²³ interest of the State. In our view, however, it would be pointless to attempt to go into greater detail and establish categories of interests to be considered essential for the purposes of the present discussion.²⁴ How “essential” a given interest may be naturally depends on the totality of the conditions in which a State finds itself in a variety of specific situations; it should therefore be appraised in relation to the particular case in which such an interest is involved, and not predetermined in the abstract.

13. The threat to such an essential interest of the State must be extremely grave, representing a present danger to the threatened interest,²⁵ and its occurrence must be

²² As argued by Anzilotti, *Corso...* (op. cit.), pp. 418 *et seq.*; A. Vonlanthen, *Die Völkerrechtliche Selbstbehauptung des Staates* (Fribourg (Switzerland), Paulusdruckerei, 1944) [thesis], pp. 175 *et seq.* (the author refers to the existence of the State or of its population); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), p. 71; Sereni, op. cit., p. 1530. In his 1939 work on “Le délit international” (*Recueil des cours...*, 1939 II (Paris, Sirey, 1947), vol. 68, p. 545), the author of the present report falls into the same error.

²³ For the reasons just stated, the expression “essential interests” seems to us closer to reality than the expression “vital interests”, used by Verdross, (“Règles générales...” (loc. cit.), p. 489) or “supreme good” used by Redslob (*Traité...* (op. cit.), p. 249).

²⁴ Strupp (“Les règles générales...” (loc. cit.), p. 568) attempts a kind of enumeration of such categories when he speaks of cases in which a State is threatened “by a great danger to its existence, its territorial or personal status, its government or its very form, limiting or even destroying its independence or its ability to act”. In our view, this enumeration would be of little use in determining, in a specific situation, whether or not the conditions for the existence of a “state of necessity” are fulfilled in these terms.

²⁵ See Strupp, “Les règles générales...” (loc. cit.), p. 568 (present or imminent danger); Anzilotti, *Corso...* (op. cit.), p. 419 (grave and imminent danger); Ago, loc. cit., p. 540 (grave and imminent danger); G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. (Milan, Giuffrè, 1962), p. 247 (grave and imminent danger); Vonlanthen, op. cit., pp. 175 *et seq.* (a present and immediately upcoming danger); Redslob, op. cit., p. 249 (grave and present danger); Cheng, op. cit., p. 71 (actual and not merely apprehended); Buza, loc. cit., p. 214 (immediate danger). Sereni (op. cit., p. 1530) further states that it must have been an unforeseeable danger.

entirely beyond the control of the State whose interest is threatened.²⁶ It would obviously be out of the question for a State intentionally to create a situation of danger to one of its major interests solely for the purpose of evading its obligation to respect a subjective right of another State.

14. The adoption by a State of conduct not in conformity with an international obligation towards another State must truly be the only means available to it for averting the extremely grave and imminent peril which it fears; in other words, it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations.²⁷ In addition, the conduct in question must be clearly indispensable in its totality, and not only in part, in order to preserve the essential interest which is threatened. Any action in excess of what is strictly necessary for that purpose is *ipso facto* a wrongful act, even if the excuse of necessity would otherwise be allowed to operate. For instance, it is obvious that, once the peril had been averted through the adoption of the conduct not in conformity with the international obligation, any subsequent persistence in that conduct would again become wrongful, even if its wrongfulness had been precluded during the preceding period. Compliance with the international obligation which was infringed must, in so far as this is still materially possible, immediately resume.

15. The interest protected by the subjective right vested in the foreign State, which is to be sacrificed for the sake of an "essential interest" of the obligated State, must obviously be inferior to that other interest. It is particularly important to make this point because, as stated above,²⁸ the idea that the only interest for the protection of which the excuse of necessity might be invoked is the very existence of the State has now been completely discarded. Consequently, the interest in question cannot be one which is comparable²⁹ and

equally essential to the foreign State concerned. Nevertheless, it is rather an exaggeration to refer, as is sometimes done in this connection, to a "good of little value"³⁰ or to "secondary values".³¹ It is a matter of relation of proportion, rather than of absolute value.

16. Even if the conditions thus far mentioned were all fulfilled in a particular case, the fact that a State invoked a state of necessity as an excuse could not have the effect of precluding the wrongfulness of conduct by that State which was not in conformity with an international obligation if the obligation in question had been specially designed to operate also, or in particular, in abnormal situations of peril to the obligated State or to its essential interests, or with the manifest intention of precluding the wrongfulness of a breach of that obligation on the ground of necessity.³² While this conclusion is more or less automatic when the special scope of the obligation is explicitly defined in the rule from which it flows, or in other rules contained in the same instrument, it might also be considered inevitable in other cases too, when the fact that there was no excuse of necessity for failure to comply with the obligation is implicitly but inevitably indicated by the very nature of the rule which is its source, by the purpose or aims of that rule, or by the circumstances in which it was formulated and adopted. While the analysis of practice will provide a more fully documented reply to this question, it can be said at the present stage that we exclude the possibility that state of necessity operates as a circumstance precluding the wrongfulness of conduct not in keeping with an obligation stemming from one of the rules of *jus cogens* or certain rules of humanitarian international

protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect for an objectively minor right. In every case a comparison of the conflicting interests appears to be indispensable." (Cheng, *op. cit.*, pp. 74-75.)

and L. Buza emphasizes that "the protected right must be more important than the injured" (*loc. cit.*, p. 213).

³⁰ Term used by Cohn ("un bien de peu de valeur"): *loc. cit.*, p. 317.

³¹ Sørensen's expression: *loc. cit.*, p. 220.

³² François notes that "state of necessity cannot be invoked as a circumstance precluding wrongfulness if, at the time when the rule was formulated, account was already taken of the abnormal situation in which the State concerned might find itself." He goes on to say:

"A belligerent, for example, cannot evade the rules relating to the law of war by invoking the danger in which its country finds itself. Grotius's adage, *licere in bello quae ad finem sunt necessaria*, constitutes a guideline when it comes to jointly establishing the rules of the law of war; it cannot justify a breach of the provisions once they have been adopted and put into effect. The law of war is based on the consent of States to refrain from certain acts in case of war, i.e. when the vital interests of States are at stake. In adopting that law, a State waives the right to invoke the distress in which it finds itself in order to free itself from its obligations." (G. P. A. François, "Règles générales du droit de la paix", *Recueil des cours...*, 1938-IV (Paris, Sirey, 1938), vol. 66, p. 183.)

See also Buza, *loc. cit.*, p. 224.

²⁶ See Anzilotti, *Corso...* (*op. cit.*), p. 419; Vitta, *loc. cit.*, p. 320; Ago, *loc. cit.*, p. 545; Vonlanthen, *op. cit.*, Redslob, *op. cit.*, p. 249; L'Huillier, *op. cit.*, p. 369; Buza, *loc. cit.*, p. 215; Sereni, *op. cit.*, p. 1530.

²⁷ The point that state of necessity cannot logically operate as a circumstance precluding the wrongfulness of State conduct when the danger that such conduct is intended to prevent could be averted by some other means is expressly made by K. Strupp, *Éléments du droit international public universel, européen et américain* (Paris, Les éditions internationales, 1930), vol. I, p. 343, and "Les règles générales..." (*loc. cit.*), p. 568; by Vitta, *loc. cit.*, p. 320; by Ago, *loc. cit.*, p. 545; by Vonlanthen, *op. cit.*; by L'Huillier, *op. cit.*, p. 369; by Buza, *loc. cit.*, pp. 214-215. Redslob (*op. cit.*, p. 349) and Cheng (*op. cit.*, pp. 71 and 74) particularly emphasize that state of necessity cannot serve as a valid excuse unless all "legitimate" means to avert the peril have been unsuccessfully employed.

²⁸ See para. 12.

²⁹ Bin Cheng observed:

"It is the great disparity in the importance of the interests actually in conflict that alone justifies a reversal of the legal

law. Moreover, in view of the compelling reasons which lead to the definitive affirmation of the prohibition of the use of force against the territorial integrity or political independence of any State, it seems to us inconceivable that the legal conviction of States would today accept "necessity" as justification for a breach of that prohibition and, more generally, for any act covered by the now accepted concept of an "act of aggression".³³

17. Furthermore, there is no reason why state of necessity should come into play as a "circumstance precluding the wrongfulness" of an act of the State in the opposite case, namely, when the rule establishing the obligation—a conventional rule, of course—explicitly or implicitly subordinates observance of the obligation to the proviso that certain circumstances do not render such fulfilment too onerous or dangerous.³⁴ The concept of "necessity" is then in fact incorporated in the obligation itself, setting a limit to its scope. The State which, finding itself in such abnormal circumstances, then engages in conduct different from that provided for in the obligation for normal circumstances, in no way breaches the obligation and does not commit any act "not in conformity" with the requirements of that obligation. There is thus no wrongfulness on the part of that State to be precluded.

18. The possible preclusion of the wrongfulness of a given act committed by a State, if accepted in a particular case for reasons of "necessity", would in itself preclude only the consequences for which the State committing the act in question would otherwise be held responsible under international law by reason of the wrongfulness of that act. The preclusion would therefore in no way cover consequences to which the same act might give rise under another heading, in particular the creation of an obligation to compensate for damage caused by the act of "necessity" would be incumbent on that State on a basis other than that of *ex delicto* responsibility.³⁵ However, it is obvious that

the recognition of the existence of such an obligation cannot wrongly be adduced as a basis for concluding that the act producing it is even partially wrongful,³⁶ and for arguing that the state of necessity has no value as a circumstance precluding the wrongfulness of an act of the State in international law.

19. We must therefore refer to a concept of state of necessity based clearly on the aforementioned conditions and limits when taking up our consideration of international judicial and diplomatic practice in order to determine whether that practice does or does not confirm the acceptability of the state of necessity in general international law as a circumstance precluding the wrongfulness of an act of the State.

20. In this connection, it should first be noted that the request for information submitted to States by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930) did not put to them the question whether or not a "state of necessity" should be regarded as a circumstance precluding the wrongfulness of an act of the State. Two States, Denmark and Switzerland, nevertheless referred to that issue in their replies.

In replying to point XI (a) of the request for information, concerning the circumstances in which a

State which adopted such conduct must compensate the neutral State for any damage which it had caused. A. Rivier and F. von Liszt express themselves in broader terms. Rivier, after stating that the State "is authorized... [to] violate the right of another nation" if that is necessary to preserve its own existence, adds that "the violation of the right must be limited to the unavoidable, and... the damaged caused must be made good" (Rivier, *op. cit.*, p. 278). Von Liszt says the state of necessity precludes "the unlawful nature of the injury committed", but adds that the State which claims state of necessity "owes compensation to the State which it injures" (von Liszt, *op. cit.*, p. 201). However, it is principally in modern doctrine that the conviction appears that the possible obligation to indemnify victims and to compensate damages is entirely alien to the idea of the existence of a responsibility for a wrongful act. Thus A. P. Sereni writes: "It seems, moreover, that the state of necessity, while precluding wrongfulness, does not do away with compensation for damage" (*op. cit.*, p. 1531). Even clearer is the view on this subject of A. Favre: "In any case, the State which performs the act of necessity is obliged to compensate for the damage, even though the consequence of the state of necessity was to preclude wrongfulness" (*Principes du droit des gens* (Paris, Librairie de droit et de jurisprudence, 1974), p. 644), and of Sørensen, who states: "We are speaking here of the problem of the duty to compensate for the damage caused by a lawful act" (*loc. cit.*, p. 221).

It is interesting to note that in internal law too the most recent trend in judicial practice has been to consider state of necessity as a circumstance precluding both the criminal wrongfulness and the civil wrongfulness of an act acknowledged to have been committed in such conditions, and to treat the obligation to compensate the victims as an obligation arising from a *lawful* act. The criteria applied with a view to fixing the compensation are in part different from those used to determine *ex delicto* civil liability. On this point see, for example, Inzitari, *loc. cit.*, pp. 852 *et seq.*; Díaz Palos, *loc. cit.*, pp. 919–920.

³⁶ We feel that this error is committed by A. Sánchez de Bustamante y Sirvén, (*Droit international public*, trans. P. Goulé (Paris, Sirey, 1936), vol. III, p. 527), and J. Combacau ("La responsabilité internationale", in: H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1975), pp. 658–659).

³³ We believe that these observations should enable some writers to overcome the fears aroused by the well-known abuses of the concept of "necessity" which occurred when it was invoked as a pretext for justifying armed attacks on other States, armed intervention in the internal affairs of other States, or similar actions. We shall have occasion to revert to this essential point later.

³⁴ Anzilotti (*Corso... (op. cit.)*, pp. 414–415) notes that obligations explicitly formulated along these lines are frequent in the law of war and mentions as examples several provisions of the rules annexed to the Convention (IV) respecting the laws and customs of war on land (The Hague, 18 October 1907). He observes in this connection that "one cannot speak of acts objectively contrary to the norm if the norm itself allows them".

³⁵ The idea that conduct of a State which acted in "state of necessity" could be considered lawful while at the same time that State was obliged to compensate the State that suffered damages caused by such conduct is already found in the writers of the nineteenth century. Thus Twiss (*op. cit.*, p. 185) and Hall (*op. cit.*, p. 326), while affirming the "right" of the aggressive State to penetrate the territory of a neutral State if that proved indispensable to save its existence, are of the opinion that the

State can legitimately claim to have acted in self-defence, Denmark stated:

Self-defence and necessity should as a matter of principle be an admissible plea in international law; but, as in private law, they should be subject to certain limitations which have not yet been fixed with sufficient clearness. . . .*

Nor, generally speaking, can the right of necessity be pleaded; for in such cases the State would apply its own laws on expropriation, etc., which would be equally valid against its own nationals. It will be desirable in future to make an attempt to limit as far as possible, if not to abolish completely, the far-reaching right of necessity recognised by former international law, and particularly the former right of war. The State should respect existing national and international law and must not trespass on the rights of other nations on the ground that its own interests are threatened. As a general rule, no right of necessity should be recognised in public international law above and beyond the right of necessity allowed to private individuals in private law.³⁷

These comments are obviously vague; in particular, they do not enable one to grasp the precise dimension of the distinction which the Danish Government apparently seeks to make between “necessity” and “right of necessity”. Let us note simply that, while the Danish Government agreed that in international law necessity could constitute a circumstance precluding wrongfulness, it believed that it should be acknowledged to exist only within very limited bounds, so as to avoid a repetition of past abuses.

Switzerland, in its reply to point V of the request for information, concerning State responsibility for acts of the executive organ, stated:

It has been argued that an act accomplished by a State within the limits of its law and inspired by considerations of national defence does not constitute an international delict even though it may injure another State. A rule like this would obviously be too absolute; it would create conditions of juridical uncertainty almost amounting to a total negation of law. We should, however, admit the right of self-preservation and allow to the State a right of lawful defence provided this right is interpreted strictly and is rigorously subordinated to the existence of unjust and unlawful aggression. We should therefore clearly distinguish between this right and the *law of necessity*,* which can be used as a cloak to cover every form of injustice and arbitrariness.³⁸

Here we see the re-emergence, on the basis of the two concepts of “self-defence” (*légitime défense*—translated as “lawful defence” in the League of Nations text) and “necessity”, of the old idea of the “right of self-preservation”. At first sight, these terms might give the impression that the Swiss Government was loath to acknowledge that necessity had any standing in international law. Its opposition is not, however, a matter of principle; it is based solely on a fear of possible abuses. That being the case, one wonders whether a properly restrictive formula might not have sufficed to dispel such misgivings. Moreover, we have already seen that the Swiss Government declared itself in favour of accepting *force majeure* as a

circumstance precluding international wrongfulness.³⁹ It was not clear from the Swiss reply on that subject whether, in speaking of “*force majeure*”, a concept which has often been found to shade into that of “necessity”, the authors of the reply meant to refer to that truly *absolute* impossibility of complying with an obligation which is the very essence of *force majeure* or rather, in a broader sense, to serious difficulties which would prevent the fulfilment of the obligation except at the cost of sacrificing an essential interest of the State, and therefore would also cover cases of “necessity”. In short, it cannot be said that any decisive conclusions can be drawn, for our present purposes, from the few statements of position made at the time of the 1930 Codification Conference.

21. In international practice, cases abound in which a State has invoked a situation of necessity (whether it used those precise terms or others to describe it) with the aim of justifying conduct different from that which would have been required of it in the circumstances under an international obligation incumbent on it. It will be fitting, however, to refer to and analyse only those cases which may, in one way or another, prove conclusive for our present purposes. It will also be fitting to concentrate on those which relate to areas where the applicability of the plea of necessity—subject always to the conditions and limits which we have endeavoured to define—does not appear to have given rise to real objections of principle, even though reservations and firm opposition may have been expressed with regard to its application in the specific cases concerned. That point being established, we shall, as we did in connection with other “circumstances”, examine separately those cases in which necessity was pleaded as a ground for non-compliance with an obligation “to do” and those in which it was invoked to justify conduct not in conformity with an obligation “not to do”. Within each of these two categories, it will be useful to group cases according to their specific subject-matter.

22. An extensive series of cases of non-compliance, on grounds of necessity, with obligations *to do* relate to the *repudiation of suspension of payment of international debts*. Thus, in the *Russian indemnity* case, which has already been considered from another standpoint,⁴⁰ the Ottoman Government, in order to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, to which at the time it applied the term “*force majeure*” but which, rather, as we have several times pointed out, bore the hallmark of a “state of necessity”. In this connection, the Permanent Court of Arbitration, to which the dispute was referred, stated:

³⁷ 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. 126.

³⁸ *Ibid.*, p. 58.

³⁹ See *Yearbook... 1979*, vol. II (Part One), p. 50, document A/CN.4/318 and Add.1–4, para. 108.

⁴⁰ *Ibid.*, p. 34, para. 65.

The exception of force majeure, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is... self-destructive".

It is indisputable that the Sublime Porte proves, in support of the exception of *force majeure*... that Turkey was faced between 1881 and 1902 with the gravest financial difficulties, compounded by domestic and external events (insurrections, wars), which forced it to allocate a large part of its revenues to special purposes, to submit to foreign control a part of its finances, even to grant a moratorium to the Ottoman Bank, and in general to be unable to fulfil its obligations without delays or omissions, and only then at the cost of great sacrifices. However, it is alleged on the other hand that, during the same period and especially after the establishment of the Ottoman Bank, Turkey was able to contract loans at favourable rates, to convert others, and lastly to amortize an important part, estimated at 350 million francs, of its public debt... It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.*⁴¹

In the case in point, therefore, the Court rejected the defence raised by the Ottoman Government, which, following the wording of the Turkish submission, it continued to call a plea "of *force majeure*" but which, in view of the language used by the Court, becomes even more a *typical example of the exception of "state of necessity"*. The Court based its decision on a finding that the necessary conditions for recognizing the applicability of such a defence were not fulfilled in that particular case. We can therefore say, according to the terminology we are now using, that the Court did accept the existence in international law of a "plea of necessity", but only within very strict limits. In its view, compliance with an international obligation must be "self-destructive" in order for the wrongfulness of the conduct not in conformity with the obligation to be precluded. Its concept of "state of necessity" is restrictive as to the interest protected. Only where compliance with an obligation would imperil the existence of the State or where it might *seriously jeopardize its internal situation* could the State be considered entitled not to comply.

23. In the arbitral award delivered on 29 March 1933 by arbitrator Ö. Undén in the case of the *Forests of Central Rhodope (Merits)*,⁴² Bulgaria was ordered to pay to Greece reparations totalling 475,000 gold leva, plus interest of 5 per cent from the date of the award. As Bulgaria failed to comply with the award within the specified time, Greece appealed to the Council of the League of Nations on 6 September

1943 to adopt against Bulgaria the measures provided for in Article 13, paragraph 4, of the Covenant of the League of Nations. In justification of its conduct not in conformity with the obligations imposed by the award, Bulgaria stated before the Council:

...it was not the Bulgarian Government's intention, as might perhaps be supposed from the Greek Government's action in asking for this question to be placed on the Council's agenda (Annex 1516), to evade the obligation imposed upon it by the arbitral award in question. He confirmed therefore the statement that his Government was prepared to discharge to Greece the payment stipulated in the award. The present situation of the national finances, however, prevented the Bulgarian Government from contemplating a payment in cash. His Government was nevertheless prepared to examine immediately, with the Greek Government, any other method of payment which might suit the latter. In particular, the Bulgarian Government would be able to discharge its debt by deliveries in kind.⁴³

Greece accepted Bulgaria's proposal. The representative of Greece to the Council stated:

The Greek Government, taking into consideration Bulgaria's financial difficulties, assented to that proposal and was prepared to settle immediately, in agreement with the Bulgarian Government, the nature and quantity of the deliveries which it could conveniently accept in payment of its claim.⁴³

Thus, the two Governments seem to have clearly recognized that a situation of *necessity* such as one consisting of *very serious financial difficulties* could justify, if not the repudiation by a State of an international debt, at least a recourse to means of fulfilling the obligation other than those actually envisaged by the obligation.

24. The question of the possibility of invoking very serious financial difficulties—and hence a situation which would fulfil the conditions for recognizing the existence of a state of necessity—as justification for repudiating or suspending payment of a State debt has often also been discussed in connection with debts contracted by the State not directly with another State but with foreign banks or other financial firms. Although the question whether there is an international obligation under customary law to honour debts contracted by the State with foreign "persons" is in dispute, some of the statements of position made in the discussions on the subject seem to us to be relevant, not only because such an obligation can in any event be imposed by conventional instruments, but also because the positions in question were often stated in broad terms whose implications went beyond the particular case involved.

25. One question put in the request for information submitted to States by the Preparatory Committee for the 1930 Codification Conference at the Hague was whether the State incurred international responsibility if, by a legislative act (point III, 4) or by an executive act (point V, 1(b)), it repudiated debts contracted with foreigners. A number of Governments maintained that

⁴¹ *Yearbook... 1978*, vol. II (Part One), p. 167, document A/CN.4/315, para. 394. Document A/CN.4/315 is hereinafter called "Secretariat Survey".

⁴² United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1405.

⁴³ League of Nations, *Official Journal*, 15th year, No. 11 (Part I) (November 1934), p. 1432.

the answer to that question depended on the circumstances of the particular case; some of them expressly mentioned the case of necessity. For instance, the South African Government expressed the following view:

Such action would *prima facie* constitute a breach of its international duties and give rise to an international claim. It would certainly entail international responsibility if a State, able to meet its liabilities, in repudiating the debts it owes to foreigners, was prompted by lack of consideration for their rights.

The Union Government *would not*,* however, *exclude the possibility of such repudiation being a justifiable act*.* Foreigners lending money to a particular State can hardly expect not to be prejudicially affected under any circumstances by the vicissitudes of the State in question. If, through adverse circumstances beyond its control, a State is actually placed in *such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress*.* It will then have to rank its obligations and make provisions for those which are *of a more vital interest first*. *A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign* or national*. There are *limits to what may be reasonably expected of a State** in the same manner as with an individual. If, in such a contingency, the hardships of misfortune are equitably divided over nationals as well as foreigners and the latter are not specially discriminated against, there should be no reason for complaint.⁴⁴

A similar position was adopted by the Austrian Government, which stated:

The dominant doctrine of international law does not seem to qualify the repudiation of debts by the State as a violation of that State's international obligations unless the State acts arbitrarily—for instance, diverts from their proper destination the securities earmarked for its creditors. On the other hand, this doctrine does not admit that States whose nationals have been injured by such repudiation may intervene on behalf of the injured persons in cases in which repudiation has not been arbitrary, but has been necessitated by *vis major*. It must be allowed that, in most cases, the risks involved in acquiring the securities of a State whose financial situation is unstable are already counterbalanced by the price of issue or rate of interest.⁴⁵

In the light of the replies received, the Preparatory Committee made a distinction, in the Bases of discussion drawn up for the Conference, between repudiation of debts and the suspending or modifying of the service of a debt. With regard to the latter, it stated:

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by *financial necessity*.* [Basis of discussion No. 4, para. 2⁴⁶].

26. The same question has been considered on numerous occasions by international judicial bodies. In the *French Company of Venezuela Railroads* case, the French Government complained, *inter alia*, that

during the revolution of 1898–1899 the Venezuelan Government had not paid its debts to the company. The dispute was referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 19 February 1902. In his award, the umpire Plumley stated that, in view of the circumstances, the Venezuelan Government:

... cannot be charged with responsibility ... for its inability to pay its debts ... The umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree. Its acts and its neglects were caused and incited by entirely different reasons and motives. *Its first duty was to itself. Its own preservation was paramount*.* Its revenues were properly devoted to that end. The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget.⁴⁷

27. In the case concerning the payment of various *Serbian loans* issued in France, which was submitted to the Permanent Court of International Justice and on which the Court rendered its judgement on 12 July 1929, the Serb-Croat-Slovene State advanced two arguments in support of its contention that it was now entitled to regard its debts originally payable in gold francs as payable in paper francs. The first was that it was materially impossible for it to obtain from the Banque de France the gold francs needed to pay its debts according to the terms of the loan contracts. (As has already been noted,⁴⁸ the Court found itself unable to accept the plea of “*force majeure*” in this particular case, since the terms of the loans in no way prevented the debtor from discharging its debts by paying the creditors the equivalent in paper francs of the gold franc value of the debts.) The second and main argument was that the existence in the newly created State of a very serious situation due to the war made it impossible to place on the State's finances so heavy a burden as the payment in full of its external debts without very seriously jeopardizing its financial stability. A parallel was drawn with the fact that the French Government itself had forced an irreparable sacrifice upon its own creditors through the legislative measures it had had to take in order to stabilize its currency, that being the only way it could cope with the huge costs resulting from the war.⁴⁹ The French Government strongly maintained that those arguments did not apply in the case in question, although it did not deny that under other circumstances a serious situation might justify non-observance of the clauses stipulated in a loan contract.⁵⁰ The same view was

⁴⁷ United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 353.

⁴⁸ See *Yearbook ... 1979*, vol. II (Part One), pp. 54–55, document A/CN.4/318 and Add.1–4, para. 118.

⁴⁹ See Secretariat Survey, para. 264. The respondent Government placed both the arguments it advanced in the context of the single concept of “*force majeure*” which it noted was recognized under the laws of both countries (*ibid.*, p. 470). See also the oral statement by the Counsel for the Serb-Croat-Slovene State, Mr. Devèze (*ibid.*, para. 266).

⁵⁰ See the oral reply of the agent of the French Government, Mr. Basdevant (*ibid.*, para. 267).

⁴⁴ Secretariat Survey, para. 64.

⁴⁵ *Ibid.* Needless to say, when the Austrian Government spoke of “*vis major*” it was referring to situations which, in our view, are more a matter of a “state of necessity”.

⁴⁶ *Yearbook ... 1956*, vol. II, p. 223, document A/CN.4/96, annex 2. See also, to the same effect, Basis No. 9, concerning the repudiation or modification of debts by the executive power (*ibid.*).

taken by the Court, which, in ruling that it could not be held that the war and its economic consequences “affected the legal obligations of the contracts between the Serbian Government and the French bondholders”,⁵¹ seems to have considered that the debtor State’s financial situation would not, in this specific case, collapse as a result of its paying the debt in full. Apparently, however, the same Court entirely agreed in principle that a real state of necessity might, in some cases, be invoked as precluding the wrongfulness of conduct not in conformity with an international financial obligation.

28. Nonetheless, it was in particular the dispute between Belgium and Greece in the *Société Commerciale de Belgique* case that provided the occasion for lengthy debate on whether the existence of a situation of *very serious financial difficulties* could be invoked to justify non-payment of a State debt to a foreign financial firm. In the case in question, there had been two arbitral awards requiring the Greek Government to pay a sum of money to the Belgian company in repayment of a debt contracted with the company. As the Greek Government was tardy in complying with the award, the Belgian Government applied to the Permanent Court of International Justice for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government, while not contesting the existence of such obligations, stated in its defence that its failure thus far to comply with the arbitral awards was due not to any unwillingness but to the country’s serious budgetary and monetary situation. In section 4 of this chapter,⁵² we quoted a passage from the Greek Government’s written submissions describing the conditions which made it *impossible* to “make the payments and transfer the foreign currency” which compliance with the award would entail “*without jeopardizing the country’s economic existence** and the normal functioning of its public services”. We pointed out then that, in speaking of “*force majeure*” and the “*impossibility*” of engaging in the conduct required by the obligation, the pleader for the Greek Government probably did not have in mind an actual *absolute impossibility*, but rather an impossibility of engaging in such conduct without thereby injuring a *fundamental interest of the State*, i.e. a situation which, in our opinion, might be subsumed under the hypothesis of a *state of necessity* rather than under that of *force majeure*. That is why we mention the case again here, since it really belongs, despite imprecisions of terminology, among the cases—indeed the most significant cases—of the application of the concept of “state of necessity”.

29. In its counter-memorial of 14 September 1938, the Greek Government had already argued that it had been under an “imperative necessity”, stating:

The State has . . . the duty to suspend the execution of *res judicata* if its execution may disturb order and social peace,* of which it is the responsible guardian, or if the normal operation of its public services may be gravely jeopardized* or gravely hampered thereby.⁵³

It denied having “committed a wrongful act contrary to international law”, as alleged by the plaintiff, stating:

The Government of Greece, anxious for the vital interests of the Hellenic people and for the administration, economic life, health situation and security,* both internal and external, of the country could not take any other course of action; any Government in its place would do the same.⁵⁴

This argument is again advanced in the Greek Government’s rejoinder of 15 December 1938, from which we took the passage quoted in section 4 and referred to in paragraph 28 above, where reference was made to the serious danger to the country’s economic existence that compliance with its international obligations would have entailed.⁵⁵ But it was in the oral statements made on 16 and 17 May 1939 by the Counsel for the Greek Government, Mr. Youpis, that the argument of necessity was particularly developed. After reaffirming the principle that contractual obligations and judgements must be executed in good faith, Mr. Youpis went on to say:

Nevertheless, there occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country’s resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. *The painful problem arises of making a choice between the two duties; one must give way to the other in some measure: which?**

Doctrine and the decisions of the courts have therefore had occasion to concern themselves with the question: . . .

Doctrine recognizes in this matter that *the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts.** No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt endangers economic life or jeopardizes the administration,* the Government is, in the opinion of authors, *authorized to suspend or even to reduce the service of debt.**⁵⁶

The Counsel for the Greek Government then proceeded to a detailed analysis of the literature and of the judicial precedents, in which he found full confirmation of the principle he had stated. In the hope of making that principle more easily acceptable—although he may also have had other intentions—he first of all

⁵¹ *Ibid.*, para. 268. See also the judgement rendered by the Court on the same date in the case concerning the payment in gold of the Brazilian Loans issued in France (*ibid.*, para. 273).

⁵² *Yearbook . . . 1979*, vol. II (Part One), pp. 55–56, document A/CN.4/318 and Add.1–4, para. 120.

⁵³ Secretariat Survey, para. 276.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, para. 278.

⁵⁶ *Ibid.*, para. 281.

referred to it as “the theory of *force majeure* expressed in another formulation”. Then, however, bowing to the obvious, he immediately added that “various schools and writers express the same idea in the term ‘state of [necessity]’”. He then said:

Although the terminology differs, everyone agrees on the significance and scope of the theory: everyone considers that *the debtor State does not incur responsibility if it is in such a situation*.⁵⁷

30. The respondent Government was thus enunciating, in a particularly well-documented manner and as having an absolutely general scope of application, the principle that a duly established state of “necessity” constituted in international law *a circumstance precluding the wrongfulness of State conduct not in conformity with an international financial obligation* and the responsibility which would otherwise derive therefrom. It is important to note that so far as recognition of that principle is concerned, the applicant Government declared itself fully in agreement. In his statement of 17 May 1939, the Counsel for the Belgian Government, Mr. Sand, said:

In a learned survey . . . Mr. Youpis stated yesterday that a State is not obliged to pay its debt if in order to pay it it would have to jeopardize its essential public services.*

*So far as the principle is concerned, the Belgian Government would no doubt be in agreement.*⁵⁸

As a matter of fact, the Belgian Counsel was not even contesting the point that the financial situation in which the Greek Government found itself at the time could have justified the tragic account given by its pleader. The points on which he sought reassurance were the following: (a) that that Government’s default on its debt was solely on factual grounds involving inability to pay and that no other reasons involving contestation of the right of the creditor entered into the matter; (b) that inability to pay could be recognized as justifying total or partial “suspension” of payment, but not a final discharge of even part of the debt. In other words, it must be recognized that the wrongfulness of the conduct of the debtor State not in conformity with its international obligation would cease to be precluded once the situation of necessity no longer existed, at which time the obligation would again take effect in respect of the entire debt.⁵⁹ From that standpoint, the position of the Belgian Government is particularly valuable for the purpose of determining the limit to the

admissibility of the ground of necessity to which attention was drawn above.⁶⁰

31. The Court, for its part, noted in its judgement of 15 June 1939⁶¹ that it was not within its mandate to declare whether, in the specific case, the Greek Government was justified in not executing the arbitral awards. However, by observing that in any event it could only have made such a declaration after having itself verified the financial situation alleged by the Greek Government and ascertained what the effects of the execution of the awards would have been, the Court showed that it implicitly accepted the basic principle on which the two parties were in agreement.

32. On this subject of international obligations “to do”, it should be noted that obligations relating to the repayment of international debts are not, in international practice, the only obligations in connection with which circumstances bearing the marks of a “state of necessity” have been invoked to justify State conduct not in conformity with what was required. The case of *properties of the Bulgarian minorities in Greece* is, in our opinion, a rather typical example. Here again, the case was mentioned in the preceding section of this chapter,⁶² because the League of Nations Commission of Enquiry used the term “*force majeure*” to justify the fact that the Greek Government, following the unfavourable outcome of the war between Greece and Turkey, had settled Greek refugees from Asia Minor on properties left temporarily vacant by their Bulgarian owners, to whom they should have remained available under the terms of the Treaty of Sévres with Bulgaria. However, a close scrutiny of the case shows that, as we have pointed out,⁶³ there was not for the Greek Government a “material impossibility” of complying with its international obligations concerning respect for the Bulgarian properties in its territory. It could not, therefore, be called a case of “*force majeure*”, at least according to the terminology we have adopted in this report. The plea accepted by the League of Nations Commission of Enquiry was actually more one of “necessity”. What had led the Greek Government to act in a manner not in conformity with its international obligations to Bulgaria was the need to safeguard an interest which it deemed essential, namely, the provision of immediate shelter for its nationals who were pouring into its territory in search of refuge. This conduct could thus be purged of the imputation of international wrongfulness which would otherwise have attached to it. From another standpoint, however, it still entailed the obligation to compensate the individuals whom the act committed in

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, para. 284.

⁵⁹ In stressing that the debt, payment of which could only be suspended, subsisted in full and would become payable as soon as the temporary situation of necessity no longer existed, the Belgian Government was, among other things, countering the confusion caused by the fact that in the argument presented by the Counsel for the Greek Government, the concept of “state of necessity” was virtually equated with that of “*force majeure*”, because the latter could have been used to infer that the debtor State was finally discharged of the debt. On this point, see the comments made in chap. V, sect 4 (*Yearbook . . . 1979*, vol. II (Part One), pp. 55–56, document A/CN.4/318 and Add.1–4, para. 120).

⁶⁰ See para. 14.

⁶¹ See Secretariat Survey, para. 288.

⁶² See *Yearbook . . . 1979*, vol. II (Part One), p. 53, document A/CN.4/318 and Add.1–4, para. 115.

⁶³ *Ibid.*, p. 53, footnote 239.

a state of necessity had deprived of their properties. The situation is therefore one of those to which we have referred specifically.⁶⁴

33. Having considered some cases in which the existence of a "state of necessity" was invoked by a State with the aim of justifying non-compliance with an international obligation "to do", we now turn to cases where the obligation at issue was an obligation "not to do", or, in other words, to refrain from certain conduct. Particularly relevant in this connection are cases where the "essential interest" of the State that was threatened by a "grave and imminent danger" and was safeguardable only through the adoption of conduct which in principle was prohibited by an international obligation was to ensure the survival of the fauna or vegetation of certain areas on land or at sea or to maintain the normal use of those areas, or, more generally, to ensure the ecological balance of a region. It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States. Consequently, most statements of position proposing to preclude on that basis the wrongfulness of conduct not in conformity with an international obligation will be found to be contemporary ones. However, there are also a few precedents, perhaps the most recent being the position adopted in 1893 by the Russian Government in the case of *fur seal fisheries off the Russian coast*. In view of the alarming increase in sealing by British and North American fishermen near Russian territorial waters, and in view of the imminent opening of the hunting season, the Russian Government, in order to avert the danger of extermination of the seals, issued a decree prohibiting sealing in an area which was contiguous to its coast but was at the same time indisputably part of the high sea and therefore outside Russian jurisdiction. In a letter to the British Ambassador dated 12 (24) February 1893, the Russian Minister for Foreign Affairs, Chickline, explained that the action had been taken because of the "*absolute need*" for immediate provisional measures" in view of the imminence of the hunting season. He added that he considered it necessary to:

emphasize the essentially precautionary [*"provisoire"*] character of the above-mentioned measures, which were taken under the pressure of *exceptional circumstances* . . .⁶⁵

and declared his willingness to conclude an agreement with the British Government with a view to a permanent settlement of the question of sealing in the area. This position is therefore interesting as an affirmation of the validity of the plea of necessity in international law,⁶⁶ and also because it brings out

several of the conditions enumerated above⁶⁷ as having to be fulfilled before one can even consider whether a situation of "necessity" justifies action by a State which is not in conformity with an international obligation: namely, the absolutely exceptional nature of the alleged situation, the imminent character of the danger threatening a major interest of the State, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this "justification", depending on the continuance of the feared danger. The agreement with the British Government was in fact concluded in May 1893.⁶⁸

34. It is interesting to compare this position of the Russian Government with the position adopted by the United States of America during the same period on the question of *the hunting of fur seals in the Bering Sea*. The United States Government claimed that it was entitled to extend the application of its own fishery regulations beyond its territorial waters. Its purpose was to put a stop to the operations of Canadian sealers who, it said, were taking fur seals on the high seas by methods of fishing which resulted in a massacre of the animals, to the detriment of the fur industry set up by the United States on one of the American islands in the Bering Sea frequented by seals. The British Government objected to such an application of United States fishery regulations, on the ground that the Canadian sealers were operating only on the high seas. On the basis of the Treaty of 29 February 1892, the dispute was submitted to a Tribunal of Arbitration. In his argument before the Tribunal, the agent of the United States observed:

The ground upon which the destruction of the seal is sought to be justified, is that the open sea is free, and that since this slaughter takes place there, it is done in the exercise of an indefeasible right . . .; that the nation injured can not defend itself on the sea, and therefore upon the circumstances of this case can not defend itself at all, let the consequences be what they may.

The United States Government denies this proposition. While conceding and interested to maintain the general rule of the freedom of the sea, as established by modern usage and *consensus* of opinion, it asserts that the sea is free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it; that the right of self-defense on the part of a nation is a perfect and paramount right to which all others are subordinate, and which upon no admitted theory of international law has ever been surrendered; that it extends to all the material interests of a nation important to be defended; . . . that it may, therefore, be exercised upon the high sea as well as upon the land, and even upon the territory of other and friendly nations, provided only that the necessity for it plainly appears; and that wherever an important and just national interest of any description is put in peril for the sake of individual profit by an act upon the high sea, . . . the right of the individual must give way, and the nation will be entitled to protect itself against the injury, by whatever force may be reasonably necessary, according to the usages established in analogous cases.⁶⁹

⁶⁴ See para. 18 above.

⁶⁵ Secretariat Survey, para. 155.

⁶⁶ In describing these measures, the Tsarist Minister also referred to "*force majeure*" and "self-defence" (*légitime défense*), but it is clear that, according to the terminology which we have endeavoured to clarify in the present report, what we had here was a typical example of measures taken in a "state of necessity".

⁶⁷ See paras. 12, 13 and 14.

⁶⁸ J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. I, p. 826.

⁶⁹ *Ibid.*, pp. 839-840.

The agent of the British Government replied that the fallacy in the United States argument was that a State had a right in time of peace to do on the high seas, as an act of "self-defence" or "self-preservation", whatever it might conceive to be necessary to protect its property or its interests. He noted that by far the greatest number of instances recognized by international law of rights of self-defence or self-preservation against the laws of another State were cases of belligerent rights exercised in a situation of genuine "emergency", and that even then there were limitations.⁷⁰ The Tribunal of Arbitration made its award in 1893. It found that the United States had not "any right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit".⁷¹ In addition, the majority of the Tribunal rejected proposed amendments to the award submitted by the United States member of the Tribunal, the most important of which would have recognized the rights of all nations, under international law, in respect of self-protection and self-defence.⁷² Although the Russian and United States positions both related to the subject of sealing on the high seas, the similarity between them was actually only apparent. The United States Government, unlike the Russian Government, did not assert the existence of an exceptional circumstance of "necessity" as a ground for the temporary adoption, in order to deal with an imminent ecological danger which could not be averted by any other means, of measures not in conformity with the obligation to refrain from certain conduct in areas of the open sea. The United States Government did not approach the other Governments concerned, as the Russian Government did, with a request for the speedy conclusion of an agreement on joint action against a common danger, after which it would desist from activities incompatible with its international obligations. Washington actually relied on a different concept from that of "necessity", namely, the concept of "self-protection", meaning the right to take action anywhere for the protection of its own interests and those of its nationals. The Tribunal of Arbitration did not, therefore, allow itself to be influenced by the argument that there was a danger of the seals being massacred by Canadian sealers; it viewed the American measures as action taken primarily for the purpose of protecting the economic interests of a United States industry against competition from a foreign industry by giving it an impermissible monopoly to take fur-seals in certain areas of maritime space which must remain accessible to everyone. It would therefore be quite wrong to regard the Tribunal's award as a rejection of the concept of "necessity" and, in general, as a precedent for denying the admissibility of that concept in international law.

⁷⁰ *Ibid.*, p. 892.

⁷¹ *Ibid.*, p. 917.

⁷² *Ibid.*, pp. 919-920.

35. A case which occurred in our own times and which may be regarded as typical from the standpoint of fulfilment of the conditions we consider essential in order for the existence of a "state of necessity" to be recognized is the "*Torrey Canyon*" incident. On 18 March 1967, the *Torrey Canyon*, under Liberian flag, with a cargo of 117,000 tons of crude oil, went aground on submerged rocks off the coast of Cornwall but outside British territorial waters. A hole was torn in the hull, and after only two days nearly 30,000 tons of oil had spilt into the sea. This was the first time that so serious an incident had occurred, and no one knew how to avert the threatened disastrous effect on the English coast and its population. The British Government tried several means, beginning with the use of detergents to disperse the oil which had spread over the surface of the sea, but without appreciable results. In any event, the main problem was the oil remaining on board. In order to deal with that, it was first decided to assist a salvage firm engaged by the shipowner in its efforts to refloat the tanker, but on 26 and 27 March the *Torrey Canyon* broke into three pieces and 30,000 more tons of oil spilt into the sea. The salvage firm gave up, and the British Government then decided to bomb the ship in order to burn up the oil remaining on board. The bombing began on 28 March and succeeded in burning nearly all the oil. It should be noted that the British Government's action did not evoke any protests either from the private parties concerned or from their Governments. It is true that the bombing did not take place until after the ship had been reduced to a wreck and the owner seemed implicitly to have abandoned it, but even before that, when the action to be taken was under discussion, there was no adverse reaction to the idea of destroying the ship, which the Government was prepared to do against the wishes of the owner, if necessary. The British Government did not advance any legal justification for its conduct, but on several occasions it stressed the existence of a situation of extreme danger and the fact that the decision to bomb the ship had been taken only after all the other means employed had failed.⁷³ It therefore seems to us that, even if the shipowner had not abandoned the wreck, and even if he had tried to oppose its destruction, the action taken by the British Government outside the areas subject to its jurisdiction would have had to be recognized as internationally lawful, since the conditions for a "state of necessity" were clearly fulfilled.

36. The lesson of the *Torrey Canyon* incident did not go unheeded. In view of the fact that such incidents

⁷³ On this case, see the white paper issued by the British Government: *The "Torrey Canyon"*, Cmnd. 3246 (London, H.M. Stationery Office, 1967); and United Kingdom, *Parliamentary Debates (Hansard), House of Lords, Official Report* (London, H.M. Stationery Office), 5th series, vol. 281 (4 April 1967), cols. 874-883; and *ibid.*, *House of Commons, Official Report*, 5th series, vol. 743 (20 March 1967), cols. 1054-1060; vol. 744 (4 April 1967), cols. 38-54; and (10 April 1967), cols. 758-821 and 874-926.

might recur at any time, it seemed essential to ground the right of the coastal State to take protective measures on positive rules which would be more precise than the mere possibility of relying on "state of necessity" as a circumstance precluding the international wrongfulness of certain measures taken on the high seas. That possibility should remain as a kind of *ultima ratio* for exceptional circumstances, and not for situations that are foreseeable in the normal course of events. In 1969, therefore, IMCO convened a conference which adopted, on 29 November 1969, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. In accordance with article 1, paragraph 1, parties to the Convention may take:

such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.⁷⁴

Any measures taken must, of course, be proportionate to the actual or threatened damage.

Article 222 of the Informal Composite Negotiating Text drawn up by the President of the Third United Nations Conference on the Law of the Sea on 15 July 1977, which reads as follows:

Measures relating to maritime casualties to avoid pollution

1. Nothing in this Part of the present Convention shall affect the right of States to take measures, in accordance with international law, beyond the limits of the territorial sea for the protection of coastlines or related interests, including fishing, from grave and imminent danger from pollution or threat of pollution following upon a maritime casualty or acts related to such a casualty.

2. Measures taken in accordance with this article shall be proportionate to the actual or threatened damage.⁷⁵

is along the same lines.

37. However, despite the trend noted in the preceding paragraph, it is only logical that a state of necessity should still be invoked as a ground for State conduct not in conformity with international obligations in cases where such conduct proves necessary, by way of exception, in order to avert a serious and imminent danger which, even if not inevitable, is nevertheless a threat to a vital ecological interest, whether such conduct is adopted on the high seas, in outer space or—even this is not ruled out—in an area subject to the sovereignty of another State.⁷⁶ The latter would apply, for example, if extremely urgent action beyond its frontiers were the only means for a State to protect its territory from the spread of toxic fumes suddenly

escaping from a storage tank because, in that particular case, time and means were lacking for the organs of the neighbouring State to take the necessary measures. Other examples of the same kind can well be imagined.

38. There is another area in which it is particularly interesting to examine cases where a State, having engaged in conduct not in conformity with an obligation to refrain from precisely such conduct, has argued in its own defence (the terms used being of little importance, provided that the substance of the argument is plain to see) that it was faced with the "necessity" of averting a grave and imminent danger that would inevitably have resulted from its complying with the obligation. This is the area of international obligations concerning the treatment to be accorded, within the territory of the State, to foreign nationals, including both natural and artificial persons.

39. In these cases, the obligation at issue is more often a conventional one, since customary obligations in this respect are relatively few and there are differences of opinion as to their very existence and their scope. There is, however, one case, already old,⁷⁷ in which the parties to the dispute do seem to have taken for granted the existence of an obligation on the State, under general international law, to honour prospecting and exploitation concession contracts concluded with foreigners. In the *Company General of the Orinoco* case, that French company had obtained from the Venezuelan Government concessions to exploit minerals and develop a transport network in a large area over which Venezuela believed it had sovereignty. However, much of the area covered by the concession contracts was claimed by Colombia, which in fact had grounds for considering it part of its territory. Colombia therefore strongly protested against the granting of the concessions by the Venezuelan Government and demanded the return of the area concerned. Venezuela, wishing to avert the danger of armed conflict with the neighbouring republic, which was becoming imminent, felt obliged to rescind the concessions it had granted and return to Colombia the areas over which it had mistakenly exercised sovereign powers. This led to a dispute between the Venezuelan Government and the Company General of the Orinoco. The French Government having sided with the company, the case was referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 19 February 1902. The Commission, however, accepted the argument advanced by Venezuela, which had been forced to annul the concessions granted to the French Company because of the real danger of war they had created. Umpire Plumley therefore ruled that, in the exceptional circumstances of the case, it was lawful

⁷⁴ United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 166.

⁷⁵ *Official Records of the Third United Nations Conference on The Law of the Sea, Sixth Session*, vol. VIII, *Official Composite Negotiating Text* (United Nations publication, Sales No. E.78.V.4), document A/CONF.62/WP.10.

⁷⁶ See paras. 56 *et seq.* below.

⁷⁷ Not to mention, of course, the cases already discussed above (paras. 26 to 31) which may have involved the violation of some customary international obligation to honour debts contracted by the State with foreigners.

under international law for the Venezuelan Government to rescind the concessions, although he agreed that the company was entitled to compensation for the consequences of an act which had been internationally lawful but severely detrimental to its interests.⁷⁸

40. As regards cases where the obligation, non-compliance with which the party concerned sought to justify on the ground that it had acted in a "state of necessity", was an obligation arising out of an international convention, there are three that we think are important enough to be cited. The first is a very old case; it concerns an Anglo-Portuguese dispute dating from 1832. The Portuguese Government, which was bound to Great Britain by a treaty requiring it to respect the property of British subjects resident in Portugal, argued that the pressing necessity of providing for the subsistence of certain contingents engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects. Upon receiving that answer to its protests, the British Government consulted its Law Officers on the matter. On 22 November 1832, Mr. Jenner replied with the following opinion:

... I have the honour to report that I agree with Mr. Hoppner in the opinion that in whatever point of view the present conflict in Portugal may be considered, it cannot affect the immunities of

⁷⁸ The umpire's reasoning was as follows:

"... As the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefor the duty of compensation.* Had there been no other troublesome question of State entangled with the contracts of the Company General of the Orinoco it is quite possible that this governmental surgery would not have taken the life of the claimant company. Such entanglements, however, existed.

"... Notwithstanding the pending litigation over the boundary, the Company General of Orinoco was permitted to enter into unquestioned and absolute possession of these litigated areas. From the viewpoint of nations the respondent Government had been led into grave error. This error it must repair. It could only repair by receding. It could only recede by compromise with the company or by annulment. Every day that the contract was continued it was more or less a menace to the peaceful relations then existing between those two countries. That which had been held as a valued enterprise, a boon to Venezuela, for the reasons stated had become a source of serious national danger.

"... Enough has been said, however, to suggest the ground upon which the umpire bases his judgment that the strait of Venezuela in regard to the Colombian incident was a potent cause of the position assumed by the respondent Government toward the Company General of the Orinoco in 1889, 1890 and 1891. It was a question of governmental policy, and that Venezuela decided upon this plan of action must be attributed to its solicitude for peace with a sister Republic." (United Nations, *Reports of International Arbitral Awards*, vol. X (op. cit.), pp. 280-281).

It is clear that, in referring to the "duty of self-preservation", the umpire meant to represent the rescission of the concessions by the Venezuelan Government as conduct adopted in a "state of necessity", since the so-called right or duty of "self-preservation" was at that time generally considered to constitute the basis of a "state of necessity".

British Subjects resident in that Kingdom, nor deprive them of the privileges granted to them by Treaty. But the real question here is, *whether the Privileges and Immunities so granted are, under all circumstances, and at whatever risk, to be respected,** and I humbly apprehend that *the proposition cannot be maintained to that extent.** Cases may be easily imagined in which the *strict observance of the Treaty would be altogether incompatible with the paramount duty which a Nation owes to itself.** When such a case occurs Vattel (Book II, chap. 12, Sect. 170) observes that it is 'tacitly and necessarily excepted in the Treaty'.

In a case, therefore, of *pressing necessity,** I think that it would be competent to the Portuguese Government to appropriate to the use of the Army such Articles of Provisions etc., etc., as may be *requisite for its subsistence,** even against the will of the Owners, whether British or Portuguese; for I do not apprehend, that the Treaties between this Country and Portugal are of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be *so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.**

The *extent of the necessity,** which will justify such an appropriation of the Property of British subjects, must depend upon the circumstances of the particular case, but it must be *imminent and urgent.**⁷⁹

Despite its age, this case is therefore a particularly sound precedent, mainly because the two parties were agreed on the principles enunciated and hence on express recognition of the validity of the plea of necessity where the conditions for it are fulfilled. But the case is also of interest because of the terminology used, which is unusually apt for those times, and because of its contribution to the definition of the two conditions—"imminence" and the "urgency" of the danger to be averted—which we have stressed.⁸⁰

41. The second case, a century closer to us and well known to writers who have dealt with the question of "state of necessity", is the *Oscar Chinn* case. In 1931, the Government of Belgium adopted measures concerning fluvial transport—designed to benefit the Belgian company Unatra—in what was then the Belgian Congo. According to the United Kingdom, one of whose subjects, Oscar Chinn, had been harmed by the measures in question, the latter had created a "*de facto* monopoly" of fluvial transport in the Congo, which in its view was contrary to the principles of "freedom of navigation", "freedom of trade" and "equality of treatment" provided for in articles 1 and 5 of the Convention of Saint-Germain-en-Laye of 10 September 1919.⁸¹ The question was submitted to the Permanent Court of International Justice, which gave its judgement on 12 December 1934. The Court held that the "*de facto* monopoly" of which the United Kingdom complained was not prohibited by the Convention of Saint-Germain.⁸² Having thus found

⁷⁹ A. D. McNair, *International Law Opinions* (Cambridge, University Press, 1956), vol. II, pp. 231 *et. seq.*

⁸⁰ See para. 13 above.

⁸¹ League of Nations, *Treaty Series*, vol. VIII, p. 25.

⁸² *P.C.I.J.*, Series A/B, No. 63, p. 89.

that the conduct of the Belgian Government was not in conflict with its international obligations towards the United Kingdom, the majority of the Court saw no reason to consider whether any wrongfulness in the conduct in question might have been precluded because the Belgian Government had perhaps acted in a state of necessity. The question was however, considered in depth in the individual opinion of Judge Anzilotto, who took the view that, if the facts alleged by the Government of the United Kingdom, namely, the creation of a fluvial transport monopoly in favour of Unatra, had been better substantiated, the Belgian Government would have been able to excuse its action only by itself substantiating a claim to have acted in a "state of necessity". The opinion stated as follows:

6. If, assuming the facts alleged by the Government of the United Kingdom to have been duly established, the measures adopted by the Belgian Government were contrary to the Convention of Saint-Germain, the circumstance that these measures were taken to meet the dangers of the economic depression cannot be admitted to consideration. It is clear that international law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfilment of its engagements. . . .

7. The situation would have been entirely different if the Belgian Government *had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations*.*

The question whether the Belgian Government was acting, as the saying is, under the *law of necessity** is an issue of fact which would have had to be raised, if need be, and proved by the Belgian Government. I do not believe that that Government meant to raise the plea of necessity, if the Court had found that the measures were unlawful; it merely represented that the measures were taken for grave reasons of public interest in order to save the colony from the disastrous consequences of the collapse in prices.

It may be observed, moreover, that there are certain undisputed facts which appear *inconsistent with a plea of necessity*.*

To begin with, there is the fact that, when the Belgian Government took the decision of June 20th, 1931, it chose, from among several possible measures—and, it may be added, in a manner contrary to the views of the Leopoldville Chamber of Commerce—that which it regarded as the most appropriate in the circumstances. No one can, or does, dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis: provided always that the measures selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those obligations. On the other hand, the existence of that freedom is incompatible with the *plea of necessity**, which, by definition, implies the *impossibility of proceeding by any other method than the one contrary to law*.*

Another undisputed fact which seems *irreconcilable with the plea of necessity** is the offer made by the Government to transporters other than Unatra on October 3rd, 1932. Whatever its practical value, that offer showed that it was possible to concede advantages to all enterprises, similar to those granted to Unatra, and hence to avoid creating that *de facto* monopoly which, in the submission of the Government of the United Kingdom, was the necessary consequence of the decision of June 20th, 1931.⁸³

Although it is only an *obiter dictum*, the verbal clarity and lucid reasoning of this opinion make it one of the

most famous statements of position on the question of necessity. The admissibility, as a principle, of the "plea of necessity" in international law emerges in a manner which leaves no room for doubt. At the same time, the concept of "state of necessity" accepted in international legal relations is very restrictive. It is restrictive as regards the determination of the *essential importance of the interest* of State which must be in jeopardy in order for the plea to be effective; it is also restrictive as regards the requirement that the conduct not in conformity with an international obligation of the State must really be, in the case in question, the *only means* of safeguarding the essential interest which is threatened.

42. The third case we believe is worth taking into account is the one involving the United States of America and France which came before the International Court of Justice in 1950 under the title *Rights of Nationals of the United States of America in Morocco*. The necessity of averting a grave danger to an essential interest of the State—i.e., of safeguarding its "fundamental economic balance"—was invoked in this case as a ground for non-compliance with an international obligation which fell within the area of the treatment of foreigners, since one of the points at issue was whether or not it was lawful to apply to United States nationals a 1948 decree by the Resident General of France in Morocco establishing a régime of import restrictions in the French zone of Morocco in a manner which the United States did not consider to be in conformity with obligations arising out of treaties concluded between the United States and Morocco. The treaties in question guaranteed to the United States the right freely to engage in trade in Morocco without any import restrictions save those specified in the treaties themselves.⁸⁴ In its defence, the French Government asserted, *inter alia*, that the import restrictions imposed by the decree were necessary for the enforcement of exchange controls, such controls being essential to safeguard the country's economic balance. It argued that that balance would have been seriously jeopardized by the removal of exchange controls in a situation which had been rendered critical by the fluctuation of the franc on the Paris black market and by the "dollar gap" of Morocco.

43. It is true that, in describing the situation characterized by the "necessity" of taking measures to avert the grave danger which would otherwise have jeopardized an essential interest of the country, the French Government and its pleader used the term "*force majeure*" rather than "state of necessity", which to our mind would have been more appropriate. However, we believe that their main reason for doing so was to enable them to invoke in support of their arguments the precedent, discussed above,⁸⁵ of the

⁸³ *Ibid.*, pp. 112–114.

⁸⁴ *I.C.J. Pleadings*, vol. I, p. 258 *et seq.* See Secretariat Survey, para. 310.

⁸⁵ Para. 22.

Russian indemnity case, where the same thing had occurred.⁸⁶ In any event, the substance of the matter is what counts for our purposes. The important point is that the assistant agent of the French Government, Professor Reuter, took care to draw special attention to the fact that, just as in the above-mentioned precedent the respondent Government had argued that payment of its debt would have seriously jeopardized the internal and external situation of the Ottoman Empire, in the present case between France and the United States the French Government was claiming that the removal of exchange controls would imperil France's "fundamental economic balance".⁸⁷ Thus, the basic condition for recognition of a "state of necessity", which is, as we have tried to show, the existence of a grave and imminent, and otherwise unavoidable danger to essential interests of the State if it were to comply with its international obligations, was clearly identified by the applicant. The agent of the United States Government for his part, denied that the danger feared by the other party actually existed or that, in any event, there was a connection of the kind established by that party between the necessity of averting such a danger and the restrictions imposed on American imports without the consent of the United States Government.⁸⁸ He did not, however, challenge outright the validity of the "plea" the characteristics of which had been described by the French Government, and its possible applicability to situations other than that involved in the particular case in question. It therefore appears to us that this case too provides considerable support for the recognition of the applicability of the plea of necessity in international law.⁸⁹

44. Lastly, the *S.S. "Wimbledon"* case is worthy of mention in an area related to that of the treatment accorded to foreigners within the territory of the State, namely, the area of obligations imposed on a State by either customary or conventional law to refrain from placing restrictions on or impediments to the free

passage of foreign vessels through certain areas of its maritime territory. During the Russo-Polish war of 1920-1921 the British vessel *Wimbledon*, chartered by a French company and carrying a cargo of munitions and other military material destined for Poland, was refused passage through the Kiel Canal by the German authorities on the ground that, in view of the nature of the cargo, its passage through German waters would be contrary to the neutrality orders issued by Germany in connection with the war between Poland and Russia. The French Government protested on the ground that Germany's conduct was not in conformity with article 380 of the Treaty of Versailles,⁹⁰ which stated that:

The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

The ensuing dispute was referred to the Permanent Court of International Justice, with the United Kingdom, Italy and Japan, as co-signatories to the Treaty, intervening before the Court on the side of France. The issue debated during the proceedings was essentially whether or not the action taken by the German authorities with regard to the *Wimbledon* was prohibited by article 380 of the Treaty of Versailles. In its judgement of 17 August 1923, the Court ruled that it was, and that such a prohibition in no way conflicted with the obligations of Germany as a neutral State.⁹¹ Consequently, the Court did not have occasion to rule on any "plea of necessity" which Germany might have made. However, the question was mentioned during the oral proceedings, both by the agents of two of the applicant Governments and by the agent of the respondent Government. For instance, the agent of the French Government, Mr Basevant, said:

Will not the principles of international law, the general rules of the law of nations,* furnish some grounds for frustrating the rule of free passage,* through the Kiel Canal in the case of a vessel carrying military material destined for a neutral State? First let me say, without otherwise dwelling on this point, that no arguments against the application of the rule of free passage have been advanced on the ground either of impossibility of compliance or of the danger which compliance with the provision might have created for Germany;* the plea of necessity* was not made at all. Indeed, any such arguments seem inconceivable in this case. I shall not labour the point.⁹²

Thus, the learned French internationalist, while declaring that any such "plea" could not apply in the case in question and pointing out that, in any event, none had

⁸⁶ In considering that case we noted that, at a time when terminology had not yet been refined, the Ottoman Government had used the term "*force majeure*" to describe its extremely difficult financial situation, in which not honouring its debt became a necessity in order to avert the danger of the country's economic collapse. We also saw that the Permanent Court of Arbitration, in contesting the Ottoman Government's argument, retained its terminology but brought out more clearly by its line of reasoning the fact that the situation alleged by the debtor Government would, if substantiated, have constituted a typical "plea of necessity".

⁸⁷ See Secretariat Survey, para. 311.

⁸⁸ *Ibid.*, para. 312.

⁸⁹ The Court did not have occasion to rule on the issue which had been debated at length in the oral arguments of the parties. It noted that:

"Even assuming the legality of exchange control, the fact nevertheless remains that the measures applied by virtue of the Decree of December 30th 1948 have involved a discrimination in favour of imports from France and other parts of the French Union. This discrimination can not be justified by considerations relating to exchange control". (*Ibid.*, para. 313.)

⁹⁰ *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 189.

⁹¹ The Court noted:

"Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the 'Wimbledon' through the Kiel Canal, but, on the contrary, was entitled to permit it. Moreover, under Article 380 of the Treaty of Versailles, it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article." (*P.C.I.J., Series A, No. 1, p. 30.*)

⁹² *P.C.I.J., Series C, No. 3, vol. I, pp. 178-179.*

been made, revealed that in principle he recognized that both the concept of "*force majeure*" (implied in the reference to "impossibility of compliance") and the concept of "state of necessity", so well reflected in the idea of the "danger" which compliance with the obligation would create for the State bound by it, were established "grounds", under the general rules of international law, for "frustrating" compliance with international obligations.

45. The agent of the Italian Government, Mr. Pilotti, dwelt specifically on the question whether Germany's conduct could have been justified on grounds of "*force majeure*" or *status necessitatis*. In this connection, he observed:

... it is not conceivable that the bound subject should try to free itself from the duty of carrying out the obligation, unless it be to the extent that maxims of private law concerning the execution of obligations may be applicable to international law.

Here, however, there can be no question, either of a *material impossibility*,* which is quite excluded, or of a legal impossibility, which could not be justified by any argument. Indeed, the provision of the free passage through the Canal is stipulated, as has already been said, in favour of all Powers at peace with Germany, even in favour of non-signatory Powers, and consequently the provision cannot in itself allow Germany to take up an illicit attitude of partiality towards any Power whatsoever that might become a belligerent.

Neither would it be possible to speak of *force majeure*,* or more particularly of that concept which had been expressly sanctioned in the first book of the German Civil Code relating to the exercise of rights in general (sect. 227), and which, besides, lends itself to controversy; I mean the *status necessitatis*.

Indeed, there is no proof to show that the war between Poland and Russia, in consequence of the acts accomplished by the two belligerents, constituted for Germany that *immediate and imminent danger, against which she would have had no other means of protection** but the general prohibition of the transit of arms through her territory, and particularly that *such a danger should have continued to exist at the time** when the *Wimbledon* presented itself at the entrance of the Canal.⁹³

After responding to some of the other arguments put forward by Germany, Mr. Pilotti returned to the subject, concluding:

... the discussion is brought back to the simpler and safer ground of looking for some *juridical reason justifying the voluntary non-execution** on the part of Germany of her obligations, which reason could only be a *material impossibility** or the *status necessitatis*. Now surely from that standpoint it is not sufficient to invoke merely general ideas of sovereignty and neutrality.⁹⁴

This statement of position was therefore not only affirmative in substance with regard to the applicability in international law of the concept, derived from private law, of "state of necessity", but also contributed useful elements for the definition of the conditions under which it might be invoked.⁹⁵

46. Finally, the German Agent, Mr. Schiffer, denied that his Government had intended to plead a state of

necessity. To his mind, Germany had no need to make any "plea" in defence of its breach of an international obligation, for the simple reason that it had not committed any breach. His line of reasoning was as follows:

The representative of one of the applicant parties argued that Germany claimed that she acted under the *jus necessitatis*. This is not the case. There was no impossibility whatever for Germany to carry out the Treaty; nor has Germany contravened the Treaty.

I repeat that it is not the intention of the German Government to claim any *jus necessitatis*. On the contrary, Germany claims that she has remained true to her conventional obligations resulting from the Treaty of Versailles.⁹⁶

While denying in such clear terms that Germany needed the *ultima ratio* of the plea of necessity in order to justify its conduct here, Mr. Schiffer scrupulously refrained from contesting the validity in principle of such a plea. The "*Wimbledon*" case therefore shows a significant concurrence of views as to the admissibility in general international law of "state of necessity" as a circumstance precluding the wrongfulness of State conduct not in conformity with an international obligation and a no less significant contribution by some of the protagonists to the definition of the conditions to be fulfilled in order for the existence of such a circumstance to be recognized.⁹⁷

47. The State which, in a given case, acts in a manner not in conformity with an international obligation concerning the treatment to be accorded to the persons or property of nationals of another country may, at the time when it so acts, be at war with a third country. This in itself does not of course prevent the State in question from invoking in justification of its conduct a situation of necessity which it would invoke if it were at peace with everyone. On the other hand, the war in which it is engaged, and its consequences,

⁹⁶ *P.C.I.J., Series C*, No. 3, vol. I, p. 314.

⁹⁷ On the other hand, there are cases sometimes cited by writers as significant for the purpose of a study of "state of necessity" which we feel are not really relevant to that concept and therefore do not merit discussion here. One of them is the *Virginius* case, concerning the seizure on the high seas of a vessel improperly flying the American flag by a destroyer belonging to Spain, which was attempting to put down the Cuban insurrection (see J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. II, pp. 895 *et seq.*). Despite a mention of the "right of self-preservation" during the oral proceedings, the case was really concerned only with the definition of the right of search and of the conditions for exercising it. Another is the *Armstrong Cork Company* case, where the Italian Government, which was about to enter the war, ordered an Italian ship carrying American-owned cargo to return immediately, like all other ships of its merchant marine, to an Italian port. This was nothing more than an entirely lawful precaution, and the fact that the United States of America/Italy Conciliation Commission (set up by the 1947 Treaty of Peace with Italy) mentioned, purely incidentally, that the "right of necessity" had sometimes been used as an expedient in order to legalize the arbitrary (United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No. 65.V.4, p. 163) did not actually justify any inference one way or the other.

⁹³ *Ibid.*, pp. 284–285.

⁹⁴ *Ibid.*, p. 288.

⁹⁵ Particularly the conditions to which attention was drawn in paras. 13 and 14 above.

may be the very reason for the state of necessity which caused it to act. Conduct not in conformity with the obligation to respect the ownership by foreign nationals of material (food-stuffs, for example) may be dictated by a total lack of provisions and the no less total impossibility of overcoming it by other means. The positions adopted in an old but very widely cited case—the “*Neptune*” case—remain significant in this regard.

48. In 1795, when Great Britain was at war with France, the American vessel *Neptune*, carrying a cargo of rice and other foodstuffs owned by citizens of the United States, was captured on the high seas by a British frigate. The ensuing dispute was brought before the Mixed Commission established under article VII of the Treaty of 19 November 1794 (the “Jay Treaty”). Great Britain argued, *inter alia*, that the action had been justified by necessity, the British nation having at that time been threatened with a scarcity of food as a result of the war. In its award, made in 1797, the Commission rejected the British argument; however, it did so, as the opinions written by some of the commissioners show, not because it meant to deny that “necessity” could constitute a circumstance precluding the wrongfulness of conduct not in conformity with an international obligation, but because in the case in question the conditions for that were not fulfilled. One of the American commissioners, Mr. Pinkney, expressed himself as follows:

I shall not deny that *extreme necessity* may justify such a measure [the seizure of neutral property]. It is only important to ascertain whether that *extreme necessity* existed on this occasion and upon what terms the right it communicated might be carried into exercise.

We are told by Grotius that the necessity must not be imaginary, that it must be real and pressing, and that even then it does not give a right of appropriating the goods of others until all other means of relief consistent with the necessity have been tried and found inadequate. Rutherford, Burlamaqui, and every other writer who considers this subject at all will be found to concur in this opinion.⁹⁸

Applying these principles to the facts stated by Great Britain, Mr Pinkney concluded that they were not sufficient to justify an inference that Great Britain “was pressed by a necessity like this”. Similarly, the other American commissioner, Col. Trumbull, after stating:

The necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we cannot, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others.⁹⁹

asked: “Did any such state of things exist in Great Britain in April 1795?”, and he too replied in the negative. The two commissioners thus refused to acknowledge any “necessity” in the case submitted to

them, but they did so only after first acknowledging that, if they had been presented with a case of truly “extreme” or “irresistible” necessity, they would have had to agree that that justified non-compliance with an international obligation, particularly the obligation to respect the property of foreign nationals.

49. There is therefore nothing to prevent a belligerent State from pleading “necessity”, even if it arises from the very fact that a state of war exists and from the resulting constraints, as a ground for not complying with a peacetime international obligation still binding on it, notwithstanding the supervention of a state of belligerence with another State, vis-à-vis a third country with which it remains at peace. In time of war, however, the idea of “necessity” materializes mainly in a form other than that of a circumstance precluding, by way of exception, the wrongfulness of an act of the State not in conformity with the requirements of an obligation imposed on it by a rule of international law. In making this statement, we have in mind the function assigned to the concept of necessity “of war” or “military necessity” as the basic underlying intention of the rules of the international law of war and neutrality. In this special sector of international law, the concept in question is not regarded, or at least not primarily, as a kind of subcategory of “state of necessity” in the sense in which we have tried to define it in the context of peacetime law and of which we have given many examples. As we say, this concept, about which there is for the best of reasons nothing exceptional in this other context, is mainly viewed as underlying the very existence of the rule, which is formulated precisely for cases where “necessity of war” exists and in such a way as to meet that necessity. In other words, “necessity of war” then constitutes the *ratio*, the *raison d’être*, of certain fundamental rules of the law of war and neutrality, namely, those which, in derogation of principles of peacetime law, confer on a belligerent State the legal right to resort, as against the enemy and its nationals or—which is even more important for our purposes—as against neutral States and their nationals, to acts which peacetime law would forbid.¹⁰⁰ The situation is therefore the opposite of that in peacetime law: the normal is that of the “lawfulness” of conduct imposed on the belligerent by the requirements of the conduct of hostilities and the success of military operations, and the exception is that of the “wrongfulness” of conduct of that sort when, in a particular case, such acts are seen to be without connection with the exigencies in question and are of no real utility in relation to them.

¹⁰⁰ Especially measures which the international law of neutrality allows belligerents to take against neutral private property, against commerce by neutrals with the enemy, against freedom of transit and navigation of neutral shipping, and so on. Also included are the powers which the law of war allows to be exercised with respect to the private property of enemy nationals, although in the case of the enemy the law of war allows the commission of a whole series of acts, whether or not based on “necessity of war”.

⁹⁸ J. B. Moore, *International Adjudications* (New York, Oxford University Press, 1931), vol. IV, pp. 398–399.

⁹⁹ *Ibid.*, p. 433.

That being so, what is involved is not, of course, "necessity" as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather "non-necessity" as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when, in a particular case, the "necessity of war" whose existence constitutes the basis of the rule and of its applicability is clearly seen to be absent that this rule of the special law of war and neutrality does not apply and the general rule of peacetime law prohibiting certain acts resumes its ascendancy.

50. It is also true that a review of international practice brings to light many well-known statements of position by spokesmen for Governments asserting or acknowledging either the lawfulness in time of war (including civil war) of such acts as the unintentional, or even deliberate, destruction of neutral property for reasons of "military necessity", or the wrongfulness of acts of that kind because, in the particular case in question, no such necessity existed or the acts committed were "wanton", to use a term which is common in English law.¹⁰¹ However, these statements

of position are clearly concerned with determining the content, conditions and limits of applicability of a permissive rule of the law of war and neutrality and not with any alleged incidence, in the case in question, of the principle of the law of international responsibility which allows "state of necessity" to constitute a circumstance precluding, by way of exception, the wrongfulness of conduct not in conformity with an obligation imposed by a prohibitive rule. In other words, what Governments meant to affirm was certainly not the existence of an obligation which generally prohibited belligerent States from destroying neutral property in the course of military operations and which could be avoided only where non-compliance could be excused in exceptional cases of necessity created by war. On the contrary, what they have sought to maintain is that an obligation to refrain from causing the destruction of neutral property really exists only with respect to destruction which is entirely wilful and totally unrelated to the purposes of military operations. These conclusions are confirmed by some of the decisions rendered by arbitral or claims commissions.¹⁰² The foregoing

¹⁰¹ Among the best-known statements of position relating to the destruction of neutral property incidental to international wars, mention may be made of the opinions of the British Law Officers of the Crown on the Bombardment of Grey Town case (1854) (see Secretariat Survey, para. 247), of the Secretary-General of the Italian Ministry of Foreign Affairs in connection with the Bottaro case (1871) (S.I.O.I.-C.N.R., *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861-1887), vol. II, p. 1146); of the Russian Minister for Foreign Affairs on the *Aghios Nicolaos* case (1879) (*ibid.*, p. 1152); of the Italian Minister for Foreign Affairs in connection with damage caused to neutrals by the belligerents during the Chilean-Peruvian-Bolivian war (1882) (*ibid.*, pp. 1156-1157); of the British Law Officers of the Crown on the same subject (Secretariat Survey, para. 249); and of the United States Department of State in connection with the bombardment of Samsun (1922) (G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, pp. 693-694).

Among the statements of position relating to the destruction of foreign property occurring, again incidentally, in the course of operations against insurgents or during a civil war, mention may be made of those of the British Secretary of State for Foreign Affairs on the bombardment of the warehouse at Antwerp (1830) (Secretariat Survey, para. 163); of the British Law Officers of the Crown in connection with the bombardment of Messina (1848) (*ibid.*, paras. 170 and 171) and with the insurrection in Santo Domingo (1861-1863) (*ibid.*, para. 179); of the Counsel for the United States of America in the Dutrieux case (1884) (Moore, *History and Digest* . . . , vol. IV, pp. 3702 *et seq.*); of the Italian Minister for Foreign Affairs in connection with the bombardment and occupation of Sfax (1881) (S.I.O.I.-C.N.R., *op. cit.*, pp. 1155-1156) and the Brazilian civil war of 1893-1894 (Secretariat Survey, para. 212); of the United States of America Department of State in connection with the bombardment of Almería (1937) (Hackworth, *op. cit.*, p. 694), etc.

In addition, the international lawfulness of the deliberate destruction of neutral property has been asserted and generally accepted when the purpose was claimed to be to prevent such property from falling into enemy hands and being used by the enemy or to protect troops against harm, for instance in the form of an epidemic. See in this connection point 8 of the principles applied by the Claims Commission created in 1901 by an act of the Congress of the United States of America to consider claims

regarding damage sustained as a result of the Cuban insurrection of 1895-1898 (Secretariat Survey, para. 226); and the replies of Great Britain to point VIII and of the United States of America to point XI of the request for information submitted to Governments by the Preparatory Committee for the 1930 Codification Conference (League of Nations, *Bases of discussion* . . . (*op. cit.*), p. 105, and *idem*, *Supplement to vol. III* (C.75(a). M.69(a).1929.V), p. 22, respectively. See also the statements of position of Governments in cases relating to the destruction of boats, for example in the Duclair case (1870), cited by B.C. Rodick, *The Doctrine of Necessity in International Law* (New York, Columbia University Press, 1928), p. 102, and in connection with the case Léontios et Nicolas Arakas v. Etat bulgare (1926) (see *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1928), vol. VII, pp. 37-39); or relating to damage to submarine telegraph cables, e.g. in the case Eastern Extension, Australasia and China Telegraph Company Ltd. (Great Britain) v. United States (1923) (United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.3), pp. 115 *et seq.*), etc.

As regards the destruction of property in the interests of the army, see for example the positions expressed in the Hardman case (1913) concerning the destruction of housing to prevent an outbreak of disease among the troops (*ibid.*, pp. 25-26), and in the Faletich case (1929), where a house was destroyed in order to obtain material for the construction of trenches and barracks for the troops (Hackworth, *op. cit.*, pp. 697-698).

Recognition of the lawfulness of deliberate destruction of neutral property is, of course, without prejudice to the possibility of demanding indemnification from the State responsible for the act on some other ground than that of compensation for an internationally wrongful act.

¹⁰² See, *inter alia*, the decision of the Chile/United States of America Arbitral Commission set up by the Convention of 7 August 1892 in the Du Bois case (Secretariat Survey, para. 353); that of Umpire Plumley of the Netherlands/Venezuela Mixed Commission set up by the Protocol of 28 February 1903 in the Bembelista case (United Nations, *Reports of Arbitral Awards*, vol. X (*op. cit.*), p. 718); that of Commissioner Paul of the United States of America/Venezuela Mixed Commission set up by the Protocol of 17 February 1903, in the American Electric and Manufacturing Co. case (*ibid.*, vol. IX (United Nations pub-

(Continued on next page.)

comments also apply to the statements of position, of which again there are many, concerning the requisitioning of property of neutral nationals in case of international war or of foreign nationals in case of civil war.¹⁰³ In short, we may therefore conclude that there is no need to take all these statements of position and their application of the concept of "military necessity" into account in defining "state of necessity" for the purposes of this section.

51. Some writers have advocated an application of the concept of "military necessity" which would come close to that of "necessity" in the strict sense, in that it would actually give this particular type of necessity, the peculiar purpose of which is to safeguard the overriding interest in the success of the military operations against the enemy and, ultimately, in his defeat, sufficient scope to preclude, by way of exception, the wrongfulness of non-compliance with an obligation imposed on the belligerent State by a rule of the international law of war. This idea found favour in particular with many German writers before the First World War, and it is also the focus of the principle controversy, in the international-law literature, about whether the concept of "military necessity" should be accepted or rejected.¹⁰⁴

(Footnote 102 continued)

lication, Sales No. 59.V.5), p. 146); that of Umpire Gutiérrez Otero, of the Spain/Venezuela Mixed Commission set up by the Protocol of 2 April 1903, in the Mena case (*ibid.*, vol. X (*op. cit.*), pp. 74 *et seq.*); etc. Particularly worthy of note is the statement by Commissioner Paul, who described as a general principle of international law the principle that damages suffered by neutral property owing to "imperious necessities of military operations" were not wrongful.

¹⁰³ The lawfulness of such requisitioning where necessities of war required it (always without prejudice to the obligation to pay compensation to the owners) and, conversely, its wrongfulness where that circumstance does not obtain were affirmed, for example, by Umpire Thornton in the Bartlett and Barge case (1874) (Moore, *History and Digest . . .* (*op. cit.*), vol. IV, p. 3721); by the decision of Umpire Alexander in his decision of 16 June 1900 in the Orr and Laubenheimer case between the United States of America and Nicaragua (United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. E/F.69.V.1), p. 40); by the decision of the United States of America/Venezuela Mixed Commission set up by the Protocol of 17 February 1903, in the Upton case (*ibid.*, vol. IX (*op. cit.*), p. 234); by the United States of America/Mexico Mixed Commission set up by the convention of 8 September 1923, in the Coleman case (*ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 364). See also, for a restrictive definition of necessities of war for the purposes under discussion here, the aide-mémoire of 4 March 1941 from the German Ambassador in Washington (Hackworth, *op. cit.* (1943), vol. VII, p. 539).

¹⁰⁴ Attention may be drawn, in connection with this controversy between opposing arguments, to the following works: C. Lüder, "Krieg und Kriegsrecht im Allgemeinen", *Handbuch des Völkerrechts*, ed. F.J. von Holtzendorff (Hamburg, Verlagsanstalt und Druckerei, 1889), vol. 4, pp. 253 *et seq.*; M. Huber, "Die Kriegserrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht* (Breslau), vol. VII (1913), pp. 351 *et seq.*; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, pp. 207 *et seq.*; U. Borsi, "Ragione di guerra e stato di necessità nel diritto internazionale", *Rivista di diritto internazionale* (Rome), series II, year X, vol. V, No. 2 (1916), pp. 157 *et seq.*; de Visscher, *loc. cit.*, pp. 74 *et seq.*; Vitta,

52. The fact is that there are rules of the international law of war which impose obligations on belligerents with regard to the means and methods of conducting hostilities with each other. On the basis of the implied premise that any conduct designed to inflict damage on an enemy belligerent is in principle licit under the international law of war unless specially prohibited by a particular rule of that law, these obligations impose some limitations on a belligerent State with regard to those means and methods, the general purpose being to mitigate the rigours of war. There are in this field what are called rules of humanitarian law applicable to armed conflict, most of which are actually codified in international conventions. The question has therefore arisen whether the existence of a state of "necessity", and more specifically of "military necessity", could or could not be invoked to justify the adoption of conduct not in conformity with what is required of the State by one of the obligations in question. Those writers who are inclined to answer this question in the affirmative have argued that, if observance of any of those obligations should prove to be incompatible with the success of the operations undertaken to defeat the enemy, *Kriegsraison* itself would require disregard of the obligation and would preclude any wrongfulness in the conduct of the State which acted accordingly.

53. However, it is clear that this argument cannot stand; in fact, nowadays it is generally rejected. One point which has been made in support of it is that there are, after all, some written rules of the humanitarian law of war which provide an express exception to the obligation to comply with their provisions in case of "urgent military necessity".¹⁰⁵ That is true, but in our

loc. cit., pp. 339 *et seq.*; P. Weiden, "Necessity in international law", *Transactions of the Grotius Society*, vol. 24, *Problems of Peace and War* (London, Sweet & Maxwell, 1939), pp. 105 *et seq.*; N.C.H. Dunbar, "Military necessity in war crimes trials", *The British Year Book of International Law*, 1952 (London), vol. 29, pp. 442 *et seq.*; W.G. Downey, "The Law of War and Military Necessity", *The American Journal of International Law* (Washington, D.C.), vol. 47, No. 2 (April 1953), pp. 251 *et seq.*; W.V. O'Brien, "The meaning of military necessity in international law", *World Polity* (Utrecht, Spectrum, 1957), vol. I, pp. 109 *et seq.*; Buza, *loc. cit.*, pp. 222 *et seq.*; Sereni, *op. cit.* (1965), vol. IV, pp. 1927 *et seq.*; G. Schwarzenberger, *International Law* (London, Stevens, 1968), vol. II, pp. 128 *et seq.*

¹⁰⁵ For example, article 33 of the Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of 12 August 1949, which provides that:

"The material of mobile medical units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick",

nevertheless goes on to state:

"The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from their purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of *urgent military necessity*,* provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them." (United Nations, *Treaty Series*, vol. 75, pp. 52 and 54.)

view it proves exactly the opposite of what can allegedly be deduced from it. In the first place, if it had really been intended that the scope of an exception of this kind should extend to all the provisions of the convention or conventions in question, it would have been incorporated in a general clause placed at the end of each convention and therefore applicable to all its provisions, and not, as was actually done, in the text of a provision covering a particular matter in which the inclusion of the exception has its own *raison d'être*. Where the exception is not expressly mentioned, there is no justification for presuming it.¹⁰⁶ Secondly, when one thinks it over, the mere idea of generalizing the exception in question would have been completely at variance with the purposes of the instruments that were drawn up. The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that "military necessity" was the very criterion of that conduct. The representatives of States who formulated those rules intended, by so doing, to impose certain limits on States, to provide for some restrictions on the almost total freedom of action which belligerents claimed, in their reciprocal relations, by virtue of that criterion. And they surely did not intend to allow necessity of war to destroy retrospectively what they had so arduously achieved. They were also fully aware that compliance with the restrictions they were laying down might hinder the success of a military operation, but if they had wanted to allow those restrictions only where they would not hinder the success of a military operation, they would have said so expressly—or, more likely, would have abandoned their task, which would have become of relatively little value. The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest; States subscribing to the conventions undertook to accept that subordination and not try to find pretexts for evading it. It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed precisely to prevent necessities of war from causing suffering which it was desired to proscribe once for all. The conclusion is that, apart from the provisions expressly inserted in certain rules, there is no "necessity of war" that constitutes a valid ground for State conduct not in conformity with the obligations imposed by conventions designed to humanize war.

¹⁰⁶ Several of the military manuals issued since the Second World War state that, in humanitarian law conventions, any exception on grounds of "military necessity" applies only with respect to the provisions in which it is expressly sanctioned. See, for example, United States of America, Department of the Army, *The Law of Land Warfare* (Field Manual, FM 27-10) (Washington, D.C., U.S. Government Printing Office, 1956); and United Kingdom, the War Office, *The Law of War on Land, being Part III of the Manual of Military Law* (London, H.M. Stationery Office, 1958). Where judicial practice is concerned, the war crimes tribunals rejected the argument of military necessity in the case of atrocities committed against wounded, prisoners, and so on. See in this connection the cases cited by Dunbar, *loc. cit.*, pp. 446-449, and by Sereni, *op. cit.*, vol. IV, pp. 1936 *et seq.*

54. It does not follow automatically from this conclusion that the international law of war is an absolutely closed area as regards any possible application of "state of necessity" as a circumstance precluding the wrongfulness of conduct not in conformity with one of the obligations imposed on belligerents by the rules, customary and other, of that special sector of international law. To draw so sweeping a conclusion would probably be going too far, even taking into the account the fact that the rules of the international law of war are already reduced to essentials and that some of them, it seems to us, are surely rules of *jus cogens*, so that any "plea of necessity" is entirely ruled out as a ground for failure to comply with them.¹⁰⁷ In any event, the admissibility of the plea of necessity in connection with the obligations laid down by the international law of war is obviously conceivable only where the situation alleged to constitute a state of necessity fulfils all the conditions we have enunciated,¹⁰⁸ and in particular if the "essential" interest to be safeguarded in a specific case at the expense of an *inferior* interest of another party is something other than merely that interest in ensuring the success of a military operation and defeating the enemy which is the hallmark of what is by general agreement called "necessity of war".

55. In our research aimed at identifying, through a study of international practice and international judicial decisions, the areas in which "state of necessity" has validly constituted, and in our view still constitutes a circumstance precluding, by way of exception, the wrongfulness of non-compliance, in certain specific conditions, with an international obligation, we have not thus far touched on the sector of the overall international obligations of States which concerns respect by every State for the territorial sovereignty of others. Yet history shows that on many occasions Governments have tried to give "necessity" a leading role as a ground for acts committed in breach of an obligation in that sector. This may seem to be a surprising omission on our part, especially since it is precisely the fact that States do in some cases plead necessity as a ground for non-compliance with what are indeed the most important of the obligations in question that has been at the heart of the argument concerning the admissibility in general of the plea of necessity, and that has done most to mobilize many internationalists against the very principle of such a plea. However, the omission for which we might be criticized is easily explained. The actual cases we looked into were cases in which the existence of a—usually spurious—"state of necessity" was asserted with the aim of justifying the annexation by a State of the territory, or part of the territory, of another State—whether or not the annexation was affected by

¹⁰⁷ See para. 16 above.

¹⁰⁸ See paras. 12 *et seq.* above.

starting a war or undertaking military operations—¹⁰⁹ or the occupation and use for military purposes of the territory of a State which had been neutralized by a treaty concluded before the outbreak of war between some of the parties to the treaty¹¹⁰ or had declared its neutrality in a war between other States:¹¹¹ in short,

¹⁰⁹ Among the most frequently cited historical cases in which necessity was invoked to justify annexations effected by recourse to war, mention may be made of that of the Free City of Krakow, annexed by Austria in 1846 (E. Hertslet, *Map of Europe by Treaty* (London, Butterworth, 1875), vol. II, pp. 1061 *et seq.*; G.F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dietrich, 1852), vol. X, pp. 111 and 125); the annexation of Rome by Italy in 1870 (S.I.O.I.—C.N.R., *op. cit.*, pp. 871 *et seq.*; V. Bruns, ed., *Fontes Juris Gentium*, series B, sect. 1, tome 1, part I (Berlin, Heymanns, 1932), pp. 960–961; and the annexation of Ethiopia by Italy in 1936 (League of Nations, *Official Journal*, 16th year, No. 11 (November 1935), p. 1137). “Necessity” was also invoked in 1908 by Austria–Hungary as justification for the annexation—effected by a show of force, but without war—of Bosnia–Hercegovina, province of the Ottoman Empire which had been placed under its administration by the Treaty of Berlin (13 July 1878), but sovereignty over which remained with Turkey. See the note sent by Austria–Hungary to the States signatories to the treaty in justification of the annexation, in *British Documents on the Origins of the War, 1889–1914* (London, H.M. Stationery Office, 1928), vol. V, pp. 398 *et seq.*

¹¹⁰ What may be considered the “classic” case was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of the necessity of forestalling an attack on its territory by France through Luxembourg and Belgium. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs (J.B. Scott, ed., *Diplomatic Documents Relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750) and the speech in the Reichstag by the German Chancellor, von Bethmann Hollweg, on 4 August 1914, containing the well-known words “*wir sind jetzt in der Notwehr; und Not kennt kein Gebot!*” (*Jahrbuch des Völkerrechts*, vol. III (special number), *Politische Urkunden zur Vorgeschichte des Weltkrieges* (Munich, 1916), p. 728).

¹¹¹ Such cases are very numerous; mention may be made of the occupation of Korea by Japanese troops during the Russo–Japanese war of 1904 (see the documents cited by E.T. Hazan in *L'état de nécessité en droit pénal international et international* (Paris, Pedone, 1949), p. 53); the occupation of certain Greek territories or islands by the Entente Powers during the First World War for use as bases for their military operations against Turkey (see the documents cited by T.P. Ion in “The Hellenic crisis from the point of view of constitutional and international law—part IV”, *The American Journal of International Law* (New York), vol. 12, No. 3 (July 1918), pp. 564 *et seq.*); the occupation by Germany during the Second World War of Denmark, Norway, Belgium and Luxembourg, and by Germany and Italy of Yugoslavia and Greece (see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (Nuremberg, 1949), vol. XXII, pp. 446 *et seq.*); the occupation, during the same war, of Iceland by the United Kingdom (*ibid.*, vol. XVIII, p. 415); of Iran by the United Kingdom and the Soviet Union (G.E. Kirk, “The Middle East”, in *Survey of International Affairs, 1939–1946: The World in March 1939*, ed. A. Toynbee and F.T. Ashton-Gwatkin (London, Oxford University Press, 1952), pp. 133 *et seq.*, and M.M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1965), vol. 5, pp. 1042 *et seq.*); and of Portuguese Timor by the Netherlands and Australia

actions all of which consist, in one way or another, of an assault on the very existence of another State, or on the integrity of its territory or the independent exercise of its sovereignty. Without going into the question as to what the situation in international law may have been at the time when these actions, especially the oldest ones, were taken,¹¹² we can say that in our own time any use by a State of armed force for any assault of the kind mentioned above on the sovereignty of another State is indisputably covered by the term “aggression” and, as such, is subject to a prohibition of *jus cogens*—the most typical and incontrovertible prohibition of *jus cogens*, both in general international law and in the United Nations system. Since the essential condition to which we have already referred¹¹³ is absent, invoking any “state of necessity” whatever cannot, in our opinion, have the effect of precluding the international wrongfulness of State conduct not in conformity with such a prohibition. It would be an absurd situation if the obligation prohibiting any use of force which constitutes aggression had the power, because of its peremptory nature, to render void any agreement to the contrary concluded between two States, so that prior consent by the State subjected to the use of force could not have the effect of constituting a ground, but that such an effect could be attributed to an assertion of necessity, even if genuine, by the State using force. It would be equally absurd if all that a State having committed an act which, under present-day international law, qualifies as an “international crime”¹¹⁴ needed to do in order to be absolved

(*Keesing's Contemporary Archives, 1940–1943* (Bristol), vol. IV, pp. 4943 *et seq.*). In so far as any “justification” of these actions was sought, “necessity” was always invoked, with varying degrees of candour.

¹¹² Actually, in those days, when “necessity” was invoked as a justification for such actions, this was often done mainly for political and moral reasons, because no State wanted to stand before the eyes of the world as the perpetrator of acts committed solely for purposes of crude expansionism and in pursuit of purely arbitrary interests. But from the strictly legal standpoint, apart from cases where the actions in question were specially prohibited by treaties, such appeals to “necessity” were only of *ad abundantiam* value, since the prohibition of the use of force had not yet been incorporated in general international law and the question did not therefore arise of precluding, by way of exception, the wrongfulness of an act which could not in itself be considered wrongful. In fact, it is interesting to note that, once the rule concerning the prohibition of armed force began to take root in international law, States became less and less inclined to invoke necessity as a justification for the use of force. At the time of the Chaco conflict between Paraguay and Bolivia (1928–1935), Paraguay contended that it was Bolivia's intention to argue “necessity” in justification of the march by its troops on River Paraguay and their invasion of the Chaco region (League of Nations, *Official Journal*, 13th year, No. 9 (September 1932), p. 1581). However, Bolivia firmly denied having ever had any such intention and argued that it was merely claiming effective possession of an area which had always been part of its national territory (*ibid.* p. 1583).

¹¹³ See para. 16 above.

¹¹⁴ See *Yearbook . . . 1976*, vol. II (Part Two), pp. 95–96, 118 *et seq.*, document A/31/10, chap. III, sect. B.2, art. 19 and paras. (59) *et seq.* of the commentary.

of any wrongfulness was to assert that it had acted in a "state of necessity"—even assuming it could prove that it had done so. It should also be noted that article 5, paragraph 1, of the Definition of Aggression adopted by the General Assembly on 14 December 1974¹¹⁵ provides that:

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

We can therefore state without a shadow of doubt that, however extensive or limited may be the effect as a ground which present-day international law attributes to "state of necessity", the latter can never constitute a circumstance precluding the wrongfulness of State conduct not in conformity with the obligation to refrain from any use of force constituting an act of aggression against another State.

56. However, that area of international obligations in which the basic principle that every State is required to respect the sovereignty of other States is reflected and spelt out is susceptible not only to the kind of breaches which warrant the description of acts of aggression and which, at least in the most serious cases, clearly constitute "international crimes". Consequently, while it may be taken for granted that assaults of such magnitude and flagrancy on the sovereignty of others can never, under international law as it now stands, be justified by any assertion of state of necessity, there remains the question whether or not the duly established existence of such a circumstance might have the effect of precluding, by way of exception, the wrongfulness of an assault which proved, especially when viewed in context, to be less serious. We are referring in particular to certain actions by States in the territory of other States which, although they may sometimes be coercive in nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression. These would include, for instance, some incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their bases in the

foreign territory, or to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or especially to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier. The common feature of these cases is, first of all, the existence of a grave and imminent danger to the State, to some of its nationals or simply to people, a danger of which the territory of the foreign State is either the theatre or the place of origin, and which the foreign State in question has a duty to avert by its own action but which its unwillingness or inability to act allows to continue. Another common feature is the limited character of the actions in question, in terms both of duration and of the means employed, in keeping with the purpose, which is restricted to eliminating the perceived danger.

57. In the past, writers on international law have sometimes referred to precisely the kind of cases mentioned above as examples of situations in which a State could invoke necessity in justification of its actions not in conformity with the requirements of an international obligation.¹¹⁶ Nor has there been any dearth of actual cases in which "necessity" was invoked precisely to preclude the wrongfulness of an armed incursion into foreign territory for the purpose of carrying out one or another of the operations referred to above. To cite only a few examples out of the many involving situations of this kind, there was the celebrated "*Caroline*" case, in which British armed forces entered United States territory and attacked and destroyed (also causing loss of life) a vessel owned by American citizens which was carrying recruits and military and other material to the Canadian insurgents;¹¹⁷ there were the repeated violations of the

¹¹⁶ Anzilotti (*Corso* . . . , 4th ed. (*op. cit.*), p. 414), cites as a typical case of a State acting in a "state of necessity" the case where the State in question, learning that near the frontier, but in foreign territory, an intrusion which is about to be launched, with the aim of provoking a revolutionary or separatist movement in the country, is being organized by exiles, and being unable to notify the foreign authorities in time, sends in armed forces to seize the conspirators.

¹¹⁷ The action occurred during the night of 29 December 1837. Necessity was first mentioned as a ground, in reaction to the American protests, by the British Minister in Washington, Henry S. Fox, who referred in that connection to the "necessity of self defence and self preservation"; the same point was made by the counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "*absolutely necessary as a measure of precaution*" (see respectively W.R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, pp. 422 *et seq.*, and McNair, *op. cit.*, pp. 221 *et seq.*). On the American side, Secretary of State Webster replied to Minister Fox that "*nothing less than a clear and absolute necessity can afford ground of justification*" for the commission "*of hostile acts within the territory of a Power at Peace*" and observed that the British Government must prove that the action of its forces had really been caused by "*a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for*

¹¹⁵ Resolution 3314 (XXIX), annex.

The impossibility of taking advantage—after the adoption of the Charter of the United Nations—of "state of necessity" to justify an aggression has been asserted by K.J. Partsch, "Selbsterhaltungsrecht", *Wörterbuch des Völkerrechts*, ed. K. Strupp, 2nd ed., rev. by H.J. Schlochauer (Berlin, de Gruyter, 1962), vol. III, p. 529; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1960), vol. II, p. 444; A. Favre, "Fault as an element of the illicit act", *The Georgetown Law Journal* (Washington, D.C.), vol. 52, No. 2 (Winter 1964), p. 566; and *Principes du droit des gens* (*op. cit.*), p. 644; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, pp. 390-391; P.A. Steiniger, "Die allgemeinen Voraussetzungen der Völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe* (Berlin), vol. XXII, No. 6 (1973), p. 445; Graefrath, Oeser and Steiniger, *op. cit.*, p. 75; Lamberti Zanardi, "Necessità . . ." (*loc. cit.*), p. 898.

Mexican frontier from 1836 to 1896 by United States troops in pursuit of Indians who were making attacks into American territory from their bases in Mexican territory and then returning to that haven;¹¹⁸ there was the dispatch in 1876 of Italian and Austrian warships to the waters off Salonica to protect the lives of nationals of the two countries who, like other foreigners, were threatened by manifestations of xenophobia on the part of the mob after disorders broke out in the city;¹¹⁹ lastly, there were other cases of the dispatch to foreign territory of land or sea forces, both then and later, on similar grounds.¹²⁰ It therefore seems to us that, before the First World War and also during the period between the two World Wars, the legal conviction of States on the point we are dealing with was that a "state of necessity", if it was asserted in good faith and was duly established and evidenced by the *genuine existence of all the conditions enumerated*, could be regarded as a circumstance that might, by way of exception, preclude the wrongfulness, which would otherwise have been undeniable, of an intervention in foreign territory for any one of the

limited and temporary purposes to which we have referred. The doubts and misgivings of some writers on this subject were not in fact due to any opposition in principle to the idea, as such, of a justification of this kind, but rather to a perfectly understandable reaction to the flagrant way in which States often abused the justification they advanced and to a fear that the end-result of such repeated abuses would be the assertion that there existed an actual "right of intervention" in foreign territory.

58. Was there a change in the situation in this respect after the Second World War, especially as a result of the adoption of the Charter of the United Nations? As noted above,¹²¹ the most striking aspect of the evolution of international law during the period from the late 1920s to the late 1960s was the gradual formation, in the *opinio juris* of the members of the international community, of a conviction of the peremptory character, allowing of no derogation, of the principle prohibiting aggression. In the Charter, this prohibition was set forth as a written rule, embodied in the provision of Article 2, paragraph 4 (the key provision of the Charter), which requires Member States to refrain from the use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". And it is primarily in consideration of the fact that this fundamental prohibition is today unquestionably a norm of *jus cogens* that we came to the conclusion that no plea of necessity could now have the effect of justifying the commission of an act of aggression. One problem which may then arise is whether, in Article 2, paragraph 4 of the Charter, the intention was simply to forbid aggression in all its possible aspects or whether the intention was to go beyond simply prohibiting aggression and also extend the obligation to "refrain" enunciated in that paragraph to other possible forms of use of force, except when it is used in exercise of the right of "self-defence" as provided in Article 51. The fact that the wording of Article 2, paragraph 4, of the Charter is almost identical with that of article 1 of the Definition of Aggression approved by the General Assembly¹²² might at first sight suggest that the authors of the Definition interpreted the prohibition in the Charter as relating only to "aggression". However, the enumeration in article 3 of the Definition of acts qualifying as an act of aggression¹²³ convinces us that the intention

(Footnote 117 continued)

deliberation" (*British and Foreign State Papers, 1840-1841* (London, Ridgway), vol. 29 (1857), pp. 1129 *et seq.*). In his message to Congress of 7 December 1841, the President of the United States reiterated that "This Government can never concede to any foreign Government the power, *except in a case of the most urgent and extreme necessity**, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government ..." (*ibid.*, 1841-1842, vol. 30 (1858), p. 194). Thus the divergence of views shifted from the plane of principle to that of fact. The incident was not closed until 1842, with an exchange of letters in which the two Governments found themselves in agreement both on the basic principle that the territory of an independent nation is inviolable and on the fact that "a strong overpowering necessity may arise when this great principle may and must be suspended.*" "It must be so" added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity*" (*ibid.*, pp. 195 *et seq.*). For Secretary of State Webster's reply, *ibid.*, pp. 201 *et seq.* Thus the applicability in principle of the plea of necessity in the area under discussion here was expressly recognized by the two Powers between which the dispute had arisen.

¹¹⁸ For cases extending all the way from 1836 to 1896, see J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. II, pp. 418 *et seq.* An end to the repeated incidents was signalled by the conclusion, on 4 June 1896, of an agreement between the United States of America and Mexico under which the armed forces of the two nations were reciprocally accorded the right to pursue bands of hostile Indians beyond the frontier, in desert areas and up to a specified depth.

¹¹⁹ However, the Italian Consul at Salonica received instructions stating that he was not authorized to bring armed detachments ashore except in case of *real and imminent danger* or unless the local authorities formally declared that they had not sufficient forces available. See S.I.O.I.-C.N.R., *op. cit.*, p. 939. The Rome Government adopted the same attitude on a number of other occasions (*ibid.*, pp. 931 *et seq.*).

¹²⁰ For cases culled from Japanese practice between the two World Wars, see League of Nations, *Official Journal*, 9th year, No. 6 (June 1928), pp. 792-793, and *ibid.*, 12th year, No. 12 (December 1931), pp. 2347 and 2376.

¹²¹ Para. 55.

¹²² "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

¹²³ This enumeration, in subparas. (a) to (g) of art. 3 of the Definition (see footnote 115 above), does not include a number of less serious acts which might be committed by a State in the territory of other States. It should also be noted in this connection that art. 2 of the Definition acknowledges that the Security Council may conclude that some acts involving the use of force in

of the drafters of Article 2, paragraph 4 of the Charter must have been also to include in the obligation to refrain, enunciated in that paragraph, other acts besides those which merit being classified as acts of aggression, and that no doubt should therefore remain as to the prohibition by the Charter—in keeping with general international law—of any kind of conduct involving any assault whatsoever on the territorial sovereignty of another State, irrespective of its magnitude, duration or purposes. It is equally beyond question that there can now no longer be any possibility of considering that there exists, as is sometimes spuriously argued, an actual “right of intervention” in foreign territory for any of the particular reasons or any of even the very limited purposes we have mentioned.¹²⁴ All this, however, still does not take us to the point where we can say that the wrongfulness, which in principle is incontestable in this case also, of an intervention by force in foreign territory, which nevertheless is manifestly less serious than a true act of aggression, cannot, by way of exception, be precluded because the State making the intervention acted in conditions which clearly proved the existence of a “state of necessity”—quite the contrary, since the question whether a certain “plea” may be applicable cannot logically arise unless the act to which the plea relates is to be regarded in the abstract as wrongful.

59. A negative conclusion as to whether the possibility of recognizing that wrongfulness might, by way of exception, be precluded in this case would, of course, be unavoidable if, in interpreting the rule of *jus cogens* prohibiting aggression, one adopted so broad a concept of aggression that it covered any form of act committed by force in foreign territory. However, to do that might be to expand, beyond what is at present accepted by the legal conviction of States, either the concept of “aggression”¹²⁵ or the concept of a “peremptory norm” as defined in article 53 of the Vienna Convention on the Law of Treaties.¹²⁶ But

without going as far as that, one could, more simply, note that Article 51 of the Charter mentions only self-defence as an admissible form of the use of force and infer from that fact that the drafters of the Charter might have had the intention of implicitly *excluding* the applicability of the plea of necessity, however well-founded such a plea might be in specific cases, to any conduct not in conformity with the obligation to refrain from the use of force. In other words, it might be supposed that they intended, in this specific area, to provide an exception to the otherwise possible exception to the rule that conduct not in conformity with an international obligation is wrongful. However apposite, especially because of its simplicity, such a supposition may be, it is still only a supposition, and it would be arbitrary for us, in pursuit of our present task, to regard it as anything else. From the fact that it was considered essential to safeguard specially and explicitly, contrary to the general prohibition of the use of force, the right to use force in “self-defence”, it does not logically or necessarily follow that the intention was to exclude absolutely the elimination of the wrongfulness of conduct not in conformity with the prohibition on the ground of the existence of other circumstances. In any case, since the Charter does not explicitly lay down such an exclusion, it is only by implication that the organs competent to interpret the Charter could have reached the conclusion, when considering specific cases, that such an exclusion existed.

60. However, an examination of the practical cases submitted either to the International Court of Justice or to the political organs of the United Nations does not seem to be of very much help for our purposes. With regard to the Court, all we can point out is that, in its judgement of 9 April 1949 in the *Corfu Channel* case,¹²⁷ it rejected the arguments presented by the United Kingdom in defence of the minesweeping operation carried out by the British Navy in the Albanian waters of the Channel following an incident in which two British warships had blown up after striking mines. However, where the Court took a negative position was on the assertion by the representatives of the British Government that a State which was the victim of a serious breach of international law had a *right to intervene by direct action in the territory of the State which had committed the breach*, or at least a *right to take countermeasures in that territory as a matter of self-help* in order to prevent the continuance of the wrongful action or to ensure that the offending State did not remove the evidence of its misconduct, all this despite the prohibition by the Charter of the United Nations of the use of force and as a limitation on that prohibition. The British Government accordingly maintained that it had acted in exercise of this *right* (we would say, rather, this *option*) directly to adopt measures of

violation of the Charter should not be considered acts of aggression because the acts concerned or their consequences were not of sufficient gravity. Moreover, a broad interpretation, although not by any means covering all the prohibitions comprised in Article 2, para. 4 of the Charter, appears to follow from principle 1 of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, approved by the General Assembly on 24 October 1970 (resolution 2625 (XXV), annex).

¹²⁴ See para. 56 above.

¹²⁵ Even if one remained within the already very broad terms of art. 3 of the Definition of Aggression, which enumerates a wide range of acts as constituting acts of aggression, one would probably be able to present as “aggression” all the kinds of actions for limited purposes concerning which we are here considering whether the plea of necessity can apply.

¹²⁶ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

¹²⁷ *I.C.J. Reports 1949*, p. 4.

constraint against the State caught in a breach of international law.¹²⁸ The Court, reflecting recent trends of opinion on the subject, denied that, whether limited or not, the “alleged right of intervention” had “a place in international law” or that a State could obtain redress by applying, as a matter of “self-help”, countermeasures of constraint against the State which had committed an international offence.¹²⁹ However, it seems clear that the legal question which the Court had to decide was whether or not, under the present-day international legal order, a State injured by an internationally wrongful act of another State had the option of reacting unilaterally by making an assault on the territorial sovereignty of that other State, as a coercive “countermeasure” for the offence from which it had suffered. However, the Court did not have any occasion to rule on the quite different question whether or not a State finding itself, irrespective of any wrongful act by others, in a material situation characterized by the absolute “necessity” of acting contrary to its obligations in order to safeguard an essential interest which, if it failed to act, would inevitably be threatened by an imminent danger, could invoke that “state of necessity” as a circumstance that might, by way of exception, preclude the otherwise undeniable wrongfulness of its conduct.¹³⁰ The terms of the dispute submitted for the Court’s judgement were quite different: the British Government asserted that it had acted in exercise of its right; thus it was in no way invoking, as a ground for an act otherwise wrongful on its part, a circumstance for the existence of which it was not in any event argued that all the conditions were fulfilled in the case in question. In our opinion, therefore, it would be stretching the meaning and scope of the judgement to try to draw conclusions from it, one way or the other, with regard to the applicability of the plea of necessity in the area with which we are dealing.

61. Nor does an analysis of State practice seem to permit sure and definitive conclusions on the precise

point we should like to elucidate. Our aim is not—let us repeat, so that there may be no misunderstanding—to seek ways of establishing whether or not the existence of a “state of necessity” might preclude the wrongfulness of an action involving the use of force against the territory of a foreign State which would jeopardize its territorial integrity or political independence or, at least, by reason of its purposes and its magnitude, would assume the aspect of an act of aggression; this has already been clearly answered in the negative. Nor is the aim to seek to establish whether or not actions, even involving some use of force but circumscribed in magnitude and duration, which are carried out, as mentioned above,¹³¹ for limited purposes and without any true aggressive intentions towards the State whose territory is affected, are also prohibited by present-day international law; for the purposes of our present research, we have taken this prohibition for granted in the context of the United Nations system. The only point on which we should like light to be shed, if possible, is whether or not the wrongfulness, which is in principle accepted as undeniable, of any such action might, by way of exception, be precluded where the State which committed it is able to show that it acted in a real “state of necessity”, with all the conditions for recognition of the existence of that circumstance being fulfilled.

62. A survey of practice shows that States engaging in some action involving the use of force have sometimes pleaded that they had a duty to protect, by such action, a vital interest which was threatened by a grave danger, but that they have not expressly invoked as a justification the ground of necessity, probably because they themselves realized that not all the conditions for doing so were fulfilled in the case in question and that, moreover, the magnitude and purposes of the action taken were not such that it could be described as limited and unaggressive.¹³²

¹²⁸ In the written proceedings, the British Government had maintained that there existed, without any limitation, a “right of intervention”. In the course of the oral arguments, Sir Eric Beckett, who presented the case for the British Government, claimed only a “limited right of self-help” or “self-redress” afforded by international law to any State which was the victim of a breach of an international obligation. See *I.C.J. Pleadings, Corfu Channel*, vol. II, pp. 282 *et seq.*, vol. III, pp. 295 *et seq.*, vol. IV, pp. 579 *et seq.*

¹²⁹ *I.C.J. Reports 1949*, p. 35.

¹³⁰ Even Judge Krylov, who, having stated in his dissenting opinion (*ibid.*, pp. 76–77) that the exercise of an “alleged right of self-help” was “nothing else but intervention”, was alone in mentioning the term “necessity”, did so only in order to deny the admissibility, under present-day international law, of a “law of necessity” in the sense of *Notrecht*, “which used to be upheld by a number of German authors”, i.e. in the sense of an alleged supreme right which would prevail over any other right of other parties. As we pointed out above (para. 9), the notion of this alleged right is not only false but has nothing to do with the notion of “state of necessity” as a factual circumstance accompanying the commission by a State of an otherwise wrongful act in no way constituting the exercise of a right.

¹³¹ See para. 56.

¹³² In connection with the action conducted on 30 October 1956 by British and French forces in the Suez Canal area, the two Governments argued in the Security Council and the General Assembly, as one of the grounds for their action, that the movement of hostilities towards the Canal Zone was endangering the free passage of ships through that water way. They consequently emphasized their intention of protecting, by their intervention, the interests of the countries using the Canal. In the course of the ensuing debates, most representatives of Member States who spoke maintained that the magnitude, purposes and scope of the action undertaken by the two Powers made it a true act of aggression. In addition, they pointed out: (a) that the ostensible purpose of the action—which some of them considered to be only a pretext—could not be attained by such means; (b) that the safeguarding of the vital interest of some parties could not be achieved at the sacrifice of a no less vital interest of others. See *Official Records of the Security Council, Eleventh Year, 749th–751st meetings*, and *Official Records of the General Assembly, First Emergency Special Session, 561st and 562nd meetings*. Thus, if the two Governments responsible for the action had invoked the ground of necessity, the absence in this case of the requisite conditions would have been argued against them.

63. In other cases—for example, interventions in foreign territory in “hot pursuit” of units of insurrectionary or national liberation movements operating from bases within that foreign territory¹³³—the Governments making the interventions have usually maintained that the State in whose territory they intervened was deliberately evading its duty to prevent the attacks emanating from its territory, or was incapable of preventing them. Apart from that, however, they have invoked as justification for their action—whether rightly or wrongly is immaterial—not the fact that they found themselves in a state of necessity, but in some cases that they acted in “self-defence” and in others that they were applying a “sanction”, a coercive countermeasure. In so doing, their intention was probably to emphasize that their action was in response to a wrongful attack by another party. The discussions which took place on such cases are therefore, for the most part, irrelevant so far as the applicability of the plea of necessity in this area is concerned.

64. In other cases again, particularly interventions in foreign territory for supposedly “humanitarian” purposes such as saving the lives of nationals or foreigners threatened by insurgents, hostile groups, and so on,¹³⁴ we can find an explicit, although not exclusive, appeal

to the plea of “necessity” in the justification offered by the Belgian Government for its dispatch of paratroopers to the Congo in 1960 to protect the lives of Belgian nationals and other Europeans who, it claimed, were being held as hostages by Congolese army mutineers and insurgents. According to one author, the Prime Minister (Mr. Eyskens) told the Senate that the Government had found itself “in a situation of absolute necessity”.¹³⁵ The Minister of Foreign Affairs, Mr. Wigny, in a statement to the Security Council, said that Belgium had been “forced by necessity” to send troops to the Congo, and emphasized that the action taken had been “purely humanitarian”, had been limited in its scope by its objective, and had been conceived as a purely temporary action, pending an official intervention by the United Nations.¹³⁶ The Congolese Government, in its reply, maintained that the ground asserted by Belgium was a pretext, that its real objective was the secession of Katanga and that, consequently, an act of aggression had taken place.¹³⁷ The views expressed in the Security Council were divided between the two opposing positions; both sides, however, focused on determination and evaluation of the facts.¹³⁸ No one took any position of principle with regard to the possible validity of a “state of necessity” as a circumstance which, if the conditions for its existence were fulfilled, could preclude the wrongfulness of an action not in conformity with an international obligation. Suffice it to note—and this is not unimportant—that there was no denial of the principle of the plea of necessity as such.¹³⁹

65. However, for our purposes the Belgian intervention in the Congo remains an isolated case. In the various more recent cases in which armed action has been taken in foreign territory to free the hostages of

¹³³ See, in addition to the works already mentioned in a footnote in section 3 of this chapter (*Yearbook... 1979*, vol. II (Part Two), p. 42, document A/CN.4/318 and Add.1-4, footnote 186); I. Brownlie, “International law and the activities of armed bands”, *International and Comparative Law Quarterly* (London), vol. 7, No. 4 (October 1958), pp. 731 *et seq.*; J. Charpentier, “Existe-t-il un droit de suite?” *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 2 (April-June 1961), pp. 301 *et seq.*; M. R. García-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff, 1962), pp. 115 *et seq.*; F. Pocar, *L'esercizio non autorizzato del potere statale in territorio straniero* (Padua, CEDAM, 1974), pp. 27 *et seq.*, 87 *et seq.*; A. F. Panzera, *Attività terroristiche e diritto internazionale* (Naples, Jovene, 1978), pp. 96 *et seq.*

¹³⁴ On the general question of the lawfulness or wrongfulness of such interventions since the adoption of the Charter, see in particular H. Waldock, “The regulation of the use of force by individual States in international law”, *Recueil des cours...*, 1952-II, (Paris, Sirey, 1953), vol. 81, p. 503; Bowett, *op. cit.*, pp. 87 *et seq.*; Brownlie, *International Law...* (*op. cit.*), pp. 290 *et seq.*; J. L. Brierly, *The Law of Nations*, 6th ed., rev. by H. Waldock (Oxford, Clarendon Press, 1963), pp. 427 *et seq.*; A. J. Thomas and A. Van Wynen Thomas, *The Dominican Republic Crisis 1965: Background Paper and Proceedings of the Ninth Hamarskjöld Forum* (Dobbs Ferry, N.Y., Oceana, 1967), pp. 16 *et seq.*; C. G. Fenwick, “The Dominican Republic: intervention or collective self-defence?”, *The American Journal of International Law* (Washington, D.C.), vol. 60, No. 1 (January 1966), pp. 64 *et seq.*; R. T. Bohan, “The Dominican case: unilateral intervention”, *ibid.*, No. 4 (October 1966), pp. 809 *et seq.*; R. B. Lillich, “Forcible self-help by States to protect human rights”, *Iowa Law Review* (Iowa City, Iowa), vol. 53, No. 2 (October 1967), pp. 325 *et seq.*; P. C. Jessup, *A Modern Law of Nations: An Introduction*, 3rd ed. (New York, Macmillan, 1968), pp. 169 *et seq.*; Lamberti Zanardi, *La Legittima difesa...* (*op. cit.*), pp. 74 *et seq.*

¹³⁵ D. W. McNemar, “The postindependence war in the Congo”, *The International Law of Civil War*, ed. R. A. Falk (Baltimore, Md., Johns Hopkins Press, 1971), p. 273. (For the original text of Mr. Eyskens’ statement, see W. J. Ganshof van der Meersch, *Fin de la souveraineté belge au Congo: Documents et réflexions* (Brussels, Institut royal des relations internationales, 1963), p. 457.)

¹³⁶ See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, paras. 182 *et seq.*, 192 *et seq.*; 877th meeting, p. 142; 879th meeting, para. 151.

¹³⁷ *Ibid.*, 877th meeting, paras. 31 *et seq.*

¹³⁸ *Ibid.*, 873rd meeting, para. 144; 878th meeting, paras. 23, 65, 118; 879th meeting, paras. 80 *et seq.*

¹³⁹ At the time of the second Belgian intervention in the Congo in 1964, on the other hand, the Belgian Government invoked as its ground the “consent” of the Congolese Government, which the latter disputed (*ibid.*, *Nineteenth Year, Supplement for October, November and December 1964*, documents S/6055 and S/6063). The operation was defined as an “emergency rescue mission”.

The justification advanced by the United States for intervening in the Dominican Republic to save endangered United States citizens and nationals of some other countries was simply the inability of the then Dominican Government to provide proper protection (see *Repertoire of the Practice of the Security Council, Supplement 1964-1965* (United Nations publication, Sales No. E.68.VII.1), pp. 149 *et seq.*)

terrorists who had hijacked aircraft,¹⁴⁰ the “justification” advanced by the Governments which mounted these raids has been either the consent of the State in whose territory the raid took place (Mogadishu, 1977; Larnaca, 1978) or “self-defence” (Entebbe, 1976). The concept of state of necessity was neither mentioned nor taken into consideration, even though some of the alleged facts stated by those who spoke of “self-defence” and who were contested on that point by their opponents¹⁴¹ may have borne more relation to state of necessity than to self-defence. Should this fact in itself be regarded as indirect proof of a conviction that it is impossible in principle to invoke “state of necessity” as a circumstance precluding wrongfulness, by way of exception, in connection with actions not in conformity with the obligation to refrain from committing any kind of assault on the territorial integrity of another State? Perhaps so, but it is also conceivable that the fact that States preferred to invoke other “grounds” rather than “necessity” was due, in some specific cases, to an intention of bringing out more clearly certain alleged aspects of the case in question (such as, for instance, the non-“innocence” of the State which was a victim of the attack) or to a belief that they could not prove that all the especially strict conditions for the existence of a genuine “state of necessity” were fulfilled in that case.¹⁴² In any event, while one can certainly discern in the discussions arising out of such cases in the Security Council a dominant tendency towards an attitude of the greatest severity to all forms of action which in one way or another constitute assaults on the territorial sovereignty of States, one cannot draw any conclusions from them, either for or against the admissibility in the abstract of the plea of necessity in such cases.¹⁴³

¹⁴⁰ On this point, see, in general, A.F. Panzera, “Raids e protezione dei cittadini all'estero”, *Rivista di diritto internazionale* (Milan), vol. 61, No. 4 (1978), pp. 759 *et seq.* See also U. Beyerlin, “Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 37 (1977), No. 2, pp. 213 *et seq.*; H. Strebel, “Nochmals zur Geiselnahme in Entebbe”, *ibid.*, No. 3–4, pp. 691 *et seq.*; the articles by C. Zorgbibe, “La protection d'humanité”, and J. Schwoebel, “Le raid israélien et la Charte de l'ONU”, published in *Le Monde*, 7 July 1976, p. 2 and 9 July 1976, p. 2; of F. Pocar, “Soltanto il consenso della Somalia ha permesso l'operazione militare”, published in *Corriere della Sera* of 19 October 1977, p. 2, the note by E. Sciso, “Il raid egiziano a Larnaca”, *Rivista di diritto internazionale* (Milan), vol. 61, No. 4 (1978), pp. 945 *et seq.*

¹⁴¹ For the various statements of position concerning the Israeli raid at Entebbe, and for the draft resolutions, none of which was adopted, see *Official Records of the Security Council, Thirty-first Year, Supplement for July, August and September 1976*, documents S/12123, 12124, 12132, 12135, 12136 and 12139, and *ibid.*, *Thirty-first Year*, 1939th, 1941st and 1942nd meetings.

¹⁴² We refer in particular to the conditions that there must be absolutely no other means of safeguarding the “essential” interest threatened in the case in question and that the action taken to protect that interest must not damage an equally essential interest of the State against which the action is directed.

¹⁴³ To Wengler as well (*op. cit.*, pp. 390–391), this question remains open. The case of the violation of the territory of a State

66. The practice of the United Nations itself does not, therefore, seem to us at present to be sufficiently copious and conclusive on this point to enable us to base on it a sure and definitive answer to the question posed earlier.¹⁴⁴ Having made that finding, we do not feel that we should pursue this research and venture ourselves to assume responsibility for taking a position on this specific point. What we have been considering is whether or not the wrongfulness of conduct not in conformity with the prohibition of certain limited actions involving the use of force in foreign territory—a prohibition which we believe is firmly established under the Charter system but to which, as indicated above,¹⁴⁵ we hesitate to ascribe the same force of *jus cogens* as must, in our view, be accorded to the prohibition of aggression—might be precluded in exceptional cases where all the strict conditions we have spelt out for recognition of a “state of necessity” really existed. As also noted above,¹⁴⁶ the answer to this question depends primarily on the interpretation to be placed on certain provisions of the Charter, an instrument of conventional origin, or, in other words, on certain primary rules enunciated in that instrument. The task of deciding what that answer will be therefore rests with the various organs responsible for such interpretation, and not with a draft concerning the definition of “secondary” rules on international responsibility on which the Commission is working. It will be quite sufficient, for our present purposes, to indicate clearly in the draft article which we shall formulate that whatever admissibility we decide is warranted, on certain conditions and within certain limits, in general international law for “state of necessity” as a circumstance precluding the wrongfulness of conduct not in conformity with an international obligation should always be understood as being subject to any different conclusion that might be necessitated in a given area, not only by the existence of a rule of *jus cogens*, but also by any explicit provisions of a treaty or other international instrument or the deductions to be drawn from them by implication.

67. What we have just said logically leads us to consider expressly and in greater depth than we have been able to do so far a side issue, but one the importance of which will be apparent to all. The question is, what kind of impact the existence, in a

carried out to prevent a natural catastrophe is perhaps that which is least open to argument. Even those writers who do not admit the plea of necessity find that the prohibition of the use of force set forth in Article 2, para. 4 of the Charter does not apply to the case where intervention in foreign territory is the only way of avoiding a natural catastrophe. See, for example, Brownlie, *International Law...* (*op. cit.*), p. 370, and K. Skubiszewski, “Use of force by States. Collective security. Law of war and neutrality”, *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), p. 775.

¹⁴⁴ Para. 57 above.

¹⁴⁵ Para. 58.

¹⁴⁶ *Idem.*

given sector of international law, of conventional provisions referring in one way or another to situations of necessity can have on the consequences which would otherwise follow from the general principle we shall have occasion to recognize as belonging to present-day international law with regard to the "plea of necessity". We have mentioned from time to time the possibility that, in imposing on the States parties obligations with regard to a certain object, a convention, whether multilateral or bilateral, may expressly provide in one of its general clauses that the States in question are not bound to comply with such obligations when a special situation of "necessity" prevents them from doing so. In such a case, there are various possibilities. First of all, it is possible that the area of international law to which the obligations laid down by the convention belong is one of those in relation to which we have been able to note that State practice is revealing of the existence, in general international law, of a principle recognizing—admittedly under extremely strict conditions—that "state of necessity" has the force of a circumstance precluding the wrongfulness of conduct not in conformity with an international obligation. In that case, the special clause in the convention may have no other *raison d'être* and no other effect than to make explicit and, if you will, to protect against any possible challenge consequences identical with those which would follow from simply applying the principle of general international law. More often, however, the purpose of including in the convention a clause which explicitly mentions "necessity" will be more specific. The parties to the convention may have wanted to prescribe less rigid conditions for the recognition of a situation of necessity as a ground for a State party to the convention not to comply with its obligations, or at least conditions other than those which must be fulfilled in order for there to be a "state of necessity" as provided for in general international law. The parties may also have wanted to spell out the essential interests the "necessary" safeguarding of which may be invoked to justify an exception to compliance with the obligations laid down by the convention,¹⁴⁷ since

¹⁴⁷ For instance, with regard to the protection of human rights, art. 4, para. 1, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, annex) provides that:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Similar provisions are contained in art. 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (See United Nations, *Treaty Series*, vol. 213, p. 233) and art. 27 of the American Convention on Human Rights of 22 November 1969 (OAS, *American Convention on Human Rights: "Pact of San José, Costa Rica"*, *Treaty Series*, No. 36 (Washington, D.C.), p. 9.

the requirements peculiar to the specific subject-matter of the convention and the special nature of the obligations laid down may necessitate such an adaptation of the general principle.¹⁴⁸ In that case, the special rule will obviously prevail, and the existence of a situation of necessity such as to justify non-compliance with an obligation will have to be appraised in accordance with the terms of that special rule, and not those of the principle of general international law.

68. The logically opposite case to the one considered in the preceding paragraph is where the multilateral or bilateral convention in question contains a clause *expressly precluding* any possibility of invoking any "necessity" whatever to justify the adoption by a State of conduct not in conformity with one of the obligations laid down in the convention. In such cases, which certainly occur less often (examples are to be found in the area of international conventions on the humanization of warfare), the principle of general international law relating to the plea of necessity will, of course, be automatically set aside so far as obligations under the convention are concerned. Even the fact that, in the specific case, all the varied and strict conditions required by that principle are unquestionably fulfilled will be unable to change this negative conclusion in any way.

69. However, examples can also be found of a third case. The plea of necessity may be explicitly provided for, not in a general clause of a convention covering all

¹⁴⁸ With regard to freedom of transit, for instance, art. 12 of the Convention on Transit Trade of Land-locked States of 8 July 1965 permits an exception to the rules laid down by the convention in case of an "emergency" endangering the "political existence or safety" of the transit State (see United Nations, *Treaty Series*, vol. 597, p. 56). Similar provisions are contained in art. 7 of the Statute on Freedom of Transit (League of Nations, *Treaty Series*, vol. VII, p. 28) and art. 19 of the Statute concerning the Regime of Navigable Waterways of International Concern (*ibid.*, p. 60). The Convention on Transit Trade of Land-locked States and the Convention on Facilitation of International Maritime Traffic of 9 April 1965 (United Nations, *Treaty Series*, vol. 591, p. 265) also provide for the possibility of applying, in derogation from the obligations laid down, such temporary measures as may be necessary to protect public morals, public health or security. In economic and commercial matters, multilateral agreements often permit member States to deviate from the obligations contained in them if this is necessary to protect human, animal or plant health, or the artistic or cultural heritage, or to prevent disorder, etc. (see, for instance, art. XX of the General Agreement on GATT (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1, pp. 37-38) and art. 12 of the convention establishing the European Free Trade Association (United Nations, *Treaty Series*, vol. 370, pp. 13-14). Sometimes the special rule goes so far as to provide that an appropriate body may relieve a State party to a general agreement of an international obligation where this is necessary on account of exceptional circumstances or emergency or *force majeure* (see International Sugar Agreement of 1968, art. 56, para. 1 (*ibid.*, vol. 654, p. 88); International Coffee Agreement of 1968, art. 57, para. 1 (*ibid.*, vol. 647, p. 74); International Cocoa Agreement of 1975, art. 60, para. 1 (*United Nations Cocoa Conference, 1975* (United Nations publication, Sales No. E.76.II.D.9), pp. 23-24).

the obligations laid down in the convention, but as part of a particular clause imposing a certain specified obligation on the States parties. This kind of explicit provision indicating that "necessity" may or may not constitute a ground for non-compliance, by way of exception, with the obligation laid down in the same article, can be either positive¹⁴⁹ or negative.¹⁵⁰ In both cases, there will then arise the question what conclusion is to be drawn by implication from that special provision, relating only to one specified obligation, with respect to the other obligations laid down by the convention. It will be possible to give a definitive answer in each case only by an interpretation of the convention in question. However, it would seem natural to us to recognize in principle that the fact that necessity has been acknowledged by way of exception as a possible ground for non-compliance with an obligation specially singled out can only imply a negative conclusion as to whether the same ground may be invoked for conduct not in conformity with any other obligation under the convention. Conversely, the fact that necessity has been explicitly ruled out as a ground for deviating from an obligation specially singled out must lead *a contrario* to the conclusion that necessity can still be invoked when the obligations called in question by the conduct of the State are other than the one in respect of which it has been ruled out.

70. A detailed review of the positions taken by authors of scholarly works from the time when the question of the admissibility of the plea of necessity in international law first arose might require too much space in a report which has already gone far beyond the usual bounds for research of this kind. Moreover, we have had occasion to refer to the views expressed by the various writers who, in successive eras, have made the greatest contribution to the definition of the concept of "state of necessity", or simply "necessity", including (a) the arguments they have advanced in the discussion on whether or not such a circumstance is admissible as a ground for precluding the wrongfulness of State conduct not in conformity with an international obligation; (b) the "theoretical" basis they have sought to provide for the concept they adopted and the thesis they espoused; (c) the conditions which they believe must be fulfilled in order for a specific situation to merit the legal description of a "state of necessity" and thus have the effect of precluding the wrongfulness, otherwise established, of

State conduct.¹⁵¹ There is therefore every reason to avoid unnecessary repetition and confine ourselves here to describing the broad lines of the historical course of the legal literature on the basic question of the recognition by general international law of "state of necessity" as one of the circumstances which may by way of exception, justify conduct by a State different from that which it ought to have adopted. We shall consider in greater detail only the trends discernible among twentieth-century writers, particularly those who have dealt with the subject since the Second World War.

71. The idea that necessity may, by way of exception, constitute a ground for State conduct not in conformity with an international obligation was explicitly accepted—in the context, however, of research in which the study of internal law and of international law was intermingled—by the "classical" writers in our field, such as B. Ayala, A. Gentili, and especially H. Grotius, in the sixteenth and seventeenth centuries, and S. Pufendorf, C. Wolff and E. de Vattel in the eighteenth century.¹⁵² It should be noted that, while this acceptance was uncontested, very restrictive conditions were attached to it. During the nineteenth century, the first attempts were made by some of the champions of this idea¹⁵³ to clothe recognition of the ground of necessity with a "justification" in principle, which was as ineffectual as it was unnecessary. As we have seen, the problem with these attempts is that they seriously complicated and obscured the issue. They were accompanied by the first signs of resistance by

¹⁵¹ On all these points, see above, para. 4 and footnote 7; para. 7 and footnotes 9 and 10; para. 8 and footnotes 12–14; para. 9 and footnotes 16–19; para. 11 and footnotes 20 and 21; para. 12 and footnotes 22–24; para. 13 and footnotes 25 and 26; para. 14 and footnote 27; para. 15 and footnotes 29–31; para. 16 and footnote 32; para. 17 and footnote 34; para. 18 and footnotes 35 and 36.

In addition, a truly exhaustive analysis of the views of writers on "state of necessity", from the time when this question was first studied up to the present, has been made by the Secretariat: "State of necessity (*état de nécessité*) as a circumstance precluding wrongfulness: A survey of doctrinal views" (unpublished study prepared in 1979).

¹⁵² B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582), *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1912), vol. II (English trans.), p. 135; A. Gentili, *De iure belli, libri tres* (1612), *The Classics of International Law* (Oxford, Clarendon Press, 1933), vol. II (English trans.), p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646), *The Classics of International Law* (Oxford, Clarendon Press, 1925), vol. II (English trans.), pp. 193 *et seq.*; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688), *The Classics of International Law* (Oxford, Clarendon Press, 1934), vol. II (English trans.), pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764), *The Classics of International Law* (Oxford, Clarendon Press, 1934), vol. II (English trans.), pp. 173–174; de Vattel, *op. cit.*, p. 149.

¹⁵³ Among others, Klüber, *op. cit.*, pp. 75–76; Hall, *op. cit.*, pp. 332 *et seq.*; Wheaton, *op. cit.*, pp. 150 *et seq.*; Heffter, *op. cit.*, pp. 53 *et seq.*; Rivier, *op. cit.*, pp. 277–278; Twiss, *op. cit.*, pp. 178 *et seq.*, 184–185.

¹⁴⁹ See footnote 105 above.

¹⁵⁰ In art. 4 of the International Covenant on Civil and Political Rights, para. 1, quoted in footnote 147 above, is followed by a paragraph specifying that "no derogation" may be made under the provisions of para. 1 from certain articles of the Covenant, such as art. 7, which prohibits any inhuman or degrading treatment, and art. 8, which prohibits slavery, servitude, and so on. In this case, the fact that necessity is ruled out as a ground for non-compliance with certain provisions of the Covenant obviously implies that it may be invoked as a ground for non-compliance with any other provision, subject, however, to the terms and limits laid down in art. 4, para. 1, rather than those prescribed by the principle of general international law.

some writers¹⁵⁴ to the previously uncontested principle. It is worth mentioning once again, however, that the arguments advanced by these first opponents and repeated by nearly all those who took the same view did not really constitute a rejection of the actual idea of "necessity" as a ground, acceptable by way of exception, for certain conduct by States. Rather, they represented a dual reaction: (a) on the theoretical plane, to the impediments of "bases" and "justifications" which the champions of the idea of "necessity" were now trying to attach to it, and (b) on the practical plane, to the outright abuses of it by some Governments. To put it bluntly, it was, firstly, the idea of the existence of a "fundamental" and "natural right" to "self-preservation"¹⁵⁵ that was the target of the supporters of this critical reappraisal, and it was, secondly, the concern aroused by the quite inadmissible use made by States of that idea of self-preservation or of the idea of *Not* for purposes of expansion and domination¹⁵⁶ that caused these writers to entrench themselves in a position of hostility on principle to the acceptance of the concept of "state of necessity" in the international legal order. However, it must be noted that some writers who were particularly sensitive to the realities of international life, such as Westlake,¹⁵⁷ while indicating their opposition to any general recognition of the ground of necessity in international law, did not feel obligated to press their opposition to the point of denying the applicability of that ground to conduct not in conformity with certain categories of obligations. In other words, what began vaguely to take shape was primarily opposition to allowing necessity to be invoked in justification of unlawful actions involving the use of force against the sovereignty of others; greater precision in terminology and in demarcation could not, of course, come until later. On the other hand, in cases which still involved the adoption by a State of conduct not in conformity with an international obligation but in which the obligation related to a less essential area and one less dangerous to international life, one has the impression that the opposition to regarding state of necessity as a circumstance which might preclude the wrongfulness of the conduct in question could find no justification and was not maintained.

¹⁵⁴ See P. Fiore, *Droit international public*, French trans. by P. Pradier-Fodéré (Paris, Durand, 1868), pp. 344 *et seq.*; R. Piédelièvre, *Précis de droit international public* (Paris, Librairie Cotillon, 1894), vol. I, p. 175; P. Pradier-Fodéré, *Traité de droit international public européen et américain* (Paris, Pedone-Lauriel, 1885), vol. I, pp. 374 and 381; J. Westlake, *Chapters on the Principles of International Law* (Cambridge, University Press, 1894), pp. 113–114 and pp. 257 *et seq.*

¹⁵⁵ In para 7, we specifically criticized the idea of this so-called "right" and the idea of other equally spurious "fundamental rights", both being the result of mere abstract speculation.

¹⁵⁶ In addition to which there was the fact that States, in asserting their inalienable right to self-preservation, also showed a marked tendency to set themselves up as sole judges of the "necessity" invoked to justify their conduct.

¹⁵⁷ Westlake, *op. cit.*, p. 115.

72. During the first part of the twentieth century, and more specifically during the period preceding the Second World War, most writers still clearly shared the view that "necessity" constituted, in international law, a justification precluding, at least in some cases, the wrongfulness of an act committed in breach of international law by a State impelled to that course by a "state of necessity." Among them were Anzilotti, von Liszt, Kohler, Schoen, Faatz, Strupp, Hershey, Fenwick, Le Fur, Baty, Potter, Wolff, Spiropoulos, Vitta, Weiden, François, Cohn, Ago and Sperduti.¹⁵⁸ Only a few of these writers¹⁵⁹ were still advancing the idea of the right to self-preservation as the theoretical basis for the plea of necessity, but this was now rejected by most writers, who fully realized that the idea of this spurious "basis" was downright injurious to the thesis they were defending.¹⁶⁰ The concept of "state of necessity" gradually came to mean a factual situation forming the setting in which a certain State act was committed, a situation which could be taken into consideration by the law as an exceptional ground precluding the otherwise undeniable wrongfulness of that act.¹⁶¹ In formulating the concept which they respectively proposed, some writers, particularly German, Italian and French writers, emphasized the influence of the corresponding concept in internal law, that concept having been codified in their countries at the turn of the

¹⁵⁸ Anzilotti, "La responsabilité internationale des Etats..." (*loc. cit.*), pp. 303 *et seq.*, and Corso ..., 4th ed. (*op. cit.*), pp. 414 *et seq.*; von Liszt, *op. cit.*, pp. 201–202; J. Kohler, *Not kennt kein Gebot—Die Theorie des Notrechtes und Ereignisse unserer Zeit* (Berlin, Rotschild, 1915); P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, Kern's, 1917), Supplement 2 to vol. X, pp. 110 *et seq.*; Faatz, *op. cit.*; Strupp, "Das völkerrechtliche Delikt" (*loc. cit.*), pp. 122 *et seq.*, and "Les règles générales..." (*loc. cit.*), pp. 567–568; Hershey, *op. cit.*, pp. 230 *et seq.*; Fenwick, *op. cit.*, pp. 142–143; L. Le Fur, "La théorie du droit naturel depuis le XVII^e siècle et la doctrine moderne", *Recueil des cours...*, 1927–III (Paris, Hachette, 1928), vol. 18, pp. 429 *et seq.*; T. Baty, *The Canons of International Law* (London, Murray, 1930), pp. 95 *et seq.*; K. Wolff, "Les principes généraux du droit applicables dans les rapports internationaux", *Recueil des cours...*, 1931–II (Paris, Sirey, 1932), vol. 36, pp. 519 *et seq.*; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), pp. 287–288; Vitta, *loc. cit.*, pp. 288 *et seq.*; Weiden, *loc. cit.*, pp. 105 *et seq.*; François, *loc. cit.*, pp. 182–183; Cohn, *loc. cit.*, p. 318; Ago, *loc. cit.*, pp. 540 *et seq.*

¹⁵⁹ For example, Liszt, Hershey, Faatz, Fenwick, Baty and Vitta.

¹⁶⁰ There were some, like Strupp, who still referred to a "right" of necessity, but, as we have seen, this was a lonely position. On all these points, see paras. 7 to 9 above.

¹⁶¹ The definition of "state of necessity" given by Anzilotti may be considered characteristic of this period. According to Anzilotti, the case referred to when this concept is invoked is one where "a State, constrained by the necessity of saving itself from a grave and imminent peril which it did not deliberately cause and which it cannot otherwise avert, commits an act in contravention of the right of another State" (Anzilotti, *Corso...*, 4th ed. (*op. cit.*), p. 414.

century.¹⁶² However, most of the writers in question, while pointing out the analogies with the corresponding concept in internal law, were at pains to emphasize that it was not simply by analogy that they saw "state of necessity" as an inherent concept of international law as well. They did so because their belief was confirmed by a study of State practice, to which some of them devoted renewed attention. These writers, like those holding the opposite view, were not unaware that abuses had been and were being committed on the basis of the concept of "necessity", but they were careful to point out that other legal principles had also lent themselves to abuses in interpretation and application and that to deny, in the abstract, the existence of principles which were clearly operative in the real world of international law would not check the abuses committed under the pretext of applying the principles in question. What such writers were more concerned to highlight was, therefore, the inherent limits to the applicability of the ground of necessity, and it was precisely during this period that the first attempt was made to define the conditions set out above.¹⁶³

73. During the same period, the number of writers arguing against the applicability in international law of the concept of "state of necessity" increased. Among the names which come to mind are those of Fauchille, Borsi, Cavaglieri, de Visscher, Stowell, Brierly, Kraus, van Hill, Bourquin, Kelsen and Basdevant.¹⁶⁴ The school of thought which they represented remained, however, in the minority. Apart from some attempts—not always justifiable—to dispute the interpretation of State practice made by their opponents, the arguments

¹⁶² This is probably why writers like Wolff, Spiropoulos and Cohn regarded the principle that the ground of necessity was admissible in international law as one of the "general principles of law" referred to in the Statute of the Permanent Court of International Justice (art. 38) (*P.C.I.J., series D, No. 1, p. 22*).

¹⁶³ See paras. 12–18.

¹⁶⁴ P. Fauchille, *Traité de droit international public* (8th ed. of *Manuel de droit international public* by M.H. Bonfils) (Paris, Rousseau, 1922), vol. I, part 1, pp. 418 *et seq.*; Borsi, *loc. cit.*, pp. 170 *et seq.*; A Cavaglieri, "Lo stato di necessità nel diritto internazionale", *Rivista italiana per le scienze giuridiche* (Rome), vol. LX (1917), No. 1, pp. 89 *et seq.*, and No. 2, pp. 171 *et seq.*; C. de Visscher, "Les lois de la guerre..." (*loc. cit.*), pp. 74 *et seq.*, and "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 111–112; E.C. Stowell, *Intervention in International Law* (Washington, D.C., Byrne, 1921), pp. 399 *et seq.*; J.L. Brierly, "The shortcomings of international law", *The British Year Book of International Law*, 1924 (London), vol. 5, pp. 10–11; H. Kraus, "La morale internationale", *Recueil des cours...*, 1927–I (Paris, Hachette, 1928), vol. 16, pp. 523–524; W. van Hille, "Etude sur la responsabilité internationale de l'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. X, No. 3 (1929), pp. 567 *et seq.*; M. Bourquin, "Règles générales du droit de la paix", *Recueil des cours...*, 1931–I (Paris, Sirey, 1932), vol. 35, p. 220; H. Kelsen, "Unrecht und Unrechtsfolgen im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 564 *et seq.*; J. Basdevant, "Règles générales du droit de la paix", *Recueil des cours...*, 1936–IV (Paris, Sirey, 1937), vol. 58, pp. 551 *et seq.*

advanced by these writers in support of their thesis differed little from the ones formulated by those who had taken the same position in the nineteenth century. In their writings, we again find the polemics—no doubt well-founded, but irrelevant to the question before us—against the so-called fundamental rights of States, particularly the "right of self-preservation".¹⁶⁵ We also find the usual references to the dangers of abuse of the contested concept, an attendant drawback being that there was, in international law, no judicial organ having compulsory jurisdiction which would determine, in case of dispute, whether or not there existed a state of necessity constituting a ground for non-compliance with an international obligation. Here again, however, the drawback is simply one that is inherent in the entire international legal system and one cannot, because of it, call in question the validity of all the principles of the system. Moreover, one is struck, on close examination, by the fact that in this school of thought the opposition to "state of necessity" and the warnings against its dangers focused on these cases in which the concept had been invoked as a pretext to legalize a patently illegitimate use of violence, namely, the flagrant breach by a State of an international obligation to respect the territorial sovereignty and independence of another State; the invasion of neutralized Belgium and Luxembourg was at that time the most recent and most painful example of such a breach. In other areas, where the fear of abuses is obviously not so great, it can be seen once again that the objections to the applicability of the ground of necessity were much less strenuous, and that some writers who were generally reluctant to agree to any mention of "state of necessity in international law" nevertheless recognized the applicability of this concept in other areas, provided that certain conditions were fulfilled and certain safeguards were afforded.¹⁶⁶

74. After the Second World War, opinions in the literature on the subject of concern to us continued to be divided. Most writers of the time again favoured recognizing necessity as a circumstance precluding wrongfulness. Among them were Ross,¹⁶⁷ Redslob,¹⁶⁸

¹⁶⁵ It is primarily as an expression of opposition to the theory of the State's fundamental right to self-preservation that one should read the Declaration of the Rights and Duties of Nations adopted in 1916 by the American Institute of International Law, art. I of which reads:

"Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states." (Carnegie Endowment for International Peace, *Recommendations on International Law and Official Commentary thereon of the Second Pan American Scientific Congress, held in Washington December 27, 1915–January 8, 1916*, ed. J. B. Scott (New York, Oxford University Press, 1916), p. 46.)

¹⁶⁶ See for example Verdross, "Règles générales..." (*loc. cit.*), pp. 489 *et seq.*; and Rodick, *op. cit.*, pp. 119 *et seq.*

¹⁶⁷ Ross, *op. cit.*, pp. 247 *et seq.*

¹⁶⁸ Redslob, *op. cit.*, pp. 248 *et seq.*

Bin Cheng,¹⁶⁹ Schwarzenberger,¹⁷⁰ Oppenheim-Lauterpacht,¹⁷¹ Morelli,¹⁷² Balladore Pallieri,¹⁷³ García Amador,¹⁷⁴ von der Heydte,¹⁷⁵ Buza,¹⁷⁶ Sereni,¹⁷⁷ Monaco,¹⁷⁸ Sørensen,¹⁷⁹ Favre,¹⁸⁰ Wengler,¹⁸¹ Schlochauer,¹⁸² Graefrath, Oeser and Steiniger¹⁸³ and Zourek.¹⁸⁴ These writers all accepted a restrictive concept of state of necessity. Some of them maintained, like others before them, that in order to avoid abuses it would be wise to limit the applicability of the plea of necessity solely to cases of a threat to the

¹⁶⁹ Cheng, *op. cit.*, pp. 31, 69 *et seq.*

¹⁷⁰ Schwarzenberger, "The fundamental principles..." (*loc. cit.*), p. 343.

¹⁷¹ L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. by H. Lauterpacht (London, Longmans, Green, 1955), vol. I, pp. 297 *et seq.*

¹⁷² Morelli, *op. cit.*, pp. 338–339.

¹⁷³ Balladore Pallieri, *op. cit.*, pp. 247–248.

¹⁷⁴ F.V. García Amador, "Third report on State responsibility", *Yearbook... 1958*, vol. II, pp. 47 *et seq.*, document A/CN.4/111. A text in the preliminary draft articles prepared in 1958 by the Commission's first rapporteur on State responsibility was worded as follows:

"Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries caused to an alien if the measures taken are the consequence of 'force majeure' or of a state of necessity due to a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means." (*Ibid.*, p. 72, document A/CN.4/111, annex, art. 13, para. 1.)

In the revision of the preliminary draft articles prepared by García Amador in 1961, the case of state of necessity was separated from *force majeure*. The paragraph relating to state of necessity was worded as follows:

"Likewise, an act shall not be imputable to the State if it is the consequence of a state of necessity involving a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke that peril and was unable to counteract it by other means and so to prevent the injury." (*Yearbook... 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum, art. 17, para. 2.)

¹⁷⁵ F. A. von der Heydte, *Völkerrecht, Ein Lehrbuch* (Cologne, Verlag für Politik und Wirtschaft, 1958), vol. I, p. 314.

¹⁷⁶ Buza, *loc. cit.*, pp. 205 *et seq.*

¹⁷⁷ Sereni, *op. cit.*, vol. III, pp. 1528 *et seq.*

¹⁷⁸ R. Monaco, *Manuale di diritto internazionale pubblico*, 2nd ed., rev. (Turin, Unione tipografico-editrice torinese, 1971), p. 574.

¹⁷⁹ Sørensen, *loc. cit.*, pp. 219 *et seq.*

¹⁸⁰ Favre, "Fault as an element..." *loc. cit.*, pp. 565 *et seq.*, and *Principes du droit des gens (op. cit.)*, pp. 643–644.

¹⁸¹ Wengler, *op. cit.*, pp. 387 *et seq.*

¹⁸² H.J. Schlochauer, "Die Entwicklung des völkerrechtlichen Deliktsrechts", *Archiv des Völkerrechts* (Tübingen), vol. 16 (1975), No. 3, pp. 270 *et seq.*

¹⁸³ Graefrath, Oeser and Steiniger, *op. cit.*, pp. 74–75. See also Steiniger, *loc. cit.*, p. 45; and art. 10, para. 6 of the draft convention on international responsibility prepared by B. Graefrath and P. A. Steiniger, which states:

"Die Entschädigungspflicht entfällt bei höherer Gewalt sowie im Falle eines Staatsnotstandes." [The obligation to make reparation does not apply in cases of *force majeure* or state of emergency.] (Graefrath, Oeser et Steiniger, *op. cit.*, p. 234.)

¹⁸⁴ Zourek, *loc. cit.*, pp. 66 *et seq.*

"existence" of the State. Others, however, considered highly inopportune the very idea of such a limitation, which was the result of reasoning abstractly on the basis of internal law, in view of the fact that cases where States invoked a threat to their existence as justification for their actions were precisely the ones in which the most serious abuses have been committed. They therefore argued, in accordance with practice, that the ground of necessity should apply in cases where the essential interests jeopardized were interests other than the State's concern for its "existence". A point frequently emphasized was that, in any event, there must be a clear difference in magnitude between the "essential" interest of a State which was safeguarded by the "necessitated" action in breach of international law and the sacrificed interest of another, innocent State, which must perforce be of less importance. There gradually emerged the question whether the applicability of the ground of necessity should not be ruled out entirely in the case of conduct not in conformity with the obligation to refrain from the use of force against other State or, at the very least, in the most serious cases of such conduct.

75. Many present-day writers are also opposed, at least in principle, to acceptance of the plea of necessity. Mention may be made of Hazan,¹⁸⁵ Glaser,¹⁸⁶ Guggenheim,¹⁸⁷ once again de Visscher,¹⁸⁸ Sibert¹⁸⁹ Bowett,¹⁹⁰ Dahm,¹⁹¹ Quadri,¹⁹² Delbez,¹⁹³ Cavaré,¹⁹⁴ Jiménez de Aréchega,¹⁹⁵ Ténékidès,¹⁹⁶ Brownlie,¹⁹⁷ Combacau,¹⁹⁸ Taoka,¹⁹⁹ Lamberti Zanardi.²⁰⁰ The

¹⁸⁵ Hazan, *op. cit.*

¹⁸⁶ S. Glaser, "Quelques remarques sur l'état de nécessité en droit international", *Revue de droit pénal et de criminologie* (Brussels), No. 6 (March 1952), pp. 599 *et seq.*

¹⁸⁷ P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 60 *et seq.*

¹⁸⁸ C. de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris, Pedone, 1970), pp. 314 *et seq.*

¹⁸⁹ M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. I, pp. 236–237.

¹⁹⁰ Bowett, *op. cit.*, p. 10.

¹⁹¹ Dahm, *op. cit.*, pp. 438 *et seq.* This writer, while denying the existence of a general law of necessity, recognizes that the state of necessity may represent a circumstance precluding wrongfulness in a whole series of special cases.

¹⁹² R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), pp. 226 *et seq.*

¹⁹³ L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), pp. 371–372.

¹⁹⁴ L. Cavaré, *Le droit international public positif*, 3rd ed., rev. by J.-P. Quéneudec (Paris, Pedone, 1969), vol. II, pp. 499–500.

¹⁹⁵ E. Jiménez de Aréchega, "International responsibility", *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), pp. 542–543.

¹⁹⁶ G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 786.

¹⁹⁷ Brownlie, *International Law... (op. cit.)*, pp. 428 *et seq.*

¹⁹⁸ Combacau, *loc. cit.*, pp. 658–659.

¹⁹⁹ R. Taoka, *The Right of Self-defence in International Law* (Osaka, Osaka University of Economics and Law, 1978), pp. 82 *et seq.*

²⁰⁰ Lamberti Zanardi, "Necessità..." (*loc. cit.*), pp. 898 *et seq.*

main reason for their opposition is still the old fear of abuses, a fear further increased as a result of the use made of this "plea" in the 1920s and 1930s, for example, by Japan in 1933. However, if the writings of these authors are analysed more thoroughly, two things quickly become apparent. Firstly, some of them (Glaser and Taoka in particular) are at pains to point out explicitly that "state of necessity" could play a very useful role were it not for this danger of abuse. Secondly, it becomes increasingly clear that so far as the possibility of abuses of the concept of state of necessity is concerned, the fears of the writers we have named relate primarily to breaches of the obligation which was most solemnly proclaimed in the Charter of the United Nations—and which has unquestionably acquired the force of *jus cogens* in present-day international law. Apart from that, it is particularly interesting to note that a good many of these authors (such as Glaser, Quadri and Jiménez de Aréchaga) accept the possibility of invoking a state of necessity in cases in which there are fewer and less serious possibilities of abuse, and in particular where the need to protect a "humanitarian" interest of the population is involved.²⁰¹ It should be noted that other writers, while objecting to the idea of "necessity" as a separate plea, at the same time adopt broad concepts of "self-defence"²⁰² and "*force majeure*",²⁰³ thus making it possible to include under these other accepted "pleas" acts of a State not in conformity with international obligations which should be more correctly be regarded as acts committed in a "state of necessity".

76. Where the subject with which we are dealing is concerned, a general criticism that may in our opinion be levelled against much of the legal literature, erudite as it is, is that the conclusions formulated were reached too much on the basis of theoretical reasoning or considerations of expediency, rather than as a result of a direct and exhaustive examination of what practice shows to be the *opinio juris* of the members of the international community. Apart from this, on thorough reflection, the divergence of views which seems to divide the latest generation of writers, like their predecessors, into two opposing camps is in fact much less radical than it appears to be at first sight and than some vehement assertions would have us believe. In the final analysis, the "negative" position towards state of necessity amounts to this: we are opposed to recognizing the ground of necessity as a principle of general international law because States use and abuse that so-called principle for inadmissible and often unadmittable purposes; but we are ultimately prepared

to grant it a limited function in certain specific areas of international law less sensitive than those in which the abuses we deplore usually occur. The "affirmative" position, reduced to essentials, is: we accept the plea of necessity as constituting a recognized principle of existing general international law, and we cannot overlook the function which this concept performs in legal relations between States, as in all other legal systems; but we are careful to lay down very restrictive conditions for the application of this principle so as to prevent it from becoming an all-purpose "plea" for too easy breaches of international law; we especially want to make it impossible for it to operate in those areas where abuses have traditionally occurred in the past. Thus, it is easy to see that the gap separating the most "reasoned" positions of the two camps is a narrow one, and we do not really think that theoretical differences, the importance of which has often been exaggerated, are a serious obstacle to the completion of the task assigned to us.

77. The time has come to sum up this lengthy discussion of the subject-matter of the present section. We attempted first of all to analyse the concept of "state of necessity" (or simply "necessity"), separating it from the other concepts dealt with in chapter V, and in particular stripping it of the veneer, inimical to a proper understanding of the concept, superimposed on it by the natural law theory of the fundamental rights of States. We especially tried to show that, for our purposes, "state of necessity" should be understood to mean not just any "right" exercised by a State, but rather a factual situation accompanying the commission by the State in question of an act contrary to law, the question being whether or not there may, in international law, be ascribed to that situation the force of a circumstance precluding the wrongfulness of the act. We then proceeded to determine, one by one, the various strict conditions failing the fulfilment of all of which it would, in our view, be impossible to recognize the existence of a true "state of necessity", irrespective of the force one wished to ascribe to the latter.

78. Next, in keeping with our fundamental criterion of basing our conclusions solely on an inductive method and rejecting in advance any which are arrived at purely in the abstract, we considered the realities of international life, as reflected in judicial or arbitral decisions and in State practice. We carried out this investigation in all areas where the question of a plea of necessity has arisen. This meant reviewing cases in which economic survival, the feeding of the population and the protection of the ecological order were presented as essential interests of a State, the safeguarding of which was deemed "necessary". We took into consideration cases in which a state of necessity was invoked as a ground for non-compliance with international financial obligations, obligations to refrain from certain acts of jurisdiction on the high seas, obligations concerning the treatment of foreigners and their property, and so on. We examined cases in which the ground of necessity was invoked both in time of

²⁰¹ Quadri (*op. cit.*, p. 226) and Jiménez de Aréchaga (*loc. cit.*, p. 543) give the example of the requisitioning of cargo of foreign ships in case of famine in a country; Brownlie (*International Law... (op. cit.)*, p. 370) mentions actions necessary to avert a natural disaster, the collapse of a dam, and so on.

²⁰² For example, de Visscher ("*La responsabilité des Etats*" (*loc. cit.*), pp. 108–109) and Bowett (*op. cit.*).

²⁰³ For example, Delbez (*op. cit.*, p. 372).

peace and in time of war, in connection with obligations under peacetime law or under the law of war and of neutrality. And we were compelled to recognize that, in the areas considered, state of necessity could play a role as a circumstance precluding the wrongfulness of State conduct not in conformity with an international obligation.

79. When, on the other hand, we came last of all to the question of the present-day reactions of the *opinio juris* of the international society to any appeals which might be made to the idea of "necessity" in the area on which the arguments concerning the uses and abuses of that concept have traditionally centred, namely, the area of obligations prohibiting the use of force, we were able to observe an outright rejection of the idea that a "plea of necessity" could absolve a State of the wrongfulness attaching to an act of aggression committed by that State. We have also noted that the exclusion of this "plea" should logically extend to any other violation of an obligation arising out of a rule of *jus cogens*, out of a peremptory norm of international law. Finally, we saw what a very strict attitude the members of the international community nowadays display towards actions which, while lacking the full gravity of a true act of aggression, nevertheless involve an assault by a State on the territorial sovereignty of another State; and we noted that it remained an open question whether the interpretation of the Charter of the United Nations or of other international instruments would entail the total exclusion of the applicability of the plea of necessity to such acts or whether all that was required in connection with them was greater strictness in determining if a true "state of necessity" existed, with the aim of avoiding any abuses that might be committed under cover of "humanitarian" or other purposes. It now remains to reflect in a draft article the results of the study summarized above.

80. One last comment needs to be made. It may be that someone, taking an erroneous view of "progressive development", will suggest that the concept of "necessity" should be deleted entirely from among the possible circumstances precluding the wrongfulness of State conduct. We cannot agree. The application of the concept must, of course, be ruled out wherever it is actually dangerous, but not where it has been and continues to be useful as a "safety-valve", to relieve the inevitably untoward consequences of a concern for adhering at all costs to the letter of the law. We must ensure that the fundamental requirement of respect for the law does not ultimately lead to the kind of situation that is perfectly described by the adage *summum jus, summa injuria*. Moreover, the concept of "state of necessity" is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms; in that case, the only result would be the unhappy one of distorting and obscuring other concepts, the precise delimitation of which is no less essential.

81. In the light of the foregoing, we propose that the Commission should adopt, for the article on the subject, the following text:

Article 33. State of necessity

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if the State had no other means of safeguarding an essential State interest threatened by a grave and imminent peril. This applies only in so far as failure to comply with the obligation towards another State does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard.

2. Paragraph 1 does not apply if the occurrence of the situation of "necessity" was caused by the State claiming to invoke it as a ground for its conduct.

3. Similarly, paragraph 1 does not apply:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law, and in particular if that act involves non-compliance with the prohibition of aggression;

(b) if the international obligation with which the act of the State is not in conformity is laid down by a conventional instrument which, explicitly or implicitly, precludes the applicability of any plea of "necessity" in respect of non-compliance with the said obligation.

6. SELF-DEFENCE

82. Not until relatively recent times did the international legal order adopt a concept of "self-defence" comparable, in essential respects, to that current in national legal systems. This does not mean that publicists had not already employed, in earlier centuries, a terminology evocative of similar ideas, but in reality they were thinking of something else. The distinction drawn by Grotius and by those writing before him, which was subsequently perpetuated by the doctrine of natural law, between "just war" and "unjust war" relied on ideas akin to ethics rather than to law. Even disregarding this aspect, when an author like Emmerich de Vattel, for example, proposed a concept of "just causes of war", which conceded to nations the right to employ force only in their own defence and for the maintenance of their rights,²⁰⁴ he included among these "just causes" not only defence against armed attack or against the threat of such an attack but also the reaction deemed to be "legitimate" as such, even if it took the form of an offensive war, in response to an *iniuria* or *the threat of an iniuria*—that

²⁰⁴ De Vattel, *op. cit.*, book III, chap. III, para. 26, *The Classics of International Law* (*op. cit.*), vol. III, pp. 243–244.

is, the actual or imminent impairment of a substantial right. Neither his ideas nor those of the authors who followed his line of thinking had much chance of developing and evolving, for in consequence of the triumph, at a certain time, of the ideas of legal positivism and of the voluntarist State, any thought of differentiating between forms of recourse to force, including war, on the basis of the legitimate or illegitimate nature of this recourse in law was inevitably dropped. The fact that States blamed each other for a war, their oft-repeated assertions of the allegedly "defensive" character of the wars started by them and the implied lip-service paid to the idea of the moral superiority of the defender's position vis-à-vis the attacker's, reflected merely the need to give world public opinion, and above all their own citizens, a prestige opinion of themselves; but it would be wrong to regard this as reflecting any realization of the need for a "legal" justification of their comportment. Logically, in such a context the idea of "self-defence", properly so called, could have no place.²⁰⁵ Consequently, it was not until the legal conscience of States had to react to the horrors and disastrous consequences of the First and Second World Wars that the preconditions for the admission of the notion of "self-defence" *stricto sensu* into international law were created.

83. The absolutely indispensable premise for the admission of the idea of self-defence, with its intrinsic meaning, into a particular system of law is that the system must have contemplated, as a general rule, the prohibition of the indiscriminate use of force by private subjects, and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another. Accordingly, if self-defence is to be

regarded as an exceptional circumstance precluding the wrongfulness of conduct inconsistent with a general obligation to refrain from the use of force, it would be meaningless to think of it in the context of a system of law to which this obligation is unknown.

84. In national systems of law, there is another premise governing the application of the notion of "self-defence", a premise which in logic is not so indispensable as the one mentioned above but which has been confirmed in the course of history as its necessary complement. In these legal systems, the use of force, even for strictly defensive purposes, is likewise not admitted as a general rule, but also only as an exception to a rule under which a central authority has the monopoly or virtual monopoly of the use of force for guaranteeing everyone's respect for the integrity of others. Only in specific situations where, by its very nature, the use of force by the agencies of the central authority cannot be resorted to promptly and efficiently enough to protect a subject against an attack by another does the use of means of defence involving force by the subject in question remain legitimate.²⁰⁶

85. As the present author has mentioned above and will explain in greater detail below, the international legal order did not really begin until relatively recently to contemplate a limitation for the use of force as a means employed by States to safeguard their rights and their interests. Only about fifty years ago did international law reach the position where it could outlaw war as an instrument of international policy. Only since then, therefore, after the fulfilment of this paramount condition, which in essence is reflected in the prohibition of armed aggression and offensive war, has there come to be recognized in international relations the fundamental principle that the only recourse to war compatible with the law is that which takes place as a *defence* against an attack by another subject in breach of the prohibition.

86. Again, the world had to wait until after the Second World War for international law to experience a first attempt (ambitious in its intentions but for the time being hardly very effective) to centralize the power to use force. By virtue of agreed provisions, recourse to armed force, even by the State suffering an attack by another, was no longer to be admissible except in these exceptional, limited and temporary circumstances characterizing specifically the notion of "self-defence" as it finally crystallized in the general theory of domestic law. Not wishing to comment retrospectively on the progress reached in this further stage, this author would not for the moment go further than to say that the prohibition, which at present is undeniably imposed on every State from engaging in

²⁰⁵ Nor is the present writer convinced by the idea advanced by some authors that a true notion of "self-defence" evolved in the nineteenth century, not in connection with recourse to war but in connection with enforcement action other than war. Among modern Italian publicists, Lamberti Zanardi cites this idea. In his view, international customary law in the second half of the nineteenth century already prohibited the use of force in forms other than war, but at the same time considered lawful the use of force by a State in response to the wrongful use of force by another State. Lamberti Zanardi cites, in this regard, positions taken by State organs where the lawfulness of acts involving the use of force was affirmed so long as those acts had been committed in "self-defence". He concludes that, in the latter part of the nineteenth century, a customary law had developed "which made self-defence the condition for justification of normally wrongful acts" (Lamberti Zanardi, *La legittima difesa...* (*op. cit.*), p. 119). In our opinion, owing to the vagueness of the terminology employed by foreign ministries, the term "self-defence" tended to be used to describe acts that were more in the nature of counter-measures (sanctions or enforcement measures) taken precisely in response to the internationally wrongful act of another (art. 30 (for the text of all the draft articles adopted so far by the Commission, see *Yearbook ... 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1) or else, on occasion, action taken in a "state of necessity" (draft art. 33 (see para. 81 above)).

²⁰⁶ On the concept of "self-defence" in national legal systems see C.W. Jenks, *The Common Law of Mankind* (London, Stevens, 1958), pp. 140 *et seq.*; Zourek, *loc. cit.*, pp. 5 *et seq.*; and Taoka, *op. cit.*, pp. 1 *et seq.*

any violent infringement of the integrity or independence of another State represents in itself both the necessary and the sufficient condition for the validity of the concept of self-defence in the international legal order.

87. Accordingly, at the present time it is proper to regard self-defence as the form—or better, the only form—of “armed self-protection” that is still conceded to a State by the international law now in force. It should be pointed out straightaway, however, that this idea is mentioned solely for descriptive purposes; we are envisaging an accurate understanding of the meaning of the term “self-defence”. On the other hand, we will not make the mistake, which has been amply criticized in the context of “state of necessity”,²⁰⁷ of looking to another concept, or to the supposed existence of a “fundamental right” of the State, the definition of which purportedly comprises that other concept, for a “justification” or “basis” of self-defence as a circumstance exceptionally precluding the wrongfulness of conduct inconsistent with the general obligation to refrain from the use of armed force. The sole justification in law of the effect attributed to the situation described as “self-defence” is, as in all the other situations discussed in this chapter, the existence of a rule of general international law specifically contemplating that effect, a rule which the present author is proposing to formulate in written form. Once again, we think it wrong to treat self-defence, any more than state of necessity, as a “right”, and hence to speak of a “right of self-defence”, even though the expression is a current one, which is used in the Charter of the United Nations itself. Both “self-defence” and “state of necessity” are expressions that connote a situation or *de facto* conditions, not a subjective right.²⁰⁸ The State finds itself in a position of self-defence when it is confronted by an armed attack against itself in breach of international law. It is by reason of such a state of affairs that, in a particular case, the State is exonerated from the duty to respect, vis-à-vis the aggressor, the general obligation to refrain from the use of force. It goes without saying that this recognition of liberty for the State acting in self-defence would likewise disappear, under the system contemplated by the Charter, as soon as the Security Council took it upon itself to employ the enforcement measures necessary for ensuring the full respect of a situation jeopardized by the aggression.

²⁰⁷ See the comments above on the supposed right of “self-preservation” (“*Selbsterhaltung*”, “*auto-conservazione*”) as “justification” of the plea of necessity (paras. 7 and 8 above).

²⁰⁸ See, by analogy, critical remarks on the alleged existence of a veritable “right of necessity” (para. 9 above). Bowett (*Self-Defence...* (op. cit.) pp. 8–9) defines “self-defence” as “in itself a ‘privilege’ or ‘liberty’ which justifies conduct otherwise illegal which is necessary for the protection of certain rights *stricto sensu*”. In that author’s opinion, therefore, the “right” *stricto sensu* is not the right to act in self-defence, but the “essential substantive right” of the State—notably the right to territorial integrity—injured by the aggression to which that State reacts in self-defence.

88. This having been said, and in the light of the considerations set out in the preceding section in connection with the study of the features that distinguish the state of necessity from the other circumstances precluding wrongfulness, it is not now necessary to spend much time on determining the aspects in which in theory self-defence resembles state of necessity or the aspects which, by contrast, clearly differentiate the two “circumstances”. Admittedly, as was explained earlier,²⁰⁹ a State acting in self-defence, like a State acting in a state of necessity, acts in response to an imminent danger—which must in both cases be serious, immediate and incapable of being countered by other means. However, as we have stressed, the State vis-à-vis which another State adopts a form of conduct inconsistent with an international obligation without having any excuse other than “necessity” is a State which has committed no international wrong against the State taking the action. It was in no way responsible, by any of its own actions, for the danger threatening the other State.²¹⁰ By contrast, the State against which another State acts in “self-defence” is itself responsible for the threat to that other State. It was the first State which created the danger, and created it by conduct which is not only wrongful in international law²¹¹ but which constitutes

²⁰⁹ See para. 4 above.

²¹⁰ As has been stressed more than once by the writer, he does not by any means intend to imply that the imminent peril cannot originate in the State’s own territory—for example, from actions carried out in that territory by private persons not acting on behalf of the local State or not under that State’s control. Examples of such cases were cited in para. 57 above. The test for deciding that a case comes within the scope of “state of necessity” and not within the scope of “self-defence” is that the cause of the serious and imminent danger must not be an event attributable to the State and constituting a non-performance by that State of an international obligation it owes to the State which reacts out of “necessity”. Accordingly, in this writer’s opinion, authors like Cheng (op. cit., p. 87) and Schwarzenberger (“The fundamental principles...” (loc. cit.) p. 332), who are influenced by an old official but now obsolete terminology, are wrong to include under the notion of “self-defence” measures taken against individuals, merchant ships or private aircraft, in circumstances not implying any international responsibility on the part of the State of the nationality of those individuals, ships or aircraft. For a correct view, see Bowett (op. cit., pp. 56 *et seq.*, 89 *et seq.*), G. Arangio-Ruiz (“Difesa legittima (Diritto internazionale)” *Novissimo Digesto Italiano* (Turin), vol. VI (1960), pp. 632–633), Dahm (op. cit., pp. 442–443), and Quadri (op. cit., p. 265). See also, on this topic, para. 106 below.

²¹¹ It is of course the first condition that this conduct must be wrongful in order that the plea of “self-defence” should be admissible in exoneration of liability for what would otherwise be wrongful action taken with respect to the party which first resorted to such conduct. Most learned writers agree that, in so far as it is permissible to speak of self-defence in international law as well, the action taken in self-defence must have been preceded by an international wrong committed, or at least planned, by the subject against which this action is taken. See among those who have written on the subject since the Second World War: Ross, op. cit., p. 244; Redslob, op. cit., pp. 243–244; Bowett, op. cit., p. 9; Arangio-Ruiz, loc. cit., p. 623; Dahm, op. cit., p. 409; Sørensen, loc. cit., p. 219; H. Kelsen, *Principles of International Law*, 2nd ed., rev. by R.W. Tucker (New York, Holt, Rinehart

the most serious and unmistakable international offence of recourse to armed force in breach of the existing general prohibition of such recourse. Acting in self-defence means responding by force to forcible wrongful action carried out by another; and the only reason why such a response is not itself wrongful is that the action which provoked it was wrongful.

89. It was also in section 5 of this chapter²¹² that we referred to the question of the resemblances and contrasts between self-defence, as a circumstance precluding the wrongfulness of an act of State, and the circumstance which takes the form of the legitimate application of a sanction or, in other words, of one of the "enforcement" measures of repression or commission taken by a State against another State responsible for an internationally wrongful act, measures which we have already discussed.²¹³ Various authors have in particular compared action taken by a State in the guise of "self-defence" with action in the form of "reprisals". In this writer's opinion, there is undeniably a common element, in that in both cases the State takes action after having suffered an international wrong, namely, the non-respect of one of its rights by the State against which the action in question is directed or at least in the face of such a danger. But any possible resemblance or true analogy stops at this point. The international wrongs which, exceptionally, make it permissible for the State suffering them to adopt, in the form of sanctions or enforcement counter-measures against the responsible State, a comportment inconsistent with an international obligation may be extremely varied; by contrast, the only international wrong which, exceptionally, makes it permissible for the State to react against another State by recourse to force, despite the general ban on force, is an offence which itself constitutes a violation of the ban.²¹⁴ Hence the offence is not only an extremely serious one but is also of a very specific kind.

90. However, that is not the essence of the question. It would be quite wrong to think that self-defence can

also be defined as a kind of sanction, even if it were described as a sanction applicable to a specific kind of wrong. "Self-defence" and "sanction" are reactions relevant to different moments and, above all, are distinct in logic. Besides, action in a situation of self-defence is, as its name indicates, action taken by a State in order to defend its territorial integrity or its independence against violent attack; it is action whereby "defensive" use of force is opposed to an "offensive" use of comparable force, with the object—and this is the core of the matter—of preventing another's wrongful action from proceeding, succeeding and achieving its purpose. Action taking the form of a sanction on the other hand involves the application *ex post facto* to the State committing the international wrong of one of the possible consequences that international law attaches to the commission of an act of this nature. The peculiarity of a sanction is that its object is essentially punitive or repressive; this punitive purpose may in its turn be exclusive and as such represent an objective *per se*, or else it may be accompanied by the intention to give a warning against a possible repetition of conduct like that which is being punished, or again it might constitute a means of exerting pressure in order to obtain compensation for a prejudice suffered, etc.²¹⁵ Be that as it may, the

²¹⁵ Even though sometimes expressed in different and often vague terms, such ideas occur in the publications of the most authoritative writers on international law who have discussed this point.

According to Waldock (*loc cit.*, p. 464) "self-defence belongs to preventive justice" and, unlike reprisals, "does not include a right to exact reparation for injury done to the State which takes measures of self-defence." In the same vein, R. Quadri (*op. cit.*, p. 271) considers that "in reprisals, the invasion of another's legal sphere is justified by the wrong suffered, whereas "in self-defence the action taken in self-protection is designed to prevent the consummation of the wrong... reprisals are an *ex post facto* defence of the legal order, whereas self-defence is preventive". For D. W. Bowett ("Reprisals involving recourse to armed force" *The American Journal of International Law* (Washington, D.C.), vol. 66, No. 1 (January 1972), p. 3),

"The difference between the two forms of self-help lies essentially in their aim or purpose. Self-defence is permissible for the purpose of protecting the security of the state and the essential rights—in particular the rights of territorial integrity and political independence—upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future. But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection."

According to Lamberti Zanardi (*La legittima difesa... (op. cit.)*, pp. 133–134),

"the object of reprisals goes far beyond mere defence against a wrongful act about to be committed or in fact committed, for they are meant to punish the party responsible for the wrongful act or to constrain that party to make good the act committed. Self-defence, on the other hand, has a purely defensive object: to react to the wrong already committed or to prevent its commission, and has no other punitive purpose, nor for that matter is it solely designed to enforce a claim for compensation."

(Footnote 211 continued)

and Winston, 1966), pp. 60–61; Morelli, *op. cit.*, p. 353; E. I. Skakunov, "Samoooborona i vopros o sanktsiakh v mezdunarodnom prave", *Pravovedenie* (Leningrad), No. 3 (May/June 1970), pp. 107 *et seq.*; J. Delivannis, *La légitime défense en droit international public moderne* (Paris, Librairie générale de droit et de jurisprudence, 1971), pp. 69–70; Lamberti Zanardi, *La legittima difesa...* (*op. cit.*), p. 120; Žourek, *loc. cit.*, pp. 59–60; Schlochauer, *loc. cit.*, p. 269; Graefrath, Oeser and Steiniger, *op. cit.*, pp. 73–74.

²¹² See para. 4 above.

²¹³ See *Yearbook... 1979*, vol. II (Part One), pp. 39 *et seq.*, document A/CN.4/318 and Add. 1–4, paras. 78 *et seq.*

²¹⁴ According to Lamberti Zanardi (*La legittima difesa... (op. cit.)*, p. 131), "self-defence can be pleaded only in the case of a reaction to a special kind of wrongful act, namely, the wrongful use of force", whereas "reprisals may be justifiable as a reaction to any kind of wrongful act". In the opinion of Žourek (*loc. cit.*, p. 60), "any unlawful act, whether of commission... or of omission... may provoke reprisals, whereas only a wrongful armed attack can justify recourse to measures of self-defence".

material point here is that self-defence is a reaction to the commission of an international wrong of the kind discussed in this chapter, whereas sanctions, including reprisals, are reactions that belong to the context of the operation of the consequences of the international wrong in the field of international responsibility. It may also be noted that there is nothing to stop a State which, in the circumstances and for the purposes mentioned, uses force against another State in self-defence against a wrongful attack made by the latter, from later adopting sanctions in respect of the offence suffered.²¹⁶ In the light of what has been said above, however, these measures manifestly do not form part of the action taken in self-defence, their purpose is different, and if they are justifiable, the reasons for their justification are different.

91. In order that no point should be overlooked, it should be added that self-defence normally, and almost axiomatically, involves the use of armed force. On the other hand, in consequence of the evolution which apparently occurred in the legal thinking of States after the Second World War and which was described in

section 3 of this chapter,²¹⁷ it seems to be settled law that "sanctions" and the other counter-measures capable of being applied directly against the State committing an international wrong by the State suffering the wrong can no longer nowadays—as they formerly used to do—involve the use of armed force. As is stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:²¹⁸ "States have a duty to refrain from acts of reprisal involving the use of force". Armed reprisals can no longer be considered as legitimate. Hence this is further proof, if further evidence was needed, of yet another difference between the two concepts compared above.

92. Lastly, the practical importance of differentiating self-defence from reprisals—an importance enhanced precisely by the current view that armed reprisals are not admissible—was forcefully illustrated by the discussions in the Security Council in connection with the attack carried out by the British Royal Air Force against the Yemen Arab Republic on 28 March 1964. On that occasion, the United Kingdom argued that its action should be construed as "self-defence" within the meaning of Article 51 of the Charter, inasmuch as its sole purpose had been defensive and to ward off a future repetition of the acts of aggression and provocation committed by Yemen against the Federation of South Arabia.²¹⁹ It was argued by Czechoslovakia, Iraq, Morocco and the United Arab Republic that the United Kingdom had committed "premeditated" and illegitimate acts of reprisals.²²⁰ While not taking sides in this difference of opinions about the events, it is of interest to note, so far as principles are concerned, the clear distinction drawn by the British representative between "the two forms of self-help", one of which he described as punitive or retributive, called reprisals, and the other, called self-defence, the resisting of an armed attack.²²¹

The discussions which took place in the Security Council in connection with the attack launched against two American destroyers by North-Vietnamese torpedo boats in the Gulf of Tonkin on 4 August 1964, and the American aerial counter-attack against the North-Vietnamese torpedo boats and support vessels is likewise interesting. The representative of the United States of America and of the United Kingdom held

Žourek (*loc. cit.*, p. 60) says that:

"The object of reprisals is to cause the injurious activity or action to cease and, as the case may be, to require the State committing the wrong to make good the damage caused, whereas the sole purpose of self-defence is to repel the armed aggression and, in some cases, to forestall its repetition."

Some authors, such as Strupp, see (successive) self-defence as a form of reprisals, but recognize that "profound differences exist between reprisals and self-defence, in respect of the aim, the measures and the conditions" (Strupp, "Les règles générales..." (*loc. cit.*), p. 570). In regard to the first of these conditions, to Strupp "the aim of self-defence is to repulse an ongoing, wrongful attack; it ends there." To reprisals, however, the same author attributes a "repressive aim", sometimes accompanied by a "preventive element" with the aim of avoiding, in future, "new international delicts" (*ibid.*). More recently, a conception related to Strupp's has been expressed by Wengler (*op. cit.*, pp. 515 *et seq.*, 520 *et seq.*). Wengler subdivides the kinds of reprisal into two categories: the "Abwehrrepräsentation" and the "Selbsthilferepression", each having a distinctive aim and distinctive conditions, of which the single common element is that they are both measures that would be wrongful if they did not represent a reaction to a wrongful act of the State toward which they were adopted.

Most Soviet writers (Levin, Petrovski) likewise do not admit self-defence as coming within the meaning of the "sanctions" that are recognized as legitimate countermeasures in response to an internationally wrongful act. Skakunov (*loc. cit.*, pp. 107 *et seq.*), expresses a different opinion and criticizes the prevailing view, on the grounds that it ascribes a purely "punitive" notion to sanction. In his opinion, the meaning of sanction should be enlarged so as to comprise also measures intended to uphold the law, and hence he regards self-defence as a kind of sanction. This same conclusion has been reached by Graefrath, Oeser and Steiniger (*op. cit.*, pp. 73–74).

²¹⁶ Quadri (*op. cit.*, p. 269) points out that action taken in the form of reprisals is sometimes confused with action taken in a situation of self-defence, particularly in cases where it is a reaction to a wrongful act that is both violent and continuing, and where the response of the State suffering the wrong has several objectives simultaneously, Quadri adds, however, that reprisals and self-defence are two quite distinct legal concepts.

²¹⁷ See *Yearbook* . . . 1979, vol. II (Part One), p. 42, document A/CN.4/318 and Add.1–4, para. 89.

²¹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

²¹⁹ *Official Records of the Security Council, Nineteenth year*, 1106th meeting, para. 51; 1109th meeting, paras. 25–31; 1111th meeting, paras. 29 and 30.

²²⁰ *Ibid.*, 1106th meeting, paras. 64–68 (Iraq); 1107th meeting, paras. 14–17 (Iraq), 47–51 (United Arab Republic); 1109th meeting, paras. 57–58 (Iraq), 76–77 (Syria), 99–100 (Morocco); 1110th meeting, paras. 23–24 (Czechoslovakia).

²²¹ *Ibid.*, 1109th meeting, paras. 25–31.

that the limited action of the American navy constituted the application of a measure of self-defence authorized by the Charter,²²² whereas the representatives of Czechoslovakia and the Soviet Union argued that the action constituted an act of reprisal that was *ipso jure* inadmissible by the fact that Article 51 of the Charter recognized solely the right of self-defence.²²³

93. The point has already been made²²⁴ that self-defence should be regarded as the only form of "armed self-protection" or "self-help" still open to a State under modern international law. Some further reflections would seem to be in order for the purpose of spelling out the present writer's opinion on the actual concept of "self-help" or "self-protection" and its connection with the concept of "self-defence". It is that the expression "self-help" ("*autoprotection*", "*Selbsthilfe*", "*autotutela*", etc.) generally means the mode of action whereby the guaranteed exercise of a right is provided for in a strictly egalitarian, non-institutionalized and non-hierarchical society, like the international community. The term accurately reflects the fact that in international law—in any case, in general international law—it is the rightful holder of a particular subjective right who is at the same time given the faculty of taking measures for the purpose of safeguarding the right in question, to see to it that the right is respected and to exercise it.

94. In this context, it is of course possible that, for the purpose of safeguarding its own right, a State resorts only to measures that are normally lawful, such as simple measures of retorsion, or to other forms of conduct which, while harming the interests of the subject that infringed that State's right, yet do not conflict with an international obligation towards that other subject. In such a situation, there is no need to "excuse" the measures—to preclude, as an exception, their unlawfulness, for in any case they are not unlawful. The situation is different, however, if the State in question, for the purpose of protecting its own right, resorts to measures which would normally be unlawful and which, exceptionally, become lawful by reason of the fact that the State applying them has suffered an infringement of the right in question. In such a situation, international law regards these measures as justifiable, as sanctions for an international wrong previously committed by the subject against which these measures are taken, or, more generally, as counter-measures taken in reaction to the wrongful act; the object may be purely punitive (sanctions properly so-called) or their purpose may be to take enforcement action, to prevent the recurrence of the event, to press a claim for compensation, etc. As

was shown in section 3 of this chapter,²²⁵ according to the criteria at present in force in international law, sanctions applied, under certain conditions and with certain limitations, by a State one of whose rights has been infringed against the State which committed the infringement, are permissible even though they take the form of conduct inconsistent with some other international obligation. At the same time, however, it was pointed out in that context that such measures may not nowadays involve the use of armed force, for armed reprisals—the typical and traditional form of sanctions applied by one State to another seriously delinquent with regard to the first State in the matter of an international obligation—are now no longer admissible among the "justifiable" measures. In other words, for the purpose of safeguarding its right a State may employ only peaceful reprisals.

95. In the same context and in keeping with the same system, a State which suffers an armed attack and is consequently placed in a situation of "self-defence" is permitted, exceptionally, to resort to the use of armed force in order to halt the aggression and to frustrate its objectives, independently of any punitive intention. This is the meaning of the statement made earlier in this report that self-defence is now the only form of "armed self-help" still admissible under international law, the sole exception to the general prohibition embodied in that law of the use of weapons for self-protection. Hence, by contradistinction with the opinion of certain authors,²²⁶ the term "self-protection" or "self-help" does not denote a separate and distinct circumstance producing effects in a separate sector that would make it comparable to and *eiusdem generis* as the other circumstances capable of precluding the wrongfulness of an act of State that were described earlier in this chapter. "Self-protection" or "self-help" should be construed to mean what legal theory describes as, and comprises under, all the different forms taken by the system which in principle grants to the State, as the holder of a subjective right, the faculty

²²⁵ See *Yearbook . . . 1979*, vol. II (Part One), pp. 39 *et seq.*, document A/CN.4/318 and Add.1–4, para. 78 *et seq.*

²²⁶ Reference has already been made (see footnote 14 above) to the views of Morelli (*op. cit.*, p. 352) and of Sereni (*op. cit.*, pp. 1524 *et seq.*). In the opinion of these authors, what distinguishes self-help from the other circumstances precluding wrongfulness, and particularly from the application of a sanction, is that self-help takes the form of enforcement action for the purpose of exerting pressure on the State that is bound by an international obligation, with the object of securing the performance of that obligation, or the form of action whereby the State holding a subjective right exercises this right directly by substituting itself for the State that owes the obligation. This would mean that self-help could be resorted to even in the absence of any internationally wrongful act on the part of the State forming the object of the action. The same footnote cites some English-language authors (e.g., Schwarzenberger, "The fundamental principles . . ." (*loc. cit.*), pp. 342–343, and Bowett, *Self-defence . . .* (*op. cit.*), pp. 11 *et seq.*) who employ the term "self-help"—by contrast to "self-defence", to which they ascribe a purely defensive meaning—to describe the application of punitive or enforcement measures against a State that has committed an international delinquency.

²²² *Ibid.*, 1140th meeting, paras. 44–46 (United States), 78–79 (United Kingdom); 1141st meeting, para. 52 (United States).

²²³ *Ibid.*, 1141st meeting, para. 31 (Czechoslovakia), 77–84 (USSR).

²²⁴ See para. 87 above.

of acting in order to protect and safeguard that right in certain circumstances.²²⁷ Self-defence, like the lawful application of a sanction—provided that they are exercised within the limitations now governing them—are permitted forms of self-help, and not concepts that are distinct from, although somewhat similar to it.

96. It is considered necessary to spell out these distinctions and details in order to explain the features peculiar to the notion of “self-defence” on the basis of which the present writer proposes to continue his research, in order to discern what, in modern international law, is the precise content of the rule concerning this special ground for precluding the wrongfulness of a State’s behaviour. This seems to be the right point for resuming the discussion, which was barely begun in the early paragraphs of this section, and for inquiring into the historic evidence which, it is hoped, will confirm the soundness of the statement made above.²²⁸ Already in that paragraph the idea was advanced that, as from about the mid-1920s, both the principle prohibiting the use of armed force, even in order to safeguard a right, and the principle which allows an exception to the first principle for the benefit of the State that resorts to armed force in a situation of self-defence gradually crystallized in international legal relations. Accordingly, the passages which follow will discuss what has been achieved in international law since that period and will inquire into the practice of States, international case law and the work of learned authors.

97. From the practice of States in the period between the two wars it is evident that at that time, in connection with the adoption in various major instruments of clauses designed to restrict progressively, and eventually to outlaw, the freedom of States to resort to war (and occasionally, in a more general way, their freedom to use armed force in any manner whatsoever), there was at the same time a tendency to limit the scope of those clauses. The limitation is reflected in an exception, the effect of which is to rule as not wrongful conduct involving recourse to war in the case where a State would do so only in order to defend itself against armed attack.²²⁹ Several of the instruments

adopted at that time which provide for a general or special prohibition of recourse to war for the settlement of international disputes contain, at the same time, an express clause stating the exception in question. The prototype of this kind of instrument is the Protocol for the Pacific Settlement of International Disputes, commonly known as the “Geneva Protocol”, adopted by the Fifth Assembly of the League of Nations on 2 October 1924.²³⁰ The Protocol, which admittedly never entered into force, provided in its article 2 that the signatory States agreed not to resort to war, but admitted an exception to this commitment in the case of “resistance to acts of aggression”. The expression “self-defence” was not itself used in the text, but there is no doubt that a reference to self-defence was intended.²³¹ The expression “self-defence”, and not just the notion, made its appearance the following year in the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, which constitutes annex A to the Final Protocol signed at Locarno on 16 October 1925, and is known also by the name of “Rhine Pact”.²³² Under article 2 of the Pact, France and Belgium, on the one hand, and Germany, on the other, undertook “that they will in no case attack or invade each other or resort to war against each other”. The article then proceeded to state:

This stipulation shall not, however, apply in the case of:

- (1) The exercise of the right of *legitimate defence**, that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Articles 42 or 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone, immediate action is necessary²³³

²³⁰ League of Nations, *Official Journal, Special Supplement No. 21*, p. 21.

²³¹ The general report on the Protocol, submitted to the Fifth Assembly of the League of Nations by Mr. Politis (Greece) and Mr. Beneš (Czechoslovakia), states that the prohibition laid down in article 2:

“affects only aggressive war. It does not, of course, extend to defensive war. The right of *legitimate self-defence** continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it may be the victim.” (League of Nations, *Official Journal, Special Supplement No. 23*, p. 483.)

At the same time the Protocol provided another express exception to the obligation not to resort to war, in the case where States resorted to war “with the consent of the Council or the Assembly of the League of Nations under provisions of the Covenant and the Protocol”.

²³² League of Nations, *Treaty Series*, vol. LIV, p. 289.

²³³ Accordingly, the notion of “self-defence” endorsed by the Rhine Pact was not limited to a State’s resistance to an act of aggression directed against its own territory but extended also to resistance to an occupation of the demilitarized zone of the neighbouring State’s territory. The Pact likewise provided for a further exception to the obligation laid down in art. 2, para. 1 in the case of action in pursuance of Article 16 of the Covenant of the League of Nations or, more generally, in the case of action as the result of a decision taken by the Assembly or the Council of the League. For comments made on these points at the time, see

²²⁷ The defects inherent in the system of self-help as it is traditionally recognized by general international law are rectified in private international law by the various forms of “associated” or “collective” protection by virtue of which a number of subjects pledge themselves to co-operate for the purpose of protecting and safeguarding the right of each of them against possible infringements by third parties. What is commonly known as “collective self-defence” is precisely an example of this kind of protection. But for the purpose of going beyond the generalized system of self-help, the decisive step can only be the centralization of the power to take enforcement action, mentioned above (para. 86), which is reflected in the first attempt to centralize the power in the system of the United Nations.

²²⁸ See para. 85.

²²⁹ For a detailed discussion, from the point of view relevant here, of the agreements entered into and, more generally, of the practice of States in the period 1920–1940, see, *inter alia*, Lamberti Zanardi, *La legittima difesa* . . . (*op. cit.*), pp. 79 *et seq.* See also Brownlie, *International Law* . . . (*op. cit.*), pp. 231 *et seq.*; Zourek, *loc. cit.*, pp. 25 *et seq.*; Taoka, *op. cit.*, pp. 88 *et seq.*

Language similar to that used in the Rhine Pact recurs in bilateral treaties signed between 1926 and 1929.²³⁴ Similar terms occur also in the model treaties of mutual assistance and of non-aggression prepared in 1928 by the League of Nations Committee on Arbitration and Security.²³⁵ On 8 July 1937, Afghanistan, Iraq, Iran and Turkey signed a treaty of non-aggression. After having noted, in article 4 of the treaty, that declaration of war, invasion by the armed forces of one State of the territory of another State, attack by the armed forces of one State on the territory, ships or aircraft of another State, and aid or assistance to the aggressor were considered to be acts of aggression, it was stated that:

The following shall not constitute acts of aggression:

1. The exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression as defined above; . . .²³⁶

98. The soundness of the remark made at the beginning of the preceding paragraph is fully confirmed by the attitude observed and by the conviction expressed by the States in connection with the scope of the treaties intended to limit to extreme situations the possibility of resorting to armed force, or designed even to outlaw this possibility altogether, though the relevant clauses in these treaties do not contain an express provision concerning the lawfulness of the use of armed force by a State that meant only to defend itself against an unlawful attack. At first sight, the existence of international instruments using such terms might seem to be a rebuttal of the virtually necessary affirmation of the principle whereby armed self-defence is not wrongful—whereas generally recourse to armed force is wrongful—under those instruments. Actually, it is precisely these instruments and their application which offer the most reliable evidence of the indisputable existence of the principle that self-defence is a situation the effect of which is to preclude, exceptionally, the wrongfulness of conduct involving the use of

armed force. The attitudes of States with respect to the treaties in question show beyond the shadow of a doubt that these States regarded as perfectly lawful the use of armed force in a situation of self-defence. Nor did the absence of an express clause to that effect in any way shake their conviction, which is most significantly reflected in the Covenant of the League of Nations and in the General Treaty for Renunciation of War as an Instrument of National Policy, signed at Paris on 27 August 1928 (commonly known as the Briand-Kellogg Pact, or Pact of Paris).²³⁷

99. So far as the Covenant is concerned, the discussions regarding the precise scope of the limitations which it placed on recourse to armed force were long and numerous. The principle issues in those discussions were: (1) was the prohibition laid down in the Covenant deemed to apply only in the cases expressly contemplated in Articles 12, 13 and 15,²³⁸ or in any situation? and (2) did the prohibition affect only recourse to war *stricto sensu*, or also other forms of the use of armed force? This is not the context for expressing an opinion on the precise content of the obligations imposed by the Covenant on the States Members of the League of Nations. It will suffice to note at this point that, in certain situations at least, recourse to armed force was definitely prohibited by the Covenant, even though the Covenant contained no express proviso concerning the case where recourse to armed force by a Member State was a reaction to the need to cope with an armed attack committed against it by another State in breach of that same prohibition. Both the Member States and the bodies of the League of Nations at all times expressed the conviction that nevertheless recourse to armed force in a situation of self-defence remained perfectly lawful. When they were implicated in armed conflicts and, more generally, in connection with actions involving the use of armed force which they had undertaken, the States concerned often pleaded—a claim that may or may not have been justified—that they had acted in self-defence. What is even more important is that the States against which those other States had taken action, as well as the organs of the League of Nations, never challenged the principle of the validity of the “plea of self-defence”; they tended, rather, to go no further than to query the admissibility of the plea in the particular case.²³⁹

(Footnote 233 continued)

inter alia K. Strupp (*Das Werk von Locarno* (Berlin, de Gruyter, 1926) and G. Salvioi (“Gli accordi di Locarno”, *Rivista di diritto internazionale* (Rome), XVIIIrd year, IIIrd series, vol. V (1926), pp. 427 *et seq.*). Salvioi, in page 433 of his text, uses the expression “*stato di legittima difesa*” (“state of self-defence”).

²³⁴ For example, the treaties between France and Romania dated 10 June 1926 (League of Nations, *Treaty Series*, vol. LVIII, p. 225), art. 1; between France and the Kingdom of the Serbs, Croats and Slovenes dated 11 November 1927 (*ibid.*, vol. LXVIII, p. 373), art. 1; between Greece and the Kingdom of the Serbs, Croats and Slovenes dated 27 March 1929 (*ibid.*, vol. CVIII, p. 201), art. 2; between Greece and Romania dated 21 March 1928 (*ibid.*, p. 187), art. 1.

²³⁵ All the model treaties contained a clause like the following:

“Each of the High Contracting Parties undertakes, in regard to each of the other Parties, not to attack or invade the territory of another Contracting Party and in no case to resort to war against another Contracting Party.”

That stipulation did not, however, apply in the case of the exercise of the right of *legitimate defence*, that is to say, resistance to a violation of the undertaking. (League of Nations, *Official Journal*, *Special Supplement No. 64*, p. 182 *et seq.*)

²³⁶ League of Nations, *Treaty Series*, vol. CXC, p. 25.

²³⁷ *Ibid.*, vol. XCIV, p. 57.

²³⁸ i.e., (a) before the State concerned has submitted the dispute to arbitration or judicial settlement or to the Council and before the expiry of three months after the adoption of the decision or the Council's report; and (b) in any case never against a Member State of the League of Nations which has complied with the arbitral award or with the judgement of the Permanent Court of International Justice or with a unanimous report by the Council.

²³⁹ This is what happened in the cases of the Graeco-Bulgarian dispute of 1925 concerning a frontier incident, the dispute of 1932–1934 between Paraguay and Bolivia concerning the Chaco territory, the dispute between Japan and China in 1931–1934 concerning Manchuria, the Italo-Ethiopian dispute of 1935, and the Sino-Japanese dispute of 1937. In this connection, see once again the analysis of practice in Lamberti Zanardi (*La legittima difesa . . . (op. cit.)*, pp. 90 *et seq.*)

100. In concluding the Briand–Kellogg Pact, the signatory Powers took what was then the most decisive step towards the outlawing of recourse to war. Article I states:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II contained the following provision:

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

The treaty prohibited expressly only recourse to war, and it would probably be straining the meaning of its terms to claim to infer from it that the prohibition it contained was to extend also to recourse to force other than war. That is not the issue, however. What matters in the present context is that the treaty did not make provision for any express exception as regards the case of a war undertaken and conducted in a situation of self-defence. Yet the diplomatic correspondence which preceded the conclusion of the treaty²⁴⁰ shows clearly that the contracting parties obviously had this problem in their minds and that they were fully in agreement in recognizing that the renunciation of war which they were about to proclaim would in no way debar the signatories from the exercise of self-defence. The French and British Governments stressed this point. The reason why the contracting parties eventually, after the interpretative statements made by the Department of State of the United States of America, recognized that it was not necessary to include in the treaty an express proviso for the case of self defence, was, first, that they wished to accede to the opinion of the American Secretary of State, who argued that the value of the treaty depended largely on its simplicity, and secondly, that they agreed with him that such a clause was superfluous. In their view, it was a self-evident truth that war waged in a situation of self-defence was not wrongful; this principle could, they thought, be regarded as implied in any treaty instrument designed to limit or to ban recourse to war—a principle which, in the final analysis, was bound to clash with the terms of the treaty in such a situation.²⁴¹ By the views which they expressed, the

contracting parties even gave the impression that they frankly admitted the existence of an unwritten principle of international law, which was absolutely binding and did not admit of any derogation by a treaty, even a multilateral treaty, and which had the effect of removing any wrongfulness from conduct adopted by a State in a situation of self-defence—even conduct in the form of warlike action.

101. A like conviction regarding the exercise of an absolute or even peremptory principle pursuant to which recourse to war—henceforth undeniably regarded as wrongful—ceases to be wrongful in a situation of self-defence is reflected also in the replies given by States to a questionnaire prepared by the Secretariat of the League of Nations concerning amendments to be made in the League Covenant in order to bring it into harmony with the terms of the more recent Briand–Kellogg Pact. These replies, and also the statements made in the course of the debate on the question in the First Committee of the Assembly during the Assembly's eleventh and twelfth sessions by many States, were to the effect that the addition to the Covenant of a clause proclaiming the total prohibition, without "loopholes", of recourse to war would not affect the faculty to resort to war in cases where the conditions of a situation of self-defence were fulfilled. The Italian Government, for example, answered:

... it is not in the least necessary to include in the amendments a clause relating to self-defence, since it is obvious that a State which had disregarded the clause forbidding war could not demand that the State attacked by it should observe that clause.²⁴²

For his part, the German representative stated in the course of the discussion:

Though mentioned neither in the Covenant nor the Pact, the right of a nation to defend itself against attack was indisputable. It derived from a natural law which had *greater force than any convention*.²⁴³

Much the same ideas can be found in the report written at the close of the proceedings in the First Committee and submitted to the Assembly at its twelfth session.²⁴⁴

102. For the purpose of making a more complete list of the occasions on which States were able to comment on the plea of self-defence in the period between the two wars, reference should be made also to the answers given by the governments which replied to the request for information of the Preparatory Committee of the Hague Conference of 1930 on the responsibility

²⁴⁰ See the documents reproduced in A. Lysen, ed., *Le pacte Kellogg: Documents concernant le traité multilatéral contre la guerre signé à Paris le 27 août 1928* (Leyden, Sijthoff, 1928), and, as regards the point under discussion, the note (probably by T. Perassi) "Trattato di rinuncia alla guerra", which was published with the text of the Pact in *Rivista di diritto internazionale* (Rome), XXIst year, IIIrd Series, vol. VIII (1929), pp. 429 *et seq.*

²⁴¹ To reassure the other partners, the United States Government stated explicitly in its note of 23 June 1928 that what it called "the right of self-defence" was, in its opinion, "inherent in every sovereign State and ... implicit in every treaty. Every nation is free at all times and *regardless of treaty provisions** to defend its territory from attack or invasion" (Lysen, *op. cit.*, p. 54). Many other States (including Belgium, Czechoslovakia, France, United

Kingdom, Ireland, Italy, Japan, Poland and South Africa) referred to that statement at the time of signing or acceding to the Pact (*ibid.*, pp. 62 *et seq.*; see also Brownlie, *International Law* ... (*op. cit.*), pp. 235 *et seq.*; Lamberti Zanardi, *La legittima difesa* ... (*op. cit.*), pp. 84 *et seq.*; Žourek, *loc. cit.*, pp. 32 *et seq.*).

²⁴² League of Nations, *Official Journal*, 12th year, No. 8 (August 1931), p. 1602.

²⁴³ *Idem*, *Official Journal*, *Special Supplement No. 94*, p. 41.

For the views of other States, see Lamberti Zanardi, *La legittima difesa* ... (*op. cit.*), pp. 99–100.

²⁴⁴ League of Nations, *Official Journal*, *Special Supplement No. 93*, pp. 220 *et seq.*

of States for damage caused to the person or property of foreigners. The questionnaire contained the following point XI (a):

XI. Circumstances in which a State is entitled to disclaim responsibility. What are the conditions which must be fulfilled in such cases:

(a) When the State claims to have acted in self-defence?²⁴⁵

It was, however, a potential source of error to ask the question about self-defence as a circumstance precluding the wrongfulness of State conduct in the context of a topic like that of responsibility, not for acts committed directly against a foreign State, but for actions harming foreign private persons. The result was that the replies of Governments were not generally as significant as were those given to other points in the questionnaire and cited in earlier reports of the present writer. All the Governments which answered were, of course, agreed on the principle that the situation of self-defence constituted a circumstance allowing a State to repudiate its responsibility—or rather, could exonerate the State from liability—for an act which otherwise would definitely have been wrongful. But the idea of self-defence as such which various Governments were thinking of was very different from that we have given as the most correct, and also very different from that reflected in the legal thinking of States as it evolved *pari passu* with the gradual affirmation of the principle of the prohibition of recourse to war and as a necessary exception to that principle. What happened, therefore, was that, when referring to self-defence, Governments cited the case of measures taken by a State in defence against a threat emanating, not from another State but from private persons,²⁴⁶ in other words a case which, as was mentioned earlier, is in our opinion wholly outside the present context. A further consequence was that, in reliance on these answers, the authors of the questionnaire eventually drafted a Basis of discussion patently remote from the idea of “self-defence” properly so-called.²⁴⁷ This is no reason, however, why the answers given by other Governments should not be used here; such as that of Belgium, which stated that “the State is justified in disclaiming responsibility in the case of self-defence against an aggressor State”,²⁴⁸ and that of Switzerland which said that “the situation of self-defence exists where a State suffers an *unjust aggression, contrary to law*.”²⁴⁹

²⁴⁵ *Idem*, *Bases of discussion* . . . (op. cit.), p. 161.

²⁴⁶ See the replies of Denmark (*ibid.*, p. 126), United Kingdom (*ibid.*), South Africa (*ibid.*, p. 125), and the United States of America (League of Nations, *Supplement to vol. III* (op. cit.), p. 22).

²⁴⁷ It reads:

“A State is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons.” (Basis No. 24 (League of Nations, *Bases of discussion* . . . (op. cit.), p. 128).)

²⁴⁸ *Ibid.*, p. 125.

²⁴⁹ *Ibid.*, p. 127.

103. Evidence of the evolution which occurred in the reality of international relations in the period 1920–1939 materialized later. The International Military Tribunals of Nuremberg and Tokyo, established respectively by the Agreements of 8 August 1945 and 19 January 1946, virtually took it for granted that during that period there had come into being in international law an unwritten principle of law the effect of which was to rebut the wrongfulness of the use of armed force in the case of self-defence; the Tribunals regarded this as an exception to an *indefeasible limitation* of the general ban on the use of armed force laid down by international instruments like the Briand–Kellogg Pact. The particular issue to be adjudicated by the Nuremberg Tribunal was whether the invasion by Nazi Germany of Denmark and Norway, and later Belgium, the Netherlands and Luxembourg, and also its attack on the USSR, could be justified as acts committed in a situation of self-defence. The same issue came before the Tokyo Tribunal in connection with the conduct of Japan, on the one hand, and the Netherlands on the other (the question of the declaration of war by the Netherlands on Japan). In the judgements of both tribunals, the principle that conduct involving recourse to armed force in the form of self-defence was lawful was not challenged in any way whatsoever. What was challenged was the *de facto* existence of conditions typical of a situation of self-defence, and it was solely on that basis that the plea of self-defence was rejected. Another point considered [by the Nuremberg Tribunal] was whether preventive self-defence was lawful or not, and also the admissibility of the claim by the State which argued that it had acted in self-defence that it alone was competent to determine whether the conditions of self-defence were fulfilled in the particular circumstances.²⁵⁰ Such questions obviously are relevant to the delimitation of the legal concept of self-defence, and the concept will be considered from this angle below. The material point of interest in the present context is that the deliberations of the Tribunals themselves necessarily presupposed the recognition of self-defence as a circumstance precluding the wrongfulness of conduct involving the use of armed force which would, in other circumstances, be wrongful. For that matter the Tokyo Tribunal said so expressly in an *obiter dictum*, for in its judgement dated 1 November 1948, it stated:

The Contracting Powers [of the Briand–Kellogg Pact], including Japan, declared that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another. The Contracting Powers then agreed that the settlement or solution of all disputes or conflicts of whatever nature or of

²⁵⁰ As regards the Nuremberg Tribunal, see the passages in the judgement of 1 October 1946 reproduced in *Trial of The Major War Criminals* . . . (op. cit.), (1947), vol. I, pp. 204 *et seq.*

As regards the Tokyo Tribunal, see the passages in the judgements reproduced in: B. V. A. Röling and C. F. Rüter, eds. *The Tokyo Judgement* (Amsterdam, APA-University Press, 1977), vol. 1, pp. 46 *et seq.* and 382.

whatever origin they may be, which might arise among them, would never be sought except by pacific means.

Prior to the ratification of the Pact, some of the signatory Powers made declarations reserving the right to wage war in self-defence ... *Any law, international or municipal, which prohibits recourse to force is necessarily limited by the right of self-defence.*²⁵¹

104. The process aimed at outlawing the use of armed force in international relations, a process the stages of which have been described in this report, reached its culmination at the end of the Second World War. Under the impact of that tragedy, the principle once and for all condemning such use of force as utterly wrongful became, in this writer's opinion, part of the legal thinking of States and therefore a peremptory unwritten principle of general international law even before it was spelt out in the Charter of the United Nations in written form. It is in fact laid down in the Charter in much stricter terms than those employed in the Covenant of the League of Nations or even in the Briand-Kellogg Pact. Under Article 2, paragraph 4, not only recourse to war but any "use of force" and even the "threat of force" are prohibited. In keeping with the categorical character of this prohibition, the Charter also vests in the Security Council much wider powers than those which were vested by the Covenant in the Council of the League of Nations for the adoption of suitable measures to prevent and, where necessary, suppress any breach of the obligations set forth in this key provision of the constituent instrument of the Organization. Nevertheless, the Charter does not fail to specify *expressis verbis* in Article 51 that conduct adopted in self-defence is to be deemed internationally lawful even if, in other circumstances, like conduct should be considered as internationally wrongful because in breach of Article 2, paragraph 4. The essential terms of Article 51 provide:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .²⁵²

In confirmation of what was said earlier, it should be noted that none of the States which took part in the adoption of this text at San Francisco questioned the validity, in general international law, of the exception

whereby conduct not in conformity with the obligation to refrain from the use of force is not wrongful if adopted in self-defence. Since the adoption of the Charter, there has been no known case where it was argued that self-defence was admissible, as a plea in justification of conduct involving the use of force, solely by virtue of the rule in Article 51 of the Charter and not—primarily—by virtue of an absolute rule previously recognized by general international law. The reason why some have claimed to be able to discern a difference in content between the principle set forth in Article 51 and the corresponding principle of general international law is not that they wished to ascribe to the Charter provision any innovatory intention but, at most, that they wished to restrict to some extent the scope of the principle of general international law. It is thus confirmed that the existence of the principle of self-defence in general international law antedates the adoption of the Charter.

105. As in the discussion of State practice, it is possible, for the same reasons, to confine the study of learned opinion to the works published after 1920. The writings of scholars published in the period between the two World Wars likewise support the conclusion that that was the period when the principle that the situation of self-defence justifies, exceptionally, conduct which would otherwise be internationally wrongful by reason of the intervening ban on the use of armed force began to assume its modern shape.

106. Nevertheless, not all the opinions of theoretical writers of that time are genuinely helpful for the purposes of this report. For example, as was indicated earlier, a number of writers rely on a notion of self-defence that is in fact much closer to that which we have characterized as "state of necessity" than to the notion designated here by the term "self-defence". The writers in question, mostly from the English-speaking world, speak of "self-defence" to indicate the circumstances in which a form of conduct occurs that is designed to ward off a danger, a threat emanating, in many cases, not from the State against which the particular conduct is adopted but from individuals or groups that are private, or at any rate are unrelated to the organization of that State. As has been seen, this school of thought treats as a typical example of self-defence in international law the celebrated case of the steamer *Caroline*.²⁵³ Needless to say, in the opinion

²⁵¹ *Ibid.*, pp. 46 and 47.

²⁵² All the collective defence agreements concluded since the adoption of the Charter make an explicit or implicit reference to Article 51. Some of them reproduce textually the principle laid down in the article. Examples are art. 3, para. 1, of the Inter-American Treaty of Reciprocal Assistance (1947) (United Nations, *Treaty Series*, vol. 21, p. 77); art. 5, para. 1, of the North Atlantic Treaty (1949) (*ibid.*, vol. 34, p. 243); art. 4, para. 1 of the Treaty of Friendship, Co-operation and Mutual Assistance between Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR (1955) (*ibid.*, vol. 219, p. 3). See the list of such agreements in L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd ed., rev. (New York, Columbia University Press, 1969), pp. 349 *et seq.*

²⁵³ See para. 57 above. The danger which, as an exception, justifies conduct involving the use of armed force is generally said to be a threat of armed attack from *the territory* of the State which is the victim of the action purportedly taken in self-defence. But no distinction is drawn as to the fundamental issue whether the threat comes from the foreign State itself, or from mere private individuals, or even insurgents or organs of a third State, without any wrongful act, and still less aggression, being committed by the foreign State. See, for example, J.L. Brierly, "Règles générales du droit de la paix", *Recueil des cours* . . . , 1936-IV (Paris, Sirey, 1937), vol. 58, pp. 126 *et seq.*; cf. also Fauchille, *op. cit.*, pp. 421-422, and de Visscher, "La respon-

of those who share such a point of view, the conduct adopted by a State against another State in order to resist a wrongful attack by the latter is likewise to be regarded as conduct justifiable on grounds of self-defence. In the present writer's opinion, however, the confusion between so very different situations hampers the task of arriving at an accurate definition of self-defence. It confuses cases in which the conduct adopted against a State constitutes a reaction to an internationally wrongful act committed by that State (and to so serious a wrongful act as aggression) with cases in which such conduct is excusable—if excusable at all—solely by reason of the need to ward off a danger that simply originates in the territory of a State, the latter not being guilty of any aggression or of any wrongful act.

107. In the light of the foregoing, it is far more interesting to look at the opinions of the many writers who discern a logically indispensable connection between the progress made, at the time when they were writing, by the trend in favour of the prohibition of the use of armed force and the concurrent acceptance in international law of the concept of self-defence as the necessary limitation of that prohibition. They recognize of course that, in the context of the general international law then prevailing, action by a State that resorts to armed force in order to repel an attack of like force is always lawful by virtue of the traditional principle that permits recourse to self-help in all its forms, a principle therefore that far transcends the bounds of the idea of legitimate "defence". But they also acknowledge that the situation is different in the context of a system of international law that is special, that is established by treaty, and rejects the generalized acceptance of self-help—particularly armed self-help—either in consequence of a virtual centralization of the use of enforcement measures in order to safeguard the law or in consequence of an outright total or partial ban on the use of force by an individual State, even for the purpose of safeguarding its rights (the systems embodied in the Covenant of the League of Nations or the Briand-Kellogg Pact). In such a

context, these writers concede, it is no longer improper to speak of "self-defence" in order to characterize the exceptional circumstances in which the use of armed force by a State ceases to be wrongful.²⁵⁴ The value of the contribution made by the school of thought dominant at that time is, then, that it realized and demonstrated that where the individual State is forbidden, in one way or another, to resort to the use of armed force, there is also necessarily an overriding reason for precluding the wrongfulness of such action if genuinely taken in self-defence. It is relatively immaterial that, where such wrongfulness is not explicitly precluded by the written texts establishing the prohibition, the rule precluding it is commonly held—in keeping with the precedent set by the protagonists of the Briand-Kellogg Pact—to be implicit in the text in question, rather than to be a rule imposed by a pre-existing principle of general international law from which those texts could not have derogated. In the final analysis, the practical result is the same. The conviction that there exists in customary general international law a principle specifically removing the wrongfulness normally attaching to an action involving the use of armed force if the action in question is taken in self-defence became part and parcel of the thinking of publicists at the time when the principle of such wrongfulness itself passed from international treaty law to customary general international law. As we have said before, this evolution occurred even before these principles were embodied in the Charter of the United Nations. It is significant, furthermore, that the authors of works published since the Second World War all recognize that the use of armed force by a State in order to repel an aggression is to be considered

²⁵⁴ Cavaglieri affirms in principle that:

"The concept of self-defence, excluded from ordinary international law by the recognition of the State's wider power of self-help, still has its *raison d'être* and validity in smaller groupings in which that power is limited or even entirely abolished." (A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours* . . . , 1929-I (Paris, Hachette, 1930), vol. 26, pp. 555-556.)

He adds, specifically, that the Covenant of the League of Nations, the Locarno Treaties and the Pact of Paris (or Briand-Kellogg Pact) have opened the way to the application of the concept of self-defence in international relations. See also, by the same author, *Corso di diritto internazionale*, 3rd ed. (Naples, Rindinella, 1934), pp. 530 *et seq.*

In a course of lectures given in the same year as Cavaglieri's, Verdross ("Règles générales du droit international de la paix" (*loc. cit.*), pp. 481 *et seq.*) says, first, that "self-defence means the right to resist by force an unjust aggression, that is, an aggression contrary to a rule of law", and then proceeds to enumerate the treaties which limited or ruled out the freedom of member States to wage war against the other member States. Accordingly, he too was of the view that self-defence became relevant in international law once the prohibition of the use of force had entered the law, even if purely by treaty provisions. The same ideas are to be found in Anzilotti (*Corso* . . . , 4th ed. (*op. cit.*), pp. 413-414), Kelsen ("Unrecht und Unrechtsfolgen . . ." (*loc. cit.*), pp. 562 *et seq.*), E. Giraud ("La théorie de la légitime défense", *Recueil des cours* . . . , 1934-III (Paris, Sirey, 1934), vol. 49, p. 715), Ago (*loc. cit.*, pp. 538 *et seq.*).

(Footnote 253 continued)

sabilité des Etats" (*loc. cit.*), pp. 107 *et seq.* Actually, these latter writers state that self-defence presupposes an "unjust aggression", but this does not prevent them from citing as examples of self-defence instances in which a State reacted to attacks from private individuals.

Other writers also take the view that the concept of self-defence can justify reactions to conduct other than armed attack or a threat of armed attack. Basdevant (*loc. cit.* pp. 545 *et seq.*), discusses the question whether armed intervention by a State in foreign territory in order to protect its nationals, or the employment of enforcement measures in response to acts, even lawful acts, by another State that jeopardize the vital interests of the State resorting to such measures ought not to be justified as being in the nature of self-defence. He does not answer the question; he was not sure that international law then admitted that the nature of such measures precluded their wrongfulness, but was clearly of the opinion that, if the measures were justifiable, they would be justified on the grounds of self-defence.

as lawful notwithstanding the general prohibition on the use of such force, and they hold this view irrespective of the way in which they visualize the relationship between the customary law and the provisions of the Charter of the United Nations concerning the subject.²⁵⁵

108. The foregoing considerations all seem to lead to the following conclusion: the formative process begun in the 1920s and completed at the end of the Second World War culminated in the existence in international law of an imperative rule imposing on all States the duty to refrain from all recourse to armed force in their reciprocal relations. The same process created the conditions for the materialization of another, parallel and equally imperative rule whereby self-defence is the sole limitation on the ban imposed by the first rule. These two rules which, in this writer's opinion, are part of the legal order of the international community as a whole, occur also in written form in the legal system of that special community of a universal character and virtually coterminous with the international community—the United Nations. The fact that these rules exist both in international law and in the Charter is the characteristic which distinguishes the situation of “self-defence” from the other circumstances which, like it, have the effect of precluding the wrongfulness of conduct that would otherwise be unlawful but which, unlike it, are not expressly spelt out in a provision of the Charter. The question may arise, therefore, whether or not one ought to presume a complete identity of content between the rule that evolved spontaneously in general international law regarding self-defence and the rule which by treaty was embodied in Article 51 of the Charter. It should be noted that this Article not only cautions against any

misinterpretation of what it calls the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”, but in addition subordinates recourse to this “right” to certain restrictions and to specific rules. Hence, for the purpose of the question under discussion here, account should be taken of the intrinsic nature of the fact that the rule in question was inserted in a system which contemplates an active role for the Organization in the settlement of disputes and in the maintenance of peace and security and which envisages a measure of centralization of the use of enforcement action and, above all, of the decision-making power with regard to recourse to such action. Independently of this somewhat extraneous aspect, however, it would be hard to believe that there can be any difference whatsoever in content between the notion of self-defence in general international law and the notion of self-defence endorsed in the Charter. The evolution of the rule in force in the legal order of the world-wide international community and that of the rule in force in the United Nations system of law were virtually contemporaneous, as has been noted earlier. It is almost inconceivable that, at the same moment in history and in consequence of the same historic events, nearly all Governments should have been able to sign a treaty instrument binding them reciprocally on the basis of a specific notion and that, at the same time, they should have been able to retain in their legal thinking the conviction of being reciprocally bound on the basis of a different notion.

109. Consequently, while it is right to dismiss at the outset so unconvincing an idea as that two really divergent notions of self-defence, based respectively on general international law and on the United Nations system of law, could co-exist, nevertheless some comments seem to be necessary. A codification carried on in the framework and under the auspices of the United Nations cannot be guided by criteria that in any manner whatsoever are not fully consistent with those forming the basis of the Charter at the risk, moreover, of giving rise to dangerous uncertainties in a subject concerning so delicate a sector as that of the maintenance of international peace and security. If, therefore, and without admitting inconceivable divergences as to substance,²⁵⁶ it should nevertheless be thought that the rules regarding self-defence laid down by the Charter of the United Nations were intended to rectify in certain respects the rules that had evolved in general international law, we could only be guided by the criteria adopted in the Charter. As regards the point at issue here it may, surely, be proper to look at general international law in so far as it may help to solve problems of interpretation connected with Article 51, or in so far as it tends to clarify certain

²⁵⁵ A large majority of modern writers holds the view that the prohibition of the principle of the use of armed force has now become a rule of international customary law. None of these writers, however, has questioned the lawfulness of a State's having recourse to the use of armed force to repel an armed attack. We shall merely quote, on this subject, the opinion of the Commission, which as early as 1949 adopted a draft Declaration on the Rights and Duties of States, of which art. 12 reads:

“Every State has the right of individual or collective self-defence against armed attack.” (*Yearbook* ... 1949, part II, p. 288)

In its observations concerning the draft Declaration, the Commission specifically stated that, in its opinion, the articles thereof enunciated general principles of international law (*ibid.*, p. 290, para. 52).

As to the rare authors who persist in thinking that international customary law would still today allow recourse to armed force to safeguard a subjective right or even a simple interest, they do so (like the authors of the period between the two World Wars) while maintaining that the concept of “self-defence” has no autonomy in general international law. However, they do admit the existence of “self-defence” as an exception in those particular systems of international law which prohibit the use of armed force, such as the Charter of the United Nations. They also consider, therefore, that in those systems the use of force remains lawful if its purpose is to repel an unjust attack (see, as representative of all such opinion, Morelli, *op. cit.*, pp. 353–354).

²⁵⁶ However strange the ideas developed below may appear in the light of the earlier description of the evolution of the rule concerning self-defence in the international legal order.

other aspects which the Article does not spell out but which undoubtedly have some importance. Examples of such aspects are the proportionality between the action taken in a situation of self-defence and the object of repelling an armed attack, or the determination of the point in time at which a State may claim that it is in a situation of self-defence, or the question as to who is competent to determine whether in a particular case the conditions are present in which the right of self-defence is exercisable, etc. It may perhaps be useful to consider some of these questions before completing the study of this subject. There is not, of course, any intention whatsoever of tampering with the content or scope of the rule laid down in Article 51 of the Charter, which once again, the Commission must naturally follow faithfully in codifying the subject under discussion.

110. Notwithstanding the foregoing remarks, it is impossible to pass over in complete silence the school of thought which, unlike the present writer, declines to take it for granted that the authors of Article 51 of the Charter of the United Nations in fact intended that the rule of written law they were drafting should have the same object and the same scope that general international law ascribes to the rule whereby self-defence constitutes a circumstance precluding the wrongfulness of conduct involving the use of armed forces. According to this school, the authors of Article 51 did not mean that this Article should regulate all the situations in which a State would be qualified to plead a situation of self-defence as an exonerating circumstance, but only the most important situation, namely, that where action taken to confront an armed attack is justified. According to that opinion, Article 51 does not deal with the other cases in which "self-defence" could also be legitimately pleaded and leaves the determination and regulation of such cases to general international law, unless an exception is provided for in other regulations of the Charter. Patently, if this point of view should be shown to be sound, the codification on which the Commission is at present engaged could not be complete if it took into account only the situation contemplated in Article 51 of the Charter. It would then be indispensable to inquire more searchingly into the entire subject held by general international law to be strictly that of self-defence. Accordingly, a digression is necessary in the present discussion for the purpose of considering whether the opinion referred to above is correct.

111. According to the authors belonging to the school of thought referred to, Article 51 of the Charter contains no evidence of any intention to limit the possibility of pleading self-defence to the case where "an armed attack occurs" against a State. These authors argue that, by referring to this specific case, the Article *ipso facto* meant to give only one example, and the intention was simply to lay down the rule regarding a typical situation. There was never any intention (it is said) to exclude the possibility of pleading self-defence in other cases, for, in the opinion

of these authors, those other cases are covered by customary law, and under that law the plea of self-defence may be advanced also in cases where the conduct to be justified was not adopted in order to resist an "armed attack".²⁵⁷ All those other cases are, according to their thesis, governed exclusively by the relevant rules of general international law, and such cases include above all, but not solely, the use of armed force to deal with a "threat" of armed attack.²⁵⁸ An

²⁵⁷ See Waldock, *loc. cit.*, pp. 495 *et seq.*, and the chapter on the use of force written by Waldock in J.L. Brierly, *The Law of Nations*, 6th ed., rev. by H. Waldock (Oxford, Clarendon Press, 1963), pp. 416 *et seq.*; L.C. Green, "Armed conflict, war and self-defence", *Archiv des Völkerrechts* (Tübingen), vol. 6, No. 4 (1956-1957), pp. 432 *et seq.* and pp. 987 *et seq.*; Bowett, *Self-defence ... (op. cit.)*, pp. 187 *et seq.*; the statement by L.C. Green and the communications from D.W. Bowett and V. Dedijer on the occasion of the debate, in 1958, in the International Law Association (ILA, *Report of the Forty-eighth Conference of the International Law Association held at New York* (1958) (London, 1959), pp. 517, 598, 609 *et seq.*); M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Conn., Yale University Press, 1961), pp. 232 *et seq.*; M.S. McDougal, "The Soviet-Cuban quarantine and self-defence", *The American Journal of International Law* (Washington, D.C.), vol. 57, No. 3 (July 1963), pp. 597 *et seq.*; D.P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970) vol. 1, pp. 316 *et seq.* See also the comments by M.S. McDougal and Sir Francis Vallat on the provisional report prepared by J. Zourek in *Annuaire de l'Institut de droit international*, 1975 (Basel), vol. 56, pp. 76 *et seq.* According to J. Stone (*Legal Controls of International Conflict* (London, Stevens, 1954), pp. 243 *et seq.*), Article 51 by its terms reserves a pre-existing right—though he points out that the reservation is subject to limitations (e.g. the right is exercisable only in response to an armed attack, the Security Council must be informed) which are unknown to customary international law. Stone then adds:

"The form of Article 51 as a reservation rather than grant is critical. Within the limits of Article 51 the licence of self-defence is reserved even if some other provisions of the Charter apparently forbid it. Beyond these limits self-defence by all States still depends on customary international law as modified (in the case of Members) by any specific prohibitions elsewhere in the Charter". (Stone, *op. cit.*, p. 244.)

In Stone's opinion, therefore, in cases other than that of armed attack, the States Members of the United Nations may plead self-defence if this is admitted by customary international law and if not expressly prohibited by other rules of the Charter. Stone later confirmed his view in *Aggression and World Order* (London, Stevens, 1958), pp. 43-44. S.M. Schwebel ("Aggression, intervention and self-defence in modern international law", *Recueil des cours ... 1972-II* (Leyden, Sijthoff, 1973), vol. 136, pp. 479 *et seq.*) carefully sets out the opinions of the writers who follow this school of thought and objectively marshals the arguments for and against their theses, though he seems to be inclined to support their theses.

²⁵⁸ Some of the authors cited above regard as lawful (*légitime*) recourse to "preventive" self-defence (*défense légitime*) in the broadest sense. For example, McDougal ("The Soviet-Cuban quarantine ...") (*loc. cit.*), p. 603 considers the blockade of Cuba by the United States in 1963 as a case of preventive self-defence. Other authors, on the contrary, such as Waldock (*loc. cit.*, pp. 497-498) take the view, however, that preventative self-defence is admissible only in the case of an imminent armed attack. Be that as it may, and without wishing to take sides (at least for the moment) in the argument about the admissibility or inadmissi-

additional point made by some of these authors concerns cases of the use of force not involving armed forces, and also cases where resistance is offered to wrongful action harming the State's vital interests, even where such action does not involve the use or the threat of the use of force.²⁵⁹

112. The authors whose views are cited above, in approximate terms, of course, in so far as they agree *inter se*, buttress their theses by a wealth of arguments based on the language of the article. They contend that the fact that the authors of the English language (original) version of Article 51 used the expression "inherent right" reflects the intention to refer to a right provided for in general international law; the express provision which states that "Nothing in the present Charter shall impair" this right is evidence—according to these writers—of an intention not to limit the right in any manner whatsoever; the fact that the Article uses the expression "if an armed attack occurs" against a Member of the United Nations, and not the expression "only if . . .", is said to confirm the intention of the drafters of the provision merely to give an example (and incidentally, the draftsmanship is

criticized as inept). These writers also argue on the basis of the context, in particular, the fact that Article 51 occurs in Chapter VII of the Charter, which would explain why self-defence is mentioned only in connection with the situation of an armed attack. In addition, they cite historic arguments, for example, the fact that the terms of Article 51 did not appear in the Dumbarton Oaks proposals, inasmuch as the provision was at that time considered as superfluous, as at the time of the formulation of the Briand-Kellogg Pact. They consider that the clause was added later for the sole purpose of co-ordinating the security systems of the United Nations and of the regional organizations with regard to the exercise of collective action against an aggressor. However, this would, of course, have left unchanged the implicit proviso in force previously in favour of individual self-defence.

113. This is not the place for a detailed discussion of the merits or flaws in the various arguments that have been mentioned, and still less for venturing an interpretation of the Charter and its provisions, for that is clearly beyond the scope of the present task. Moreover, the divergence between the views of the present writer and of those who have been cited concerns not the interpretation of a provision of the Charter but rather the interpretation of general international law and, above all, the determination of the scope of the concepts employed here. At this point, it is important to reiterate a remark made earlier on. What is the fundamental reason why these publicists argue so strenuously that the scope of self-defence under general international law is much wider than that of resistance to armed attack, and thus conclude that Article 51 of the Charter, in expressly safeguarding only the right of a State to react in self-defence only in the case of armed attack, was not intended to cover the entire field of application of the concept of self-defence and left intact the much wider scope of that concept in general international law? The reason is largely that many of these writers remain wedded to notions and to a terminology—which this writer regards as incorrect—drawn from a relatively antiquated portion of State practice with which they are more familiar. It is no accident that, in their arguments, they often cite practical cases, such as that of the *Caroline* and others, which they place under the heading of self-defence in keeping with the examples set by the diplomats of the time. It has, it is submitted, been clearly shown that these cases are in fact illustrations of different circumstances; admittedly, what they have in common with self-defence is that their effect is to preclude the wrongfulness of certain kinds of State conduct, but in many other essential respects they are quite unlike self-defence. It is indispensable to differentiate, clearly, the concept of self-defence properly so-called from the various notions that are often grouped together under the common label of self-help. It is worth repeating that self-defence is a concept clearly shaped by the general theory of law to indicate the situation of a subject of law driven by necessity to

bility in international law of "preventive" self-defence, the present writer wonders whether those who argue for its admissibility really need to rely on the idea that Article 51 of the Charter deliberately did not settle the question and left it to be settled by general international law. In this connection, it is pertinent to cite the opinion of R. Bindschedler ("La délimitation des compétences des Nations Unies", *Recueil des cours* . . ., 1963-I, (Leyden, Sijthoff, 1964), vol. 108, pp. 397 *et seq.*), that the authors of Article 51 intended by the use of the words "if an armed attack occurs against a Member of the United Nations" to codify all the customary rules concerning self-defence. According to Bindschedler, therefore, those words have the effect of debarring a State from pleading self-defence if it was the victim only of a delinquency not constituting an armed attack. He adds, however, that the plea of self-defence ought to be admissible in cases of imminent danger of armed attack, for the words in question should be read in the light of customary international law which (he says) admits preventive self-defence. Bindschedler confirms this opinion in his comments on the report by Žourek in *Annuaire de l'Institut* . . . (*op. cit.*), pp. 72–73. Apparently, therefore, he reaches his conclusion on the basis of an interpretation of Article 51, even though it is an interpretation in the light of general international law, rather than on the basis of a direct reliance on general international law which (he thinks) the Charter deliberately refrained from touching.

²⁵⁹ The author who goes furthest in this direction and who is most categorical is Bowett:

"Whilst it is conceded that the right of self-defence generally applies within the context of force, it is neither a necessary nor an accurate conclusion that the right of self-defence applies only to measures involving the use of force. The function of the right of self-defence is to justify action, otherwise illegal, which is necessary to protect certain essential rights of the state against violation by other states.

The substantive rights to which self-defence pertains, and for which it serves as a means of protection are:

"(a) The Right of Territorial Integrity.

"(b) The Right of Political Independence.

"(c) The Right of Protection over Nationals.

"(d) Certain Economic Rights." (Bowett, *Self-defence* . . . (*op. cit.*), p. 270.)

defend himself by the use of force, and in particular by the use of a weapon or weapons, against another's attack. Nowadays this is as true in the system of international law as in the systems of municipal law, where the concept was defined long ago. In making such an affirmation, no one would dream of denying that States can, in other circumstances, resort to certain courses of conduct that are justified by a situation of necessity, or even distress, or that are untainted by wrongfulness because they are legitimate reactions to an infringement of their rights which nevertheless falls short of an armed attack, subject of course to the present limitations on such a reaction. The fear that the effect of adopting an accurate and strict definition of the circumstances in which recourse to self-defence is permissible may be to prevent the State from acting lawfully to protect its rights for other reasons and in other circumstances, is, in the final analysis, groundless.²⁶⁰ There is nothing to be gained from distorting the concept of self-defence in order to make its field of application much wider than it actually is, for such an enlargement would certainly not contribute to the necessary clarification of concepts.

114. After these considerations, it should be pointed out straightaway that the school of thought referred to above in no sense represents the prevailing view or even a majority view. On the contrary, the majority of the publicists who have written about self-defence by no means share that opinion; they rebut it firmly and effectively.²⁶¹ It may be said that all the theses advanced by the advocates of that school of thought

have been subjected to critical analysis and rejected one by one. The different arguments deployed in rebuttal will not be recounted here. Suffice it to say that the plea of self-defence in justification of the use of armed force by a State in cases other than those in which the State in question is the object of an armed attack is held by the majority to be utterly inadmissible, either on the basis of a direct and exclusive interpretation of Article 51 of the Charter or on that of an examination of the relationship between that Article and the corresponding rule in general international law, or else on the basis of a study of customary law alone. In connection with the expression used in Article 51 of the Charter, it has been emphasized that the English term "inherent right", probably mistranslated into French by the term "*droit naturel*" (with its undesirable connotations of the natural law theory of the fundamental rights of States),²⁶² and better reflected in

²⁶⁰ It is realized that behind the idea of describing as instances of "self-defence" cases which do not come within such a definition there may be the intention to circumvent the obstacle—one that some people consider to be too categorical—to the use of coercion in the application by a State of countermeasures designed to impose sanctions or to secure performance of an obligation after an infringement of its rights falling short of armed attack. Furthermore, in view of the absolute prohibition of any form of sanction involving the use of armed force and in view of the frustration of the hopes that the establishment of the United Nations would lead to an effective system for a centralized guarantee of law, the impression may sometimes be gained that, all too often, the subjective rights of States are ultimately devoid of any form of effective protection. This could—although it involves too many disadvantages to embark lightly on such a course—lead to a possible review, even by a spontaneous evolution, of the inflexibility of certain prohibitions, but such an evolution has not taken place nor is it about to take place. Nevertheless, there would in no case be any advantage in advocating misguided interpretations of certain provisions, for these interpretations can only lead to a dangerous confusion of principles.

²⁶¹ See, among the writers holding this majority view, J.L. Kunz, "Individual and collective self-defence in Article 51 of the Charter of the United Nations", *The American Journal of International Law* (Washington, D.C.), vol. 41, No. 4 (October 1947), pp. 877 *et seq.*; N.Q. Dinh, "La légitime défense d'après la Charte des Nations Unies", *Revue générale de droit international public* (Paris), 3rd series, vol. XIX, No. 1-2 (January-June 1948), pp. 240 *et seq.*; H. Kelsen, "Collective security and collective self-defence under the Charter of the United Nations", *The American Journal of International Law* (Washington, D.C.),

vol. 42, No. 4 (October 1948) pp. 791-792, and *The Law of the United Nations* (London, Stevens, 1950), pp. 269, 797 *et seq.*; P.C. Jessup, *A Modern Law of Nations: An Introduction* (New York, Macmillan, 1948), pp. 165 *et seq.*; H. Wehberg, "L'interdiction du recours à la force: Le principe et les problèmes qui se posent", *Recueil des cours . . .*, 1951-I (Leyden, Sijthoff, 1952), vol. 78, pp. 81 *et seq.*; Oppenheim, *op. cit.*, 7th ed. (1952), vol. II, p. 156; E. Jiménez de Aréchaga, "La legítima defensa individual en la Carta de las Naciones Unidas", *Estudios de derecho internacional (Homenaje al profesor Camilo Barcia Trelles)*, University of Santiago de Compostela (Zaragoza, Octavio y Féliz, 1958), pp. 328 *et seq.*, and *Derecho constitucional de las Naciones Unidas* (Madrid, Escuela de funcionarios internacionales, 1958), pp. 401 *et seq.*; D. Ninčić, Reply to the questionnaire prepared by G. Schwarzenberger, in: ILA, *op. cit.*, pp. 617 *et seq.*; S. Krylov, Statement in the debate at the ILA: *ibid.*, p. 512; Q. Wright, "United States intervention in the Lebanon", *The American Journal of International Law* (Washington D.C.), vol. 53, No. 1 (January 1959), pp. 116 *et seq.*; Partsch, *loc. cit.*, p. 257; G. Dahm, *Völkerrecht (op. cit.)*, pp. 410 *et seq.*, and "Das Verbot der Gewaltanwendung nach Art. 2 (4) der UNO-Charta und die Selbsthilfe gegenüber Völkerrechtsverletzungen, die keinen bewaffneten Angriff enthalten", in *Festschrift für Rudolf Laun zu seinem achtzigsten Geburtstag*, Special No. of *Jahrbuch für internationales Recht* (Göttingen), vol. XI (1962), pp. 51 *et seq.*; Brownlie, *op. cit.*, pp. 272 *et seq.*; L. Henkin, "Force, intervention and neutrality in contemporary international law", *Proceedings of the American Society of International Law at its Fifty-Seventh Annual Meeting (Washington, April 25-27, 1963)*, (Washington, D.C., 1963), pp. 148 *et seq.*; Skubiszewski, *loc. cit.*, pp. 765 *et seq.*; Skakunov, *loc. cit.*, pp. 107 *et seq.*; Lamberti Zanardi, *La legittima difesa . . . (op. cit.)*, pp. 204 *et seq.*; Delivanis, *op. cit.*, pp. 49 *et seq.*; Žourek, *loc. cit.*, pp. 52 *et seq.* (see also the comments by E. Castrén and G. Chaumont on the report by Žourek, *ibid.*, pp. 74 *et seq.*); Taoka, *op. cit.*, pp. 126 *et seq.*

In the 2nd edition of H. Kelsen's *Principles of International Law (op. cit.)*, rev. by Tucker, the latter examines the two conflicting interpretations of Article 51, but in the main he seems to prefer that in which self-defence is applicable only in the case of armed attack (pp. 64 *et seq.*). Similarly, Goodrich, Hambro and Simons, in the 3rd edition of their *Charter of the United Nations: Commentary and Documents (op. cit.)*, pp. 344 *et seq.*, incline towards the narrow interpretation, thus rectifying the attitude adopted in the earlier editions.

²⁶² Writers in both schools of thought have stressed that any reference to natural law is unacceptable; see, for example, Bowett, *Self-defence . . . (op. cit.)*, p. 187; Bindschedler, *loc. cit.*, p. 397; Žourek, *loc. cit.*, p. 46; Lamberti Zanardi, *La legittima difesa . . . (op. cit.)*, p. 213.

Spanish by the term "*derecho inmanente*" and in Russian by "*neotemlemoe pravo*" (indefeasible right), is never used in practice to designate the customary right.²⁶³ Again, much emphasis has been placed on the fact that the Charter describes as "inherent" only the right to invoke self-defence as justification of conduct adopted "if an armed attack occurs against" the State. It is not possible to read into the text of Article 51, either explicitly or implicitly, any kind of extension of this right to other cases in which the State is affected by an infringement of a right which, however important, is not held to be one of those infringed by an armed attack. The idea that the case mentioned in Article 51 is intended simply to serve as an example is therefore rejected as absurd and, furthermore, as conflicting with the evidence in the *travaux préparatoires*.²⁶⁴ Lastly, and what is most important for the present purposes, the writers who have gone most thoroughly into the substance of this problem have highlighted the plain truth (and the present writer is firmly convinced that it is the truth) that the principles that were current in general international law at the time when the Charter was drafted in no way differed, as to substance, from those laid down in Article 51. The entire question of a conflict between two allegedly different rules, one said to be operative in general international law and the other in the United Nations system of law, is artificial and has no basis in fact. There is no conflict, no divergence, no "referral" from the one to the other. In international law, whether customary general international law or the treaty law of the Charter, there is only one basic rule on the matter under consideration; there is in both systems only one exception, that of "self-defence", to the prohibition they now impose on

the use of armed force in inter-State relations, i.e. the right to take up arms to resist an armed attack.

115. The conclusions reached go a long way towards clarifying and simplifying the final task of defining, for the purposes and in the framework of the draft, the principle that self-defence is a circumstance precluding the wrongfulness of conduct by a State that is not in conformity with an international obligation owed by that State. It would be wrong to think that, for these purposes and in this framework, it is necessary also to try to settle some highly controversial problems arising, in doctrine and in United Nations practice, in connection with the interpretation and application of the wording of Article 51 of the Charter. The function of the Commission is to "codify" international law, on this as on all the other topics which it has been considering in its reports on the international responsibility of States. So far as "self-defence" is concerned, the present writer took care first to dispel the mistaken idea that there may be a difference as to substance between the concept of self-defence adopted by customary international law and that adopted by the international treaty law of the United Nations. It has been shown that in this respect the representatives of States who drafted the Charter merely put in writing—in other words, "codified"—the ideas and principles forming part of their legal thinking. The conclusion drawn was, therefore, that the rule to be formulated by the Commission on the topic under consideration cannot stray too far from that embodied in the Charter. The Commission would, however, be going beyond the limits of the task entrusted to it if it wanted in addition to express an opinion on problems which, in the final analysis, only the competent United Nations bodies are qualified to settle. Hence, the Commission is not expected to espouse any one of the (at times) conflicting views held with regard to the interpretation of the Charter and its provisions.

116. Accordingly, the Commission can hardly take sides, for example, in the controversy between those favouring a narrow and those favouring a broad interpretation of the language used in Article 51 to describe the case in which "an armed attack occurs" against a Member of the United Nations" (in French: "un Membre des Nations Unies est l'objet* d'une agression armée").²⁶⁵ It is not really for the Commission to decide whether, correctly construed, these terms mean that recourse to armed force is inadmissible for the purpose of confronting action that has not yet in fact taken the form of an actual armed attack ("agression") or that they mean, rather, that the possibility of what is known as "preventive" self-defence is admissible, particularly if the object of the preventive action is to halt, before it materializes, a thoroughly planned armed attack that is about to be launched. As is well known, opinions differ as to the

²⁶³ For example, Lamberti Zanardi (*ibid.*). The present writer does not, however, share the view expressed by Kelsen, (*The Law of the United Nations* (op. cit.), pp. 791–792) that the adjective is merely decorative. In our opinion, as in that of Lamberti Zanardi, the word "inherent", which is quite simply the one used in the United States of America note during the negotiation of the Briand–Kellogg Pact, is intended primarily to emphasize that the ability to make an exception to the prohibition on the use of force for the purpose of lawfully defending itself against an armed attack is a prerogative of every sovereign State and one that it is not entitled to renounce. This signifies—and attention has already been drawn to this particularly important point—that no treaty can "derogate" from this prerogative manifestly vested in States by an imperative principle.

²⁶⁴ See the analysis of the *travaux préparatoires* on Article 51 made by Lamberti Zanardi, *La legittima difesa* . . . (op. cit.), pp. 192 *et seq.* and 209 *et seq.*, where he reproduces the most significant statements of position. He infers from them that the representatives of States at the San Francisco Conference, and particularly the representatives of the five major Powers that co-operated in the drafting of Article 51, were perfectly aware that the Article allowed self-defence solely in the case of an armed attack. He also finds confirmation for such a conclusion in a parallel analysis of United Nations practice.

As to the practice for the years 1963–1970, see also J.-P. L. Fonteyne, "Forcible self-help by States to protect human rights: Recent views from the United Nations", *Humanitarian Intervention and the United Nations*, ed. R. B. Lillich (Charlottesville, Va., University Press of Virginia, 1973), pp. 211 *et seq.*

²⁶⁵ In Spanish: "*en caso de ataque armado*", and in Russian: "*esli proizoidet vooruzhennoe napadenie*".

inferences to be drawn from a textual or historical or teleological interpretation. In many specific cases, States have debated this question hotly and at great length, and there is no denying the shortcomings of either of the answers. Nor is it likely that general international law can offer greater clarity and certainty on this question than the legal system of the United Nations, or that it might shed some light on the interpretation. This writer believes, therefore, that the rule he is going to formulate can do nothing more than rely on decisions which can only be taken by other bodies.

117. The same is true of the problems which have arisen and arise in the United Nations in connection with the interpretation of the English words "armed attack" and the French words "*agression armée*", and the question of their approximate equivalence.²⁶⁶ The bodies responsible for interpreting and applying the Charter have often come up against the problem of determining how intensive and extensive the use of armed force must be in order for it to be regarded as an "armed attack" or "*agression armée*". The impact that the Definition of aggression adopted by the General Assembly in 1974²⁶⁷ had on the solution to this problem and the more general problem of determining which acts may be included in the concepts under consideration is certainly not to be underestimated. Under the heading of acts of aggression, the Definition includes acts that do not necessarily all qualify as "armed attacks"; various questions may therefore arise. In trying to determine whether or not an "armed attack" has taken place within the meaning of Article 51, difficulties may, moreover, sometimes arise because of the particular "object" against which the armed attack was directed or because of the "subjects" which carried it out. It is not, however, the purpose of the provision suggested below to try to settle problems of this kind.

118. On the other hand, and without inquiring too deeply into the various problems of interpretation of the Charter which arise in connection with the issue that is about to be mentioned, it is necessary here to touch on the question of "collective self-defence".²⁶⁸ It is important to have a clear idea of what is meant

when this special type of action taken in self-defence is mentioned in relation to action taken by a State which is the direct victim of an aggression or an armed attack, and when it is said that in both cases self-defence may be a circumstance precluding the wrongfulness of State conduct involving the use of armed force. In order not to belabour this point, this writer would make just two remarks. First, one must dismiss the idea that "collective" self-defence means nothing more than a plurality of acts of "individual" self-defence committed collectively—or, better, concurrently—by different States, each of which has been the victim of an armed attack, for there is no reason why the adjective "collective" should be used to describe a situation which is, in fact, only a purely fortuitous juxtaposition of several conducts adopted in "individual" self-defence. Secondly, this writer cannot agree with the idea that, although the reference to collective self-defence in Article 51 of the Charter was doubtless originally bound up with the intention of specially safeguarding the operation of regional arrangements for mutual assistance,²⁶⁹ that principle may not also be applied outside the framework of such arrangements. It seems quite inconsistent to admit, in principle, the full lawfulness of the operation of pre-existing mutual assistance arrangements and, at the same time, to treat as wrongful the fact that a State comes, with the strength at its command—even in the absence of any such arrangements—to the assistance of another State that has suffered an armed attack (that other State must, of course, request or, at least, consent to such assistance). The lawfulness, the full lawfulness, of such conduct was admitted by general international law, as was the lawfulness of the conduct of the attacked State in defending itself by the use of force against an armed attack, as an exception to the general prohibition of the use of armed force, when general international law recognized that prohibition.

119. It was noted above²⁷⁰ that it would be useful to devote some attention to certain questions on which

²⁶⁶ The original proposal used the English words, which were translated into Spanish as "*ataque armado*" and into Russian as "*vooruzhennoe napadenie*".

²⁶⁷ Resolution 3314 (XXIX), annex.

²⁶⁸ See on this question: Kunz, *loc. cit.*, pp. 874–875; Kelsen, "Collective security . . ." (*loc. cit.*), pp. 792 *et seq.*, and *The Law of the United Nations* (*op. cit.*), pp. 792 *et seq.*; Dinh, *loc. cit.*, pp. 24 *et seq.*; B. Boutros Ghali, *Contribution à l'étude des ententes régionales* (Paris, Pedone, 1949), pp. 193 *et seq.*; Waldock, *loc. cit.*, pp. 503 *et seq.*; Stone, *Legal Controls* . . . (*op. cit.*), p. 245; D. W. Bowett, "Collective self-defence under the Charter of the United Nations", *The British Year Book of International Law, 1955–1956* (London), vol. 32 (1957) pp. 130 *et seq.*, and *Self-defence* . . . (*op. cit.*), pp. 200 *et seq.*; Jiménez de Aréchaga, *Derecho constitucional* . . . (*op. cit.*), pp. 412 *et seq.*; Arangio-Ruiz, *loc. cit.*, pp. 634–635; McDougal and Feliciano, *op. cit.*, pp.

244 *et seq.*; Brownlie, *International Law* . . . (*op. cit.*), pp. 328 *et seq.*; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press, 1963), pp. 208 *et seq.*; B. Boutros Ghali, *Contribution à une théorie générale des alliances* (Paris, Pedone, 1963), pp. 95 *et seq.*; Skubiszewski, *loc. cit.*, pp. 768 *et seq.*; Delivannis, *op. cit.*, pp. 155 *et seq.*; Lamberti Zanardi, *La legittima difesa* . . . (*op. cit.*), pp. 276 *et seq.*; Zourek, *loc. cit.*, pp. 47–48; Taoka, *op. cit.*, pp. 137 *et seq.*

²⁶⁹ The drafters of the Article were thinking principally of the Act of Chapultepec (16 March 1945), by which a group of American States agreed to treat as an attack against all of them an attack against one of them. (OAS, *The International Conferences of American States, Second Supplement: 1942–1954* (Washington, D.C., 1958), pp. 66 *et seq.*) After the adoption of the Charter, many arrangements were concluded on the same basis; they all provided that the other contracting parties would come to the assistance of a State party that suffered an armed attack, even if no attack had occurred against those other parties and they were not consequently in a position to act in individual self-defence.

²⁷⁰ See para. 109.

the text of Article 51 of the Charter is silent, but which may be of practical importance for the topic under consideration and for which reference to general international law may also be helpful. Accordingly, the passages which follow refer briefly—although certainly these comments would better appear in the commentary than in the text of the article to be drafted—to certain requirements which are frequently said to be essential conditions for the admissibility of the plea of self-defence in a given case. Reference is made, in particular, to the requirements that the action to be excused must, in the case in question, be “necessary”, that it must be “proportional” to the objective which it is supposed to achieve, and that it must take place “immediately”. These are, actually, merely three aspects of the same principle which serves as a basis for the effect, attributed to the situation of self-defence, of precluding the wrongfulness of a given conduct: the objective to be achieved by the conduct in question, its *raison d’être*, is necessarily that of repelling an attack and preventing it from succeeding, and nothing else.²⁷¹

120. The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognized; hence it requires no further discussion. It should merely be noted that this requirement would be particularly important if the idea of preventive self-defence were admitted. It would obviously be of lesser importance if only self-defence following the attack was regarded as lawful.

121. The requirement of the *proportionality* of the action taken in self-defence, as we have said, concerns the relationship between that action and its purpose, namely—and this can never be repeated too often—that of halting and repelling the attack or even, in so

far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the “defensive” action, and not the forms, substance and strength of the action itself. A limited use of armed force may sometimes be sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, but this is not always certain. Above all, one must guard against any tendency in this connection to consider, even unwittingly, that self-defence is actually a form of sanction, such as reprisals. There must of course be some proportion between the wrongful infringement by one State of the right of another State and the infringement by the latter of a right of the former through reprisals. In the case of conduct adopted for punitive purposes, of specifically retributive action taken against the perpetrator of a particular wrong, it is self-evident that the punitive action and the wrong should be commensurate with each other. But in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the “necessity” and “proportionality” of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale.

Within these limits and in this sense, the requirement of proportionality is definitely confirmed by State practice.²⁷² The occasional objections and doubts expressed about it have been due solely to the mistaken idea of a need for some kind of identity of content and strength between the attack and the action taken in self-defence. It must be emphasized once again that, without the necessary flexibility, the requirement would be unacceptable. As indicated at the beginning of this paragraph, a State which is the victim of an attack cannot really be expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the attack from succeeding and bring it to an end. If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of

²⁷¹ On the subject of the requirements referred to, see Kunz, *loc. cit.*, pp. 877–878; Jessup, *op. cit.*, pp. 163–164; Cheng, *op. cit.*, pp. 94 *et seq.*; Waldock, *loc. cit.*, pp. 463–464; Schwarzenberger, “The fundamental principles . . .” (*loc. cit.*), pp. 332 *et seq.*; Jiménez de Aréchaga, “La legítima defensa . . .” (*loc. cit.*), pp. 337–338, and *Derecho constitucional* . . . (*op. cit.*), pp. 411–412; Dahm, *Völkerrecht* (*op. cit.*), pp. 417–418; McDougal and Feliciano, *op. cit.*, pp. 217–218, 229 *et seq.*, 241 *et seq.*; Brownlie, *International Law* . . . (*op. cit.*), pp. 261 *et seq.* and 434; Higgins, *op. cit.*, p. 205; Kelsen, *Principles* . . . (*op. cit.*), pp. 81 *et seq.*; Goodrich, Hambro and Simons, *op. cit.*, p. 347; Lamberti Zanardi, *La legittima difesa* . . . (*op. cit.*), pp. 127 *et seq.*, 267 *et seq.*; R. W. Tucker, “Reprisals and self-defense: the customary law”, *The American Journal of International Law* (Washington, D.C.), vol. 66, No. 3 (July 1972), pp. 588–589; Zourek, *loc. cit.*, pp. 48 *et seq.*

²⁷² See the cases cited by Lamberti Zanardi, *La legittima difesa* . . . (*op. cit.*), pp. 127 *et seq.*, 267 *et seq.*

attacks. If this conviction were to lead to the opposite extreme, that of denying that the requirement of proportionality has any incidence whatsoever on the lawfulness of an armed reaction to self-defence, it might be held to justify acts such as the large-scale murderous bombing of large areas of a State's territory in order to secure the evacuation of a small island wrongfully occupied by its forces. Even in national law, excessive forms of self-defence are punishable.

Here too one must keep in mind the distinction between action taken in self-defence proper and a subsequent and separate punitive and retributive action (even if materially alike) that the State which is the victim of the wrong represented by the armed attack takes against the State which did the wrong. Moreover, the limits inherent in the requirement of proportionality are clearly meaningless where the armed attack and the likewise armed resistance to it lead to a state of war between the two countries.

122. There remains the third requirement, namely that armed resistance to armed attack should take place *immediately*, i.e. while the attack is still going on, and not after it has ended. A State can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier. If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole. At all events, practice and doctrine seem to endorse this requirement fully, which is not surprising in view of its plainly logical link with the whole concept of self-defence.

123. One final question deserves to be touched on: who is to determine whether in a given practical case the conditions are such as to justify invoking self-defence? It seems perfectly evident that a State which considers itself the victim of an armed attack or, in more general terms, of conduct entitling it to react in self-defence against the author of that conduct, should not have to seek anybody's permission beforehand to do so; to maintain the opposite would be to contradict the very essence of the notion of self-defence. If, in certain circumstances, a State considers itself or another State to be the victim of an attack and takes

the view that it must therefore use armed force immediately in order to repel it, the extremely urgent situation obviously leaves it no time or means for requesting other bodies, including the Security Council, to undertake the necessary defensive action. There is of course nothing extraordinary in this. Seen from that angle, the situation is the same as when conduct not in conformity with an international obligation is adopted in other circumstances which international law likewise regards as precluding the wrongfulness of the conduct. This does not mean, however, that the State acting in self-defence simply has unilateral discretion to determine outright whether conditions permit it to do so.²⁷³ Other States, first and foremost the State affected by the conduct allegedly adopted in self-defence, may object that the necessary conditions did not exist. A dispute will then arise, the settlement of which is to be sought, in principle, by one of the peaceful means contemplated in Article 33 of the Charter. If the State which acted should be held not to have been entitled to invoke self-defence in justification of its action, the wrongfulness of the conduct it adopted will not be precluded and the State will obviously incur responsibility for that conduct.

124. The writer considers that the necessary information and elements are now to hand for proceeding to a definition of the rule of international law concerning self-defence. Having regard to the conclusions reached on the different matters discussed in this section, he wishes to propose the adoption by the Commission of the following provisions:

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations.

²⁷³ See, in this sense H. Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon Press, 1933), pp. 177 *et seq.*; Giraud, *loc. cit.*, pp. 800 *et seq.*; Basdevant, *loc. cit.*, p. 549; Jessup, *op. cit.*, pp. 164–165; Oppenheim, *op. cit.*, 7th ed. (1952), vol. II, pp. 159, 186 *et seq.*; Jiménez de Aréchaga, "La legítima defensa . . ." (*loc. cit.*), pp. 335–336, and *Derecho constitucional . . .* (*op. cit.*), pp. 409–410; McDougal and Feliciano, *op. cit.*, pp. 218 *et seq.*; Higgins, *op. cit.*, p. 205; Brierly, *The Law of Nations* (*op. cit.*), pp. 407–408; Zourek, *loc. cit.*, pp. 49–50.

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Principal works cited in the reports of Mr. Ago

Document prepared by the Secretariat

ACCIOLO, H.

"Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours de l'Académie de droit international de La Haye*, 1959-I. Leyden, Sijthoff, 1960, vol. 96.

Tratado de direito internacional público, 2nd ed. Rio de Janeiro, I.B.G.E., 1956, vol. I.

AGO, R.

"Le délit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1939-II. Paris, Sirey, 1947, vol. 68.

"Illecito commissivo e illecito omissivo nel diritto internazionale", *Diritto internazionale*, 1938. Milan, Istituti per gli studi di politica internazionale, 1939.

"Introduction au droit des traités à la lumière de la Convention de Vienne", *Recueil des cours de l'Académie de droit international de La Haye*, 1971-III. Leyden, Sijthoff, 1972, vol. 134.

"L'occupazione bellica di Roma e il Trattato lateranense", in: Istituto di Diritto internazionale e straniero della Università di Milano, *Comunicazioni e Studi*. Milan, Giuffrè 1945, vol. II, p. 129.

"La regola del previo esaurimento dei ricorsi interni in tema di responsabilità internazionale", *Archivio di diritto pubblico* (Padua, CEDAM), vol. 3, No. 2, May–August 1938.

La responsabilità indiretta nel diritto internazionale. Padua, CEDAM, 1934.

"La responsabilità indiretta nel diritto internazionale", *Archivio di diritto pubblico* (Padua), vol. 1, No. 1, January–April 1936.

AKEHURST, M. B.

A Modern Introduction to International Law. London, Allen and Unwin, 1970.

"Reprisals by third States", *The British Year Book of International Law*, 1970 (London), vol. 44.

"State responsibility for the wrongful acts of rebels—An aspect of the Southern Rhodesian problem", *The British Year Book of International Law*, 1968–1969 (London), vol. 43.

ALESSI, R.

Principi di diritto amministrativo. Milan, Giuffrè, 1966, vol. I.

AMERASINGHE, C. F.

"The formal character of the rule of local remedies", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 25, No. 3, 1965.

"Imputability in the law of State responsibility for injuries to aliens", *Revue égyptienne de droit international* (Cairo), vol. 22, 1966.

State Responsibility for Injuries to Aliens. Oxford, Clarendon Press, 1967.

AMERICAN LAW INSTITUTE

Restatement of the Law, Second, Foreign Relations Law of the United States. St. Paul, Minn., American Law Institute Publishers, 1965.

ANZILOTTI, D.

Corso di diritto internazionale. Rome, Athenaeum, 1915.

Idem, 3rd ed., 1928.

Idem, 4th ed., in: S.I.O.I., *Opere di Dionisio Anzilotti*, vol. I. Padua, CEDAM, 1955.

Cours de droit international, French trans. by G. Gidel of the 3rd Italian ed. Paris, Sirey, 1929.

Il diritto internazionale nei giudizi interni, Bologna, Zanichelli, 1905, repr. in S.I.O.I., *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico*, vol. 1. Padua, CEDAM, 1956, p. 281.

"Le questioni di diritto sollevate dagli incidenti del Carthage e del Manouba", *Rivista di diritto internazionale* (Rome), VIIth year, 2nd series, vol. II, No. IV, 1913, pp. 512 *et seq.*

"La responsabilità internazionale des Etats à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, Nos. 1 and 3 (1906), repr. in S.I.O.I., *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico*, vol. 1. Padua, CEDAM, 1956, p. 149.

Teoria general della responsabilità dello Stato nel diritto internazionale, Florence, Lumachi, 1902, repr. in S.I.O.I., *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico*, vol. 1. Padua, CEDAM, 1956.

ARANGIO-RUIZ, G.

"Difesa legittima (Diritto internazionale)", *Novissimo Digesto Italiano* (Turin), vol. V, 1960, p. 633.

Gli enti soggetti dell'ordinamento internazionale. Milan, Giuffrè, 1951, vol. I.

"Stati e altri enti (Soggettività internazionale)", *Novissimo Digesto Italiano* (Turin), vol. XVIII, 1971.

Sulla dinamica della base sociale nel diritto internazionale. Milan, Giuffrè, 1954.

ARATÓ, S.

Die völkerrechtliche Haftung. Pécs, Taizs, 1937.

ARIAS, H.

"The non-liability of States for damages suffered by foreigners in the course of a riot, an insurrection or a civil war", *The American Journal of International Law* (New York), vol. 7, No. 4, October 1913.

AYALA, B.

De jure et officiis bellicis et disciplina militari, libri tres (1582), *The Classics of International Law*, vol. II. Washington D.C., Carnegie Institution of Washington, 1912. English translation.

- BAADE, H. W.
 "Intertemporales Völkerrecht", *Jahrbuch für internationales Recht*, Göttingen, vol. 7, Nos. 2-3, January 1958, p. 229.
- BALLADORE PALLIERI, G.
 "Gli effetti dell' atto illecito internazionale", *Rivista di diritto pubblico—La giustizia amministrativa* (Rome), No. 1, part I, January 1931.
Diritto internazionale pubblico, 7th ed. Milan, Giuffrè, 1956.
Idem, 8th ed., rev., 1962.
- BAR, L. VON
 "De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile", *Revue de droit international et de législation comparée* (Brussels), 2nd series, vol. I, No. 4, 1899.
- BARILE, G.
 "Note a teorie sulla responsabilità indiretta degli Stati", *Annuario di diritto comparato e di studi legislativi* (Rome), 3rd series (special), vol. XXII, No. 3, 1948.
- BARSOTTI, R.
 "Insorti", *Enciclopedia del diritto*. Milan, Giuffrè, 1971, vol. XXI.
- BASDEVANT, J.
 "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1936-IV*. Paris, Sirey, 1937, vol. 58.
- BASSIOUNI, M. C.
International Extradition and World Public Order. Leyden, Sijthoff, 1974.
- BATY, T.
The Canons of International Law. London, Murray, 1930.
- BELLINI, V.
 "Il principio generale dell' effettività nell'ordinamento internazionale", *Annuario di diritto comparato e di studi legislativi* (Rome), 3rd series (special), vol. XXVII, No. 3, 1951.
- BENTZ, J.
 "Le silence comme manifestation de volonté en droit international public", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXIV, No. 1, January-March 1963.
- BERBER, F.
Lehrbuch des Völkerrechts. Munich, Beck, 1977, vol. III.
- BERLIA, G.
 "La guerre civile et la responsabilité internationale de l'Etat", *Revue générale de droit international public* (Paris), 3rd series, vol. XI, No. 1, January-February 1937.
- BEUS, J. G. DE
The Jurisprudence of the General Claims Commission United States and Mexico under the Convention of September 8, 1923. The Hague, Nijhoff, 1938.
- BEYERLIN U.
 "Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 37, No. 2, 1977.
- BILGE, A. S.
La responsabilité internationale des Etats et son application en matière d'actes législatifs [thesis No. 471]. Istanbul, Tsitouris, 1950.
- BINDSCHIEDLER, R.
 "La délimitation des compétences des Nations Unies", *Recueil des cours de l'Académie de droit international de La Haye, 1963-I*. Leyden, Sijthoff, 1964, vol. 108.
- BINDSCHIEDLER-ROBERT, D.
 "De la rétroactivité en droit international public", *Recueil d'études de droit international en hommage à Paul Guggenheim*. Geneva, Faculté de droit, Institut universitaire de hautes études internationales, 1968.
- BISCOTTINI, G.
 "Volontà ed attività dello Stato nell'ordinamento internazionale", *Revista di diritto internazionale* (Padua), XXXIVth year, 4th series, vol. XXI, Nos. I-II, 1942.
- BISSONNETTE, P. A.
La satisfaction comme mode de réparation en droit international (thesis presented to the University of Geneva). Annemasse, Grandchamp, 1952.
- BLUM, Y.
 "The Beirut raid and the international double standard: A reply to Professor Richard A. Falk", *The American Journal of International Law* (Washington, D.C.), vol. 64, No. 1, January 1970.
- BLUNTSCHLI, J. C.
Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt. Nördlingen, Beck, 1868.
- BOGAERT, E. R. C. VAN
Het rechtsmisbruik in het volkenrecht. Antwerp, De Sikkel, 1948.
- BOHAN, R. T.
 "The Dominican case: unilateral intervention", *The American Journal of International Law* (Washington, D.C.), vol. 60, No. 4, October 1966.
- BOLLECKER-STERN, B.
Le préjudice dans la théorie de la responsabilité internationale. Paris, Pedone, 1973.
- BORCHARD, E. M.
The Diplomatic Protection of Citizens Abroad or The Law of International Claims, [1915], repr., New York, Banks Law Publishing, 1928.
 "Important decisions of the Mixed Claims Commission United States and Mexico", *The American Journal of International Law* (Washington, D.C.), vol. 21, No. 3, July 1927.
 "La responsabilité des Etats à la Conférence de codification de La Haye", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XII, 1931.
 "Theoretical aspects of the international responsibility of States", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin), vol. I, part I, 1929.
- BORSI, U.
 "Ragione di guerra e stato di necessità nel diritto internazionale", *Rivista di diritto internazionale* (Rome), Xth year, series II, vol. V, No. 2, 1916.
- BOTHE, M.
Streikkräfte internationaler Organisationen. Cologne, Heymann, 1968.
- BOURQUIN, M.
 "Observations" [concerning the Strisower report], *Annuaire de l'Institut de droit international, 1927* (Brussels), vol. 33, No. I, p. 501.

- "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, 1931-I. Paris, Sirey, 1932, vol. 35.
- BOUTROS GHALI, B.**
Contribution à l'étude des ententes régionales. Paris, Pedone, 1949.
Contribution à une théorie générale des alliances. Paris, Pedone, 1963.
- BOUVÉ, C. L.**
 "The national boycott as an international delinquency", *The American Journal of International Law* (Washington, D.C.), vol. 28, No. 1, January 1934.
 "Quelques observations sur la mesure de la réparation due en certains cas par l'Etat responsable", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XI, No. 3, 1930.
 "Russia's liability in tort for Persia's breach of contract", *The American Journal of International Law* (New York), vol. 6, No. 2, April 1912.
- BOWETT, D. W.**
 "Collective self-defence under the Charter of the United Nations", *The British Year Book of International Law*, 1955-1956 (London), vol. 32.
 "Reprisals involving recourse to armed force", *The American Journal of International Law* (Washington, D.C.), vol. 66, No. 1, January 1972.
Self-defence in International Law. Manchester, Manchester University Press, 1958.
United Nations Forces: A Legal Study of United Nations Practice. London, Stevens, 1964.
- BRIERLY, J. L.**
The Law of Nations, 6th ed., rev. by H. Waldock. Oxford, Clarendon Press, 1963.
 "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, 1936-IV. Paris, Sirey, 1937, vol. 58.
 "The shortcomings of international law", *The British Year Book of International Law*, 1924 (London), vol. 5.
 "The theory of implied State complicity in international claims", *The British Year Book of International Law*, 1928 (London), vol. 9.
- BRIGGS, H. W.**
The Law of Nations, 2nd ed. London, Stevens, 1953.
 "The punitive nature of damages in international law and State responsibility for failure to apprehend, prosecute or punish", *Essays in Political Science in Honour of W. W. Willoughby*, J. M. Mathews and J. Hart, eds. Baltimore, Johns Hopkins Press, 1937.
- BROWNIE, I.**
 "Decisions of British courts during 1968 involving questions of public or private international law", *The British Year Book of International Law*, 1968-69 (London), vol. 43.
 "International law and the activities of armed bands", *International and Comparative Law Quarterly* (London), vol. 7, No. 4, October 1958.
International Law and the Use of Force by States. Oxford, Clarendon Press, 1963.
Principles of Public International Law. Oxford, Clarendon Press, 1966.
Idem, 2nd ed., 1973.
- BRUNS, V., ed.**
Fontes Juris Gentium, series B, sectio I, tomus I, pars 1. Berlin, Heymanns, 1932.
- BRUSA, E.**
 "Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile", *Annuaire de l'Institut de droit international*, 1898 (Paris), vol. 17.
- BRUSA, E. and L. VON BAR**
 "Nouvelles thèses", *Annuaire de l'Institut de droit international*, 1900 (Paris), vol. 18.
- BURCKHARDT, W.**
Die völkerrechtliche Haftung der Staaten. Bern, Haupt, 1924.
Die völkerrechtliche Verantwortlichkeit des Staates für die auf seinem Gebiete begangenen Verbrechen, Société suisse de droit international, publ. No. 17. Zurich, Orell Füssli, 1924.
- BUZA, L.**
 "The state of necessity in international law", *Acta juridica Academiae Scientiarum Hungaricae*. Budapest, Akadémiai Kiadó, 1959, vol. I.
- CALOGEROPOULOS STRATIS, S.**
 "La souveraineté des Etats et les limitations au droit de guerre", *Revue hellénique de droit international* (Athens), vol. 2, 1949.
- CALVO, C.**
 "De la non-responsabilité de l'Etat à raison des pertes et dommages éprouvés par les étrangers en temps de troubles intérieurs ou de guerres civiles", *Revue de droit international et de législation comparée* (Brussels), 1st series, vol. I, No. 3, 1869.
Le droit international théorique et pratique, 4th ed. Paris, Guillaumin, 1887, vol. I, and 1888, vol. III.
Idem, 5th ed. Paris, Rousseau, 1896, vol. III.
- CANSACCHI, G.**
 "Riparazione internazionale", *Novissimo Digesto Italiano* (Turin), vol. XV, 1968.
- CARDOZO, M. H.**
 "When extradition fails, is abduction the solution?", *The American Journal of International Law* (Washington, D.C.), vol. 55, No. 1, January 1961.
- CARLEBACH, A.**
Le problème de la faute et sa place dans la norme du droit international. Paris, Librairie générale de droit et de jurisprudence, 1962.
- CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE**
Recommendations on International Law and Official Commentary thereon of the Second Pan American Scientific Congress, held in Washington December 27, 1915-January 8, 1916, J. B. Scott, ed. New York, Oxford University Press, 1916.
- CASTRÉN, E.**
 "Civil war", *Annales Academiae Scientiarum Fennicae* (Helsinki, Suomalainen Tiedakatemia), series B, vol. 142, No. 2, 1966.
- CAVAGLIERI, A.**
Corso di diritto internazionale, 3rd ed. Naples, Rondinella, 1934.
 "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, 1929-I. Paris, Hachette, 1930, vol. 26.

- "Lo stato di necessità nel diritto internazionale", *Rivista italiana per le scienze giuridiche* (Rome), vol. LX, Nos. 1 and 2, 1917.
- CAVARÉ, L.
Le droit international public positif, 2nd ed. Paris, Pedone, 1962, vol. II.
Idem, 3rd ed., rev. by J.P. Quéneudec. Paris, Pedone, 1967, vol. I; 1969, vol. II; 1970, vol. III.
- CEPELKA, C.
Les conséquences juridiques du délit en droit international contemporain. Prague, Universita Karlova, 1965.
- CHAPPEZ, J.
La règle de l'épuisement des voies de recours internes. Paris, Pedone, 1972.
- CHARPENTIER, J.
 "Existe-t-il un droit de suite?", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 2, April-June 1961.
La reconnaissance internationale et l'évolution du droit des gens. Paris, Pedone, 1956.
- CHEN, T. C.
The International Law of Recognition. New York, Praeger, 1951.
- CHENG, B.
General Principles of Law as Applied by International Courts and Tribunals. London, Stevens, 1953.
- [CLUNET, E.]
 "Incident italo-américain de la Nouvelle-Orléans", *Journal du droit international privé et de la jurisprudence comparée* (Paris), vol. 18, No. 4, 1891.
- COCATRE-ZILGIEN, A.
L'affaire Argoud—Considérations sur les arrestations internationalement irrégulières. Paris, Pedone, 1965.
- COHN, G.
 "La théorie de la responsabilité internationale", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II*. Paris, Sirey, 1939, vol. 68.
- [Speyer] COLBERT, E.
Retaliation in International Law. New York, King's Crown Press, 1948.
- COLOMBO, L. A.
 "Responsabilidad del Estado por los actos de los poderes legislativo, ejecutivo y judicial", *Revista de ciencias jurídicas y sociales* (Santa Fe, Argentina), vol. 16, No. 78, 1954, p. 5.
- COMBACAU, J.
 "La responsabilité internationale", in: H. Thierry *et al.*, *Droit international public*. Paris, Montchrestien, 1975.
- COUSSIRAT-COUSTÈRE, V. and P.M. EISEMANN
 "L'enlèvement de personnes privées et le droit international", *Revue générale de droit international public* (Paris), vol. LXXVI, No. 2, April-June 1972.
- DAHM, G.
Völkerrecht. Stuttgart, Kohlhammer, 1958, vol. I; 1960, vol. II; 1961, vol. III.
- DECENCIÈRE-FERRANDIÈRE, A.
La responsabilité internationale des Etats à raison des dommages subis par des étrangers [thesis]. Paris, Rousseau, 1925.
- DELBEZ, L.
Les principes généraux du contentieux international. Paris, Librairie générale de droit et de jurisprudence, 1962.
Les principes généraux du droit international public, 3rd ed. Paris, Librairie générale de droit et de jurisprudence, 1964.
 "La responsabilité internationale pour crimes commis sur le territoire d'un Etat et dirigés contre la sûreté d'un Etat étranger", *Revue générale de droit international public* (Paris), 3rd series, vol. IV, 1930.
- DELIVANIS, J.
La légitime défense en droit international public moderne—Le droit international face à ses limites. Paris, Librairie générale de droit et de jurisprudence, 1971.
- DESCAMPS, E., Baron, and L. RENAULT
Recueil international des traités du XX^e siècle, année 1901. Paris, Rousseau.
- DESPAGNET, F.
Cours de droit international public, 3rd ed. Paris, Larose et Tenin, 1950.
 "Die deutsch-schweizerische Schiedsordnung im Falle Jacob", *Die Friedens-Warte* (Geneva), vol. 35, No. 4, 1935.
- DÍAZ PALOS, D. F.
 "Estado de necesidad", *Nueva enciclopedia jurídica* (Barcelona, Seix), vol. VIII, 1956.
- DINH, N. Q.
 "La légitime défense d'après la Charte des Nations Unies", *Revue générale de droit international public* (Paris), 3rd series, vol. XIX, Nos. 1-2, January-June 1948.
- DONATI, D.
I trattati internazionali nel diritto costituzionale, Turin, Unione tipografico-editrice torinese, 1906, vol. I.
- DONNEDIEU DE VABRES, H.
Les principes modernes du droit pénal international. Paris, Sirey, 1928.
- DONNER, B.
 "Kotázce nutnosti vyčerpání vnitrostátních právních prostředků před diplomatickým zákrokem" [On the need to exhaust legal local remedies before diplomatic action is taken], *Studie z mezinárodního práva* (Prague), vol. IV, 1958.
- DONOT, M.
De la responsabilité de l'Etat fédéral à raison des actes des Etats particuliers. Paris, Pedone, 1912.
- DOWNEY, W. G.
 "The law of war and military necessity", *The American Journal of International Law* (Washington, D.C.), vol. 47, No. 2, April 1953.
- DRAGO, R.
 "La réparation des dommages causés par les attroupements et les attentats en Tunisie", *Revue tunisienne de droit* (Tunis), vol. I, No. 2, April-June 1953.
- DUMAS, J.
De la responsabilité internationale des Etats. Paris, Sirey, 1930.
 "Du déni de justice considéré comme condition de la responsabilité internationale des Etats en matière criminelle", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. X, No. 2, 1929.
 "La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers", *Recueil*

- des cours de l'Académie de droit international de La Haye, 1931-II*. Paris, Sirey, 1932, vol. 36.
- Les sanctions de l'arbitrage international*. Paris, Pedone, 1905.
- DUNBAR, N. C. H.
 "Military necessity in war crimes trials", *The British Year Book of International Law*, 1952 (London), vol. 29.
- DUNN, F. S.
The Protection of Nationals: A Study in the Application of International Law. London, Oxford University Press, 1932.
- DURAND, C.
 "La responsabilité internationale des Etats pour déni de justice", *Revue générale de droit international public* (Paris), 3rd series, vol. V, 1931.
- DURANTE, F.
Responsabilità internazionale e attività cosmiche. Padua, CEDAM, 1969.
Ricorsi individuali a organi internazionali. Milan, Giuffrè, 1958.
- EAGLETON, C.
 "Denial of justice in international law", *The American Journal of International Law* (Washington, D.C.), vol. 22, No. 3, July 1928.
 "International organization and the law of responsibility", *Recueil des cours de l'Académie de droit international de La Haye, 1950-I*. Paris, Sirey, 1951, vol. 76.
 "Measure of damages in international law", *Yale Law Journal*, (New Haven, Conn.), vol. XXXIX, No. 1, November 1929.
The Responsibility of States in International Law. New York, New York University Press, 1928.
- EISSEN, M. A.
 "Les réserves *ratione temporis* à la reconnaissance du droit de recours individuel", *Les clauses facultatives de la Convention européenne des droits de l'homme*. Bari, Levante, 1974.
- ELYNYTCHEV, V. N.
 "Problema vmenenia v mezhdunarodnom prave", *Pravo-vedenie* (Leningrad), No. 5, 1970.
- EUSTATHIADES, C. T.
 "Les sujets du droit international et la responsabilité internationale—Nouvelles tendances", *Recueil des cours de l'Académie de droit international de la Haye, 1953-III*. Leyden, Sijthoff, 1955, vol. 84.
 "Principes généraux de la responsabilité internationale des Etats", *Etudes de droit international, 1929-1959*. Athens, Klissionis, 1959, vol. I.
La responsabilité internationale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international. Paris, Pedone, 1936.
- EVATT, H. V.
 "The international responsibility of States in the case of riots or mob violence—A study of the Kalgoorlie Riots Case, 1934", *Australian Law Journal, Supplement to volume 9* (Sydney), 15 November 1935.
- FAATZ, A.
 "Notwehr" und "Notstand" im Völkerrecht [thesis]. Greifswald, 1919.
- FALK, R. A.
 "The Beirut raid and international law of retaliation", *The American Journal of International Law* (Washington, D.C.), vol. 63, No. 3, July 1969.
- FAUCHILLE, P.
Traité de droit international public (8th ed. *Manuel de droit international public* by H. Bonfils). Paris, Rousseau, 1922, vol. I.
- FAVRE, A.
 "Fault as an element of the illicit act", *The Georgetown Law Journal* (Washington, D.C.), vol. 52, No. 2, Winter 1964.
Principes du droit des gens. Paris, Librairie de droit et de jurisprudence, 1974.
- FAWCETT, J. E. S.
 "The Eichmann case", *The British Year Book of International Law*, 1962 (London), vol. 38.
 "The exhaustion of local remedies: substance or procedure?", *The British Year Book of International Law*, 1954 (London), vol. 31.
 "Intervention in international law: A study of some recent cases", *Recueil des cours de l'Académie de droit international de La Haye, 1961-II*. Leyden, Sijthoff, 1962, vol. 103.
- FENWICK, C. G.
 "The Dominican Republic: intervention or collective self-defense?", *The American Journal of International Law*, (Washington, D.C.), vol. 60, No. 1, January 1966.
International Law. New York, Century, 1924.
Idem, 3rd ed. rev. and enl. New York, Appleton-Century-Crofts, 1948.
Idem, 4th ed., 1965.
- FIORE, P.
Droit international public, trans. P. Pradier-Fodéré. Paris, Durand, 1868.
Trattato di diritto internazionale pubblico, 3rd ed. Turin, Unione tipografico-editrice torinese, 1887, vol. I.
- FISCHER WILLIAMS, J.
 "The optional clause (The British signature and reservations)", *The British Year Book of International Law*, 1930 (London), vol. 11.
- FITZMAURICE, G. G.
 "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours de l'Académie de droit international de La Haye, 1957-II*. Leyden, Sijthoff, 1958, vol. 92.
 "The meaning of the term *denial of justice*", *The British Year Book of International Law*, 1932 (London), vol. 13.
- FONTENEYNE, J.-P. L.
 "Forcible self-help by States to protect human rights: recent views from the United Nations", *Humanitarian Intervention and the United Nations*, ed. R. B. Lillich. Charlottesville, Va., University Press of Virginia, 1973.
- FORSTHOFF, E.
Traité de droit administratif allemand, trans. M. Fromont. Brussels, Bruylant, 1969.
- FRANÇOIS, G. P. A.
 "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1938-IV*. Paris, Sirey, 1938, vol. 66.
- FRANKZE, H. G.
 "Die militärische Abwehr von Angriffen auf Staatsangehörige im Ausland—insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen", *Oesterreichische Zeitschrift für öffentliches Recht*, vol. XVI, Nos. 1-2, 1966.

FREEMAN, A. V.

The International Responsibility of States for Denial of Justice. London, Longmans, Green, 1938.

"Responsibility of States for unlawful acts of their armed forces", *Recueil des cours de l'Académie de droit international de La Haye, 1955-II*. Leyden, Sijthoff, 1956, vol. 88.

FRIEDMANN, H.

"Epuisement des voies de recours internes", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIV, No. 3, 1933.

"The growth of State control over the individual and its effects upon the rules of international State responsibility", *The British Year Book of International Law, 1938* (London), vol. 19.

"Some impacts of social organization on international law", *The American Journal of International Law* (Washington, D.C.), vol. 50, No. 3, July 1956.

FROWEIN, J. A.

Das de facto-Regime im Völkerrecht. Cologne, Heymann, 1968.

FURGLER, K.

Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der Praxis der Vereinigten Staaten und der Schweiz [thesis]. Zurich, Polygraphischer Verlag, 1948.

GAJA, G.

L'esaurimento dei ricorsi interni nel diritto internazionale. Milan, Giuffrè, 1967.

GANSHOF VAN DER MEERSCH, W. J.

Fin de la souveraineté belge au Congo—Documents et réflexions. Brussels, Institut royal des relations internationales, 1963.

GARCÍA AMADOR, F. V.

"State responsibility: some new problems", *Recueil des cours de l'Académie de droit international de La Haye, 1958-II*. Leyden, Sijthoff, 1959, vol. 94.

GARCÍA AMADOR, F. V., L. B. SOHN and R. R. BAXTER

Recent Codification of the Law of State Responsibility for Injuries to Aliens. Dobbs Ferry, N.Y., Oceana Publications, 1974.

GARCÍA-MORA, M. R.

International Responsibility for Hostile Acts of Private Persons against Foreign States. The Hague, Nijhoff, 1962.

GARDE CASTILLO, J.

"El acto ilícito internacional", *Revista española de derecho internacional* (Madrid, Consejo Superior de Investigaciones Científicas), vol. III, No. 1, 1950.

GARNER, J. W.

"International responsibility of States for judgments of courts and verdicts of juries amounting to denial of justice", *The British Year Book of International Law, 1929* (London), vol. 10.

"Responsibility of States for injuries suffered by foreigners within their territories on account of mob violence, riots and insurrection", *Proceedings of the American Society of International Law at its twenty-first annual meeting, (Washington, D.C., April 28-30, 1927)*. Washington, D.C., 1927.

GENTILI, A.

De iure belli, libri tres (1612), *The Classics of International Law*, vol. II. Oxford, Clarendon Press, 1933. English translation.

GIANNINI, M. S.

Diritto amministrativo. Milan, Giuffrè, 1970, vol. 1.

GIRAUD, E.

"La théorie de la légitime défense", *Recueil des cours de l'Académie de droit international de La Haye, 1934-III*, Paris, Sirey, 1934, vol. 49.

GIULIANO, M.

La comunità internazionale e il diritto. Padua, CEDAM, 1950. *Diritto internazionale.* Milan, Giuffrè, 1974, vol. I.

GLASER, S.

"Quelques remarques sur l'état de nécessité en droit international", *Revue de droit pénal et de criminologie*, (Brussels), No. 6, March 1952.

GOEBEL, J.

"The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil wars", *The American Journal of International Law* (New York), vol. 8, No. 4, October 1914.

GOODRICH, L. M. and E. HAMBRO

Charter of the United Nations: Commentary and Documents, 2nd ed. London, Stevens, 1949.

GOODRICH, L. M., E. HAMBRO and A. P. SIMONS

Charter of the United Nations: Commentary and Documents, 3rd ed., rev. New York, Columbia University Press, 1969.

GRAEFRAETH, B.

"Rechtsfolgen der völkerrechtlichen Verantwortlichkeit als Kodifikationskriterium", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe* (Berlin), vol. XXII, No. 6, 1973.

GRAEFRAETH, B., E. OESER and P. A. STEINIGER

Völkerrechtliche Verantwortlichkeit der Staaten. Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977.

GRAEFRAETH, B. and P. A. STEINIGER

"Kodifikation der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), No. 8, 1973.

GREEN, L. C.

"Armed conflict, war and self-defence", *Archiv des Völkerrechts* (Tübingen), vol. 6, No. 4, 1956-1957.

"Aspects juridiques du procès Eichmann", *Annuaire français de droit international, 1963* (Paris), vol. IX.

GREIG, D. W.

International Law. London, Butterworth, 1970.

GRISEL, A.

Droit administratif suisse. Neuchâtel, Ides et Calendes, 1970.

GROSSO, C. F.

"Necessità (Diritto penale)", *Enciclopedia del diritto*, Milan, Giuffrè, 1977, vol. 27.

GROTIUS, H.

De iure belli ac pacis, libri tres [1646], *The Classics of International Law*, vol. I. Oxford, Clarendon Press, 1913.

Idem, vol. II. Oxford, Clarendon Press, 1925. English translation.

Le droit de la guerre et de la paix, trans. J. Barbeyrac. Leyden, Aux dépens de la Compagnie, 1759, vol. 1.

GUARDIA, E. DE LA and M. DELPECH

El derecho de los tratados y la Convención de Viena. Buenos Aires, La Ley, 1970.

- GUERRERO, J. G.
La codificación del derecho internacional. Paris, Pedone, 1930.
 "La responsabilidad internacional de los Estados en los hechos y en su regla", in: *Académie diplomatique internationale. Dictionnaire diplomatique* (Paris) [n.d.], vol. II.
- GUGGENHEIM, P.
Traité de droit international public. Geneva, Georg, 1954, vol. II, and 2nd ed., rev. and enl., 1967, vol. I.
 "La validité et la nullité des actes juridiques internationaux", *Recueil des cours de l'Académie de droit international de La Haye, 1949-I*. Paris, Sirey, 1950, vol. 74.
- GUTIÉRREZ CASTRO, G. M.
La denegación de justicia como causal de reclamaciones internacionales [thesis]. Mexico, 1965.
- HACKWORTH, G. H.
Digest of International Law. Washington, D.C., U.S. Government Printing Office, 1940, vol. I.
Idem, 1941, vol. II.
Idem, 1942, vol. IV.
Idem, 1943, vols. V and VII.
- HAESLER, T.
The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals. Leyden, Sijthoff, 1968.
- HALL, W. E.
A Treatise on International Law, 2nd ed. Oxford, Clarendon Press, 1884.
Idem, 8th ed., 1924.
- HALLECK, H. W.
International Law or Rules Regulating the Intercourse of States in Peace and War. San Francisco, Bancroft, 1861.
- HARVARD LAW SCHOOL
Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12 with Explanatory Notes. Cambridge, Mass., 1961.
Draft Convention on the International Responsibility of States for Injuries to Aliens, in: *The American Journal of International Law* (Washington, D.C.), vol. 55, No. 3, July 1961, p. 548.
Research in International Law, Drafts of Conventions prepared in anticipation of the First Conference on the Codification of International Law (The Hague, 1930), part II, Responsibility of States, in: *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 23 (special Number), April 1929, p. 140.
- HATSCHEK, J.
Völkerrecht. Leipzig, Schöhl, 1923.
- HAZAN, E. T.
L'état de nécessité en droit pénal interétatique et international. Paris, Pedone, 1949.
- HEAD, I. L.
 "A fresh look at the local remedies rule", *Annuaire canadien de droit international*, 1967 (Vancouver), vol. V.
- HEFFTER, A. W.
Le droit international public de l'Europe, French trans. from the 3rd German ed. by J. Bergson. Berlin, Schroeder, 1857.
Das europäische Völkerrecht der Gegenwart, 6th ed. Berlin, Schroeder, 1873.
- HEILBORN, P.
Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen. Berlin, Springer, 1896.
- HENKIN, L.
 "Force, intervention and neutrality in contemporary international law", *Proceedings of the American Society of International Law at its fifty-seventh annual meeting (Washington, April 25-27, 1963)*. Washington, D.C. 1963.
- HERSHEY, A. S.
 "Denial of justice", *Proceedings of the American Society of International Law at its twenty-first annual meeting (Washington, D.C., April 28-30, 1927)*. Washington, D.C., 1927.
The Essentials of International Public Law and Organization, 2nd ed. New York, Macmillan, 1927.
Idem, rev. ed., 1930.
- HERTSLET, E.
Map of Europe by Treaty. London, Butterworth, 1875, vol. II.
- HIGGINS, R.
The Development of International Law through the Political Organs of the United Nations. London, Oxford University Press, 1963.
- HOUER, O.
La responsabilité internationale des Etats. Paris, Editions internationales, 1930.
 "La responsabilité internationale des Etats en matière d'actes législatifs", *Revue de droit international* (Paris), 3rd year, vol. IV, 1929.
 "Responsabilité internationale des Etats en matière d'actes judiciaires", *Revue de droit international* (Paris), 4th year, vol. V, 1930.
- HOLTZENDORFF, F. VON
 "Grundrechte und Grundpflichten der Staaten", *Handbuch des Völkerrechts*, vol. II. Hamburg, Richter, 1887.
- HUBER, M.
 "Die kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht* (Breslau), vol. VII, 1913.
- HUNT, B. L.
American and Panamanian General Claims Arbitration. Washington, D.C., U.S. Government Printing Office, 1934.
- HYDE, C. C.
 "Concerning damages arising from neglect to prosecute", *The American Journal of International Law* (Washington, D.C.), vol. 22, No. 1, January 1928.
International Law chiefly as Interpreted and Applied by the United States, 2nd ed., rev. Boston, Little, Brown, 1951, vol. 2.
- INSTITUTE OF THE STATE AND OF LAW OF THE ACADEMY OF SCIENCES OF THE SOVIET UNION
Kurs mezhdunarodnogo prava, F. I. Kozhevnikov et al., general eds., vol. V: *Osnovnye instituty y otrosli sovremen-nogo mezhdunarodnogo prava*. Moscow, Nauka, 1969.
Mezhdunarodnoe pravo. Moscow, Gosudarstvennoe Izdatelstvo Yuridicheskoi Literatury, 1957.
- INZITARI, B.
 "Necessità (Diritto privato)", *Enciclopedia del diritto*. Milan, Giuffrè, 1977, vol. 27.
- ION, T. P.
 "The Hellenic crisis from the point of view of constitutional and international law—Part IV", *The American Journal of International Law* (New York), vol. 12, No. 3, July 1918.

- IRIZARRY Y PUENTE, J.
 "The concept of 'denial of justice' in Latin America", *Michigan Law Review* (Ann Arbor, Mich.), vol. 43, No. 2, October 1944.
Jahrbuch des Völkerrechts (Munich), vol. III (special number), *Politische Urkunden zur Vorgeschichte des Weltkrieges*, 1916.
- JENKS, C. W.
The Common Law of Mankind. London, Stevens, 1958.
- JESCHECK, H. H.
Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrech. Bonn, Röhrscheid, 1952.
- JESS, A.
Politische Handlungen Privater gegen das Ausland und das Völkerrecht. Breslau, Marcus, 1923.
- JESSUP, P. C.
A Modern Law of Nations: An Introduction. New York, Macmillan, 1948.
Idem, 3rd ed., 1968.
Transnational Law. New Haven, Conn., Yale University Press, 1956.
- JÈZE, G. P. A.
Principes de droit administratif, 3rd ed. Paris, Giard, 1930, vol. II.
- JIMÉNEZ DE ARÉCHAGA, E.
Derecho constitucional de las Naciones Unidas. Madrid, Escuela de funcionarios internacionales, 1958.
 "International responsibility", *Manual of Public International Law*, ed. M. Sørensen. London, Macmillan, 1968.
 "La legítima defensa individual en la Carta de las Naciones Unidas", *Estudios de derecho internacional (Homenaje al profesor Camilo Barcia Trelles)*. University of Santiago de Compostela, pr. Zaragoza, Octavio y Féliz, 1958.
- JOHNSON, D. H. N.
 "The draft code of offences against the peace and security of mankind", *International and Comparative Law Quarterly* (London), vol. 4, No. 3, July 1955.
- KAHN, S. G.
 "Private armed groups and world order", *Netherlands Yearbook of International Law* 1970 (Leyden), vol. I, 1971.
- KALSHOVEN, F.
Belligerent Reprisals. Leyden, Sijthoff, 1971.
Keesing's Contemporary Archives, 1940-1943 (Bristol), vol. IV.
- KELSEN, H.
 "Collective security and collective self-defense under the Charter of the United Nations", *The American Journal of International Law*, (Washington, D.C.), vol. 42, No. 4, October 1948.
The Law of the United Nations. London, Stevens, 1950.
Principles of International Law. New York, Rinehart, 1952.
Idem, 2nd ed., rev. and ed. by R. W. Tucker. New York, Holt, Rinehart and Winston, 1966.
 "Théorie du droit international public", *Recueil des cours de l'Académie de droit international de La Haye*. 1953-III. Leyden, Sijthoff, 1955, vol. 84.
 "Über Staatsunrecht", *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* (Vienna), vol. 40, 1914.
 "Unrecht und Unrechtsfolgen im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4, October 1932.
- KIRK, G. E.
 "The Middle East", *Survey of International Affairs, 1939-1946—The World in March 1939*, eds. A. Toynbee and F. T. Ashton-Gwatkin. London, Oxford University Press, 1952.
- KIRSTEN, J.
 "Die völkerrechtliche Verantwortlichkeit", *Völkerrecht-Lehrbuch*. Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1973.
- KISS, A.-C.
L'abus de droit en droit international, Paris, Librairie générale de droit et de jurisprudence, 1953.
 "Les actes unilatéraux dans la pratique française du droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 2, April-June 1961.
Répertoire de la pratique française en matière de droit international public, Paris, C.N.R.S., 1962, vol. I; 1965, vol. III; 1966, vol. II.
- KLEIN, F.
Die mittelbare Haftung im Völkerrecht. Frankfurt, Klostermann, 1941.
- KLÜBER, J.-L.
Droit des gens moderne de l'Europe, 2nd ed. Paris, Guillaumin, 1874.
- KOHLER, J.
Not kennt kein Gebot—Die Theorie des Notrechtes und Ereignisse unserer Zeit. Berlin, Rotschild, 1915.
- KOPELMANAS, L.
 "Du conflit entre le traité international et la loi interne", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XVIII, Nos. 1 and 2, 1937.
- KRAUS, H.
 "La morale internationale", *Recueil des cours de l'Académie de droit international de La Haye, 1927-I*. Paris, Hachette, 1928, vol. 16.
- KUNZ, J. L.
 "Individual and collective self-defense in Article 51 of the Charter of the United Nations", *The American Journal of International Law* (Washington, D.C.), vol. 41, No. 4, October 1947.
- KURIS, P. M.
Mezhdunarodnye pravonaruchenia i otvetstvennost gosudarstva. Vilnius, Mintis, 1973.
- KURIS, P. M. and E. I. SKAKUNOV
 "K teorii otvetstvennosti gosudarstv v mezhdunarodnom prave", *Pravovedenie* (Leningrad), No. 2, March-April 1973.
- LA BRIÈRE, Y. DE
 "Evolution de la doctrine et de la pratique en matière de représailles", *Recueil des cours de l'Académie de droit international de La Haye, 1928-II*. Paris, Hachette, 1929, vol. 22.
- LAFARGUE, P.
Les représailles en temps de paix. Paris, Rousseau, 1898.
- LA FONTAINE, H.
Pasicrisie internationale—Histoire documentaire des arbitrages internationaux. Bern, Stämpfli, 1902.

LAÏS, R.

"Die Rechtsfolgen völkerrechtlicher Delikte", in: Institut für internationales Recht und der Universität Keil, *Erste Reihe, Vorträge und Einzelschriften*, No. 18. Berlin, Stilke, 1932.

LALIVE, J. F.

"Contracts between a State or a State agency and a foreign company", in: British Institute of International and Comparative Law, *International and Comparative Law Quarterly* (London), vol. 13, No. 3, July 1964.

LAMBERTI ZANARDI, P.

La legittima difesa nel diritto internazionale. Milan, Giuffrè, 1972.

"Necessità (Diritto internazionale)", *Enciclopedia del diritto*. Milan, Giuffrè, 1977, vol. 27.

LAPRADELLE, A. DE and N. POLITIS

Recueil des arbitrages. Paris, Pedone, 1923, vol. II.

Idem, 1954, vol. III.

Idem, Paris, Les Editions internationales, 1957, vol. I.

LAUBADÈRE, A. DE

Traité élémentaire de droit administratif, 3rd ed. Paris, Librairie générale de droit et de jurisprudence, 1963, vol. 1.

LAUTERPACHT, E.

British Practice in International Law. London, British Institute of International and Comparative Law, 1963.

"The contemporary practice of the United Kingdom in the field of international law: Survey and comment, V", *International and Comparative Law Quarterly* (London), vol. 7, part 1, January 1958.

LAUTERPACHT, H.

"Boycott in international relations", *The British Year Book of International Law*, 1933 (London), vol. 14.

The Development of International Law by the International Court. London, Stevens, 1958.

The Function of Law in the International Community. Oxford, Clarendon Press, 1933.

Recognition in International Law. Cambridge, University Press, 1947.

"Regles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, 1937-IV. Paris, Sirey, 1938, vol. 62.

LAW, C. H. P.

The Local Remedies Rule in International Law. Geneva, Droz, 1961.

LEAGUE OF NATIONS

Acts of the Conference for the Codification of International Law (held at The Hague from 13 March to 12 April 1930), vol. IV, *Minutes of the Third Committee* (C.351(c).M.145(c).1930.V).

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).

Idem, *Supplement to Volume III* (C.75(a).M.69(a).1929.V).

LE FUR, L.

"La théorie du droit naturel depuis le XVIII^e siècle et la doctrine moderne", *Recueil des cours de l'Académie de droit international de La Haye*, 1927-III. Paris, Hachette, 1928, vol. 18.

LEVINE, D. B.

"Ob otvetstvennosti gosudarstv v sovremennom mezhdunarodnom prave", *Sovetskoe gosudarstvo i pravo* (Moscow), No. 5, May 1966.

Otvetstvennost gosudarstv v sovremennom mezhdunarodnom prave. Moscow, Mezhdunarodnye otnoshenia, 1966.

"Problema otvetstvennosti v nauke mezhdunarodnogo prava", *Izvestia Akademii Nauk SSSR* (Moscow), Economics and Law, No. 2, 1946.

LEVY, D.

"La responsabilité pour omission et la responsabilité pour risque en droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 4, October-December 1961.

L'HUILLIER, J.

Eléments de droit international public. Paris, Rousseau, 1950.

LILICH, R. B.

"Forcible self-help by States to protect human rights", *Iowa Law Review* (Iowa City), vol. 53, No. 2, October 1967.

LISSITZYN, O. J.

"The meaning of the term 'denial of justice' in international law", *The American Journal of International Law* (Washington, D.C.), vol. 30, No. 4, October 1936.

"The treatment of aerial intruders in recent practice and international law", *The American Journal of International Law* (Washington, D.C.), 47, No. 4, October 1973.

LISZT, F. VON

Das Völkerrecht, 12th ed., rev. by M. Fleischmann. Berlin, Springer, 1925.

Le droit international, trans. by G. Gidel from the 9th ed. [1913]. Paris, Pedone, 1928.

LÜDER, C.

"Krieg und Kriegerrecht im Allgemeinen", *Handbuch des Völkerrechts*, ed. F. J. von Holtzendorff. Hamburg, Verlaganstalt und Druckerei, 1889, vol. 4.

LUZZATTO, R.

"Responsabilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. 51, No. 1, 1968.

LYSEN, A., ed.

Le pacte Kellogg—Documents concernant le traité multilatéral contre la guerre signé à Paris le 27 août 1928. Leyden, Sijthoff, 1928.

MACGIBBON, I. C.

"The scope of acquiescence in international law", *The British Year Book of International Law*, 1954 (London), vol. 31.

MANDELSTAM, A.

"La commission internationale d'enquête sur l'incident de la mer du Nord", *Revue générale de droit international public* (Paris), vol. XII, 1905.

MANNING, W. R., ed.

Diplomatic Correspondence of the United States: Canadian Relations, 1784-1860. Washington, D.C., Carnegie Endowment for International Peace, 1943, vol. III.

MARINONI, M.

La responsabilità degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale. Rome, Athenaeum, 1913.

MARTENS, F. DE

Traité de droit international, trans. A. Léo. Paris, Marescq aîné, 1883, vol. I.

- MARYAN GREEN, N. A.
International Law, Law of Peace. London, Macdonald and Evans, 1973.
- MAÚRTUA, V. M. and J. B. SCOTT
Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners. New York. Oxford University Press, 1930.
- MCDUGAL, M. S.
"The Soviet-Cuban quarantine and self-defense", *The American Journal of International Law* (Washington, D.C.), vol. 57, No. 3, July 1963.
- MCDUGAL, M. S. and F. P. FELICIANO
Law and Minimum World Public Order—The Legal Regulation of International Coercion. New Haven, Conn., Yale University Press, 1961.
- MCNAIR, A. D.
International Law Opinions, Cambridge, University Press, 1956, vol. II.
The Law of Treaties, 2nd ed. Oxford, Clarendon Press, 1961.
- MCNEMAR, D. W.
"The postindependence war in the Congo", *The International Law of Civil War*, ed. R. A. Falk. Baltimore, Johns Hopkins Press, 1971.
- MERON, T.
"The incidence of the rule of exhaustion of local remedies", *The British Year Book of International Law*, 1959 (London), vol. 35.
"International responsibility of States for unauthorized acts of their officials", *The British Year Book of International Law*, 1957 (London), vol. 33.
- MODJORIAN, L. A.
"Otvetsvennost v sovremennom mezhdunarodnom prave", *Soviet Yearbook of International Law*, 1970, (Moscow, Nauka), 1972.
- MOLEN, G. VAN DER
"Misbruik van recht in het volkenrecht", *Opstellen op het gebied van recht, staat en maatschappij* (Amsterdam), January 1949.
- MONACO, R.
Manuale di diritto internazionale pubblico. Turin, Unione tipografico-editrice torinese, 1960.
Idem, 2nd ed., rev. and enl., 1971.
"La responsabilità internazionale dello Stato per fatti degli individui", *Rivista di diritto internazionale* (Rome), XXXIst year, 3rd series, vol. XVIII, Nos. 1 and 2–3, 1939.
- MONTAGNA, R.
"La limitazione *ratione temporis* della giurisdizione internazionale obbligatoria", *Scritti giuridici in onore di Santi Romano*. Padua, CEDAM, 1940, vol. III.
- MOORE, J. B.
A Digest of International Law, Washington, D.C., U.S. Government Printing Office, 1906, vols. I–VIII.
History and Digest of the International Arbitrations to which the United States has been a Party. Washington, D.C., U.S. Government Printing Office, 1898, vols. I–V.
International Adjudications. New York, Oxford University Press, 1931, vol. IV.
- MORELLI, G.
Nozioni di diritto internazionale, 6th ed. Padua, CEDAM, 1963.
Idem, 7th ed., 1967.
- MORENO QUINTANA, L. M. and C. M. BOLLINI SHAW
Derecho internacional público—Sistema nacional del derecho y política internacional. Buenos Aires, Librería del Colegio, 1950.
- MORTATI, C.
Istituzioni di diritto pubblico, 8th ed. Padua, CEDAM, 1969, vol. I.
- MOUSSA, A.
"L'étranger et la justice nationale", *Revue générale de droit international public* (Paris), 3rd series, vol. VIII, No. 4, July–August 1934.
- MUMMERY, D. R.
"The content of the duty to exhaust local judicial remedies", *The American Journal of International Law* (Washington, D.C.), vol. 58, No. 2, April 1964.
- MÜNCH, I. VON
Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft. Frankfurt, Keppler, 1963.
- MUSACCHIA, G.
La responsabilità internazionale degli Stati per fatti degli organi legislativi. Rome, Coluzza, 1939.
- NIELSEN, F. K.
American-Turkish Claims Settlement under the Agreement of December 24, 1923 and Supplemental Agreements between the United States and Turkey—Opinions and Report. Washington, D.C., U.S. Government Printing Office, 1937.
- O'BRIEN, W. V.
"The meaning of 'military necessity' in international law", *World Polity*. Utrecht, Spectrum, 1957, vol. I.
- O'CONNELL, D. P.
International Law. London, Stevens, 1965, vol. II.
Idem, 2nd ed., 1970, vol. II.
- O'HIGGINS, P.
"Unlawful seizure and irregular extradition", *The British Year Book of International Law*, 1960 (London), vol. 36.
- OPPENHEIM, L.
International Law: A Treatise, 8th ed., rev. by H. Lauterpacht. London, Longmans, Green, 1955, vol. I.
- OTKEN, A.
"De la responsabilité internationale des Etats en raison de décisions de leurs autorités judiciaires—Analyse de trois affaires arbitrales", *Revue de droit international de sciences diplomatiques, politiques et sociales* (Geneva), 4th vol., No. I, January–March 1926.
- PANAYOTAKOS, C. P.
La règle de l'épuisement des voies de recours internes, en théorie et en pratique. Marseilles, Moullot, 1952.
- PANZERA, A. F.
Attività terroristiche e diritto internazionale. Naples, Jovene, 1978.
"Raids e protezione dei cittadini all'estero", *Rivista di diritto internazionale* (Milan), vol. 61, No. 4, 1978.
- PARRY, C.
"Some considerations upon the protection of individuals in international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1956—II. Leyden, Sijthoff, 1957, vol. 90.

- PARTSCH, K. J.
 "Repressalie", *Wörterbuch des Völkerrechts*, ed. K. Strupp, 2nd ed. rev. by H. J. Schlochauer. Berlin, de Gruyter, 1962, vol. III.
 "Selbsterhaltungsrecht", *Wörterbuch des Völkerrechts*, ed. K. Strupp, 2nd ed. rev. by H. J. Schlochauer. Berlin, de Gruyter, 1962, vol. III.
- PATEL, S. R.
A Textbook of International Law. London, Asia Publishing House, 1964.
- PAU, G.
 "Responsabilità internazionale dello Stato per atti di giurisdizione", in: Istituto de scienze giuridiche, economiche e politiche della Università di Cagliari, *Studi economico-giuridici*, vol. XXXIII (1949-1950). Rome, Pinnarò, 1950.
- PAZARCI, H.
Responsabilité internationale des Etats en matière contractuelle. Ankara, Publications de la Faculté des sciences politiques, 1973, No. 350.
- PEASLEE, A. J.
 "The sanction of international law", *The American Journal of International Law* (Washington, D.C.), vol. 10, No. 2, April 1916.
- PELLA, V. V.
La criminalité collective des Etats et le droit pénal de l'avenir, 2nd ed. Bucarest, Imprimerie de l'Etat, 1926.
La guerre-crime et les criminels de guerre. Neuchâtel, Editions de la Baconnière, 1964.
 Mémoire concernant un projet de Code des crimes contre la paix et la sécurité de l'humanité, *Yearbook of the International Law Commission*, 1950, vol. II, p. 278, doc. A/CN.4/39.
- PENNETTI, V.
Responsabilità internazionale in caso di rivolte o di guerre civili. Naples, Cozzolino, 1899.
- PERASSI, T.
Lezioni di diritto internazionale. Rome, Edizioni Italiane, 1942 (repr. of the 1941 ed.) part I.
- [PERASSI, T. ?]
 "Trattato di rinuncia alla guerra", note in: *Rivista di diritto internazionale* (Rome), XXIst year, 3rd series, vol. VIII, 1929.
- [PERRIN, G.]
 "L'agression contre la légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris), 3rd series, vol. XXVIII, No. 3, July-September 1957.
- PERSONNAZ, J.
La réparation du préjudice en droit international public. Paris, Sirey, 1939.
- PETROVSKY, Y. V.
 "O politicheskoi otvetsvennosti gosudarstv", *Soviet Yearbook of International Law*, 1970 (Moscow, Nauka), 1972.
- PIÉDELIEVRE, R.
Précis de droit international public. Paris, Librairie Cotillon, 1894, vol. I.
- PLANAS SUÁREZ, S.
Tratado de derecho internacional público. Madrid, Hijos de Reus, 1916, vol. 1.
- POCAR, F.
L'esercizio non autorizzato del potere statale in territorio straniero. Padua, CEDAM, 1974.
 "Soltanto il consenso della Somalia ha permesso l'operazione militare", *Corriere della sera*, Milan, 19 October 1977.
- PODESTÁ COSTA, L. A.
Manual de derecho internacional público, 2nd ed. Buenos Aires, Tipográfica Editora Argentina, 1947.
 "La responsabilidad del Estado daños irrogados a la persona o a los bienes de extranjeros en luchas civiles", *Revista de derecho internacional* (Havana), vol. 34, No. 67, September 1938, and No. 68, December 1938.
 "International responsibility of the State for Damages suffered by aliens during civil war", in: International Law Association, *Report of the Thirty-first Conference, held at the Palace of Justice, Buenos Aires, 24th August-30th August, 1922*. London, 1923, vol. I.
- POLAK, M. V.
 "Die Haftung des Bundesstaates für seine Gliedstaaten", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), vol. I, No. 4 (new series), May 1948.
- POLITIS, N.
 "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux" *Recueil des cours de l'Académie de droit international de La Haye*, 1925-I. Paris, Hachette 1926, vol. 6.
 "Le régime des représailles en temps de paix", *Annuaire de l'Institut de droit international*, 1934 (Brussels).
- PONS, L.
La responsabilité internationale de l'Etat à raison de dommages causés sur son territoire aux étrangers [thesis]. Toulouse, Boisseau, 1936.
- PRADIER FODÉRÉ, P.
Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines. Paris, Durand, 1885, vols. I and II.
- PREUSS, L.
 "International responsibility for hostile propaganda against foreign States", *The American Journal of International Law* (Washington, D.C.), vol. 28, No. 4, October 1934.
Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg, 1949), vol. XXII.
- PUFENDORF, S.
De jure naturæ et gentium, libri octo (1688), *The Classics of International Law*, vol. II. Oxford, Clarendon Press, 1934. English translation.
- QUADRI, R.
Diritto internazionale pubblico. Palermo, Priulla, 1949.
Idem, 5th ed. Naples, Liguori, 1968.
 "Stato (Diritto internazionale)", *Nuovo Digesto Italiano* (Turin), vol. XII, part I, 1940.
La sudditanza nel diritto internazionale. Padua, CEDAM, 1935.
- QUÉNEUDEC, J.-P.
La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents. Paris, Librairie générale de droit et de jurisprudence, 1966.

- RABASA, O.
Responsabilidad internacional del Estado con referencia especial a la responsabilidad por denegación de justicia, Mexico, Imprenta de la Secretaría de Relaciones Exteriores 1933.
- RALSTON, J. H.
The Law and Procedure of International Tribunals. Stanford, Calif., Stanford University Press, 1926.
- RAPOPORT, M.
"K voprosu ob otvetstvennosti za prestuplenia protiv chelovechestva", *Vestnik Leningradskogo Universiteta*, No. 5, 1965.
- REDSLOB, R.
Traité de droit des gens. Paris, Sirey, 1950.
- REITZER, L.
La réparation comme conséquence de l'acte illicite en droit international. Paris, Sirey, 1938.
- REUTER, P.
"Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, 1961-II, Leyden, Sijthoff, 1962, vol. 103.
"La responsabilité internationale", *Droit international public* (cours). Paris, Les Nouvelles Institutes, 1955-1956.
Revue générale de droit international public (Paris), 3rd series, vol. X, No. 5, September-October 1936.
- RINAUDO, L.
"Rappresaglia (Diritto internazionale)", *Novissimo Digesto Italiano* (Turin), vol. XIV, 1968.
- RITTER, J.-P.
"La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, 1962 (Paris), vol. VIII.
- RIVIER, A.
Principes du droit des gens. Paris, Rousseau, 1896, vol. I.
- RODICK, B. C.
The Doctrine of Necessity in International Law, New York, Columbia University Press, 1928.
- RODIÈRE, R.
"Responsabilité du fait personnel", *Répertoire de droit civil*, 2nd ed. Paris, Dalloz, 1975, vol. VI.
"Responsabilité pénale", *Nouveau Répertoire de droit*, 2nd ed. Paris, Dalloz, 1965, vol. IV.
- ROLIN, H.
"Les principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, 1950-II, Paris, Sirey, 1951, vol. 77.
- RÖLING, B. V. A. and C. F. RÜTER, eds.
The Tokyo Judgment. Amsterdam, APA-University Press, 1977, vol. I.
- ROMANO, S.
Corso di diritto internazionale, 4th ed. Padua, CEDAM, 1939.
- RONZITTI, N.
"La cattura di un individuo all'estero: In margine al caso Argoud", *Rivista di diritto internazionale* (Milan), vol. XLVIII, No. 1, 1965.
Le guerre di liberazione nazionale e il diritto internazionale. Pisa, Pacini, 1974.
- ROOT, E.
"The outlook of international law", *The American Journal of International Law* (Washington, D.C.), vol. 10, No. 1, January 1916.
- ROSENNE, S.
The Law of Treaties—A Guide to the Legislative History of the Vienna Convention. Leyden, Sijthoff, 1970.
- ROSS, A.
A Textbook of International Law. London, Longmans, Green, 1947.
- ROTH, A.
Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten. Berlin, Heymann, 1934.
Das völkerrechtliche Delikt vor und in den Verhandlungen auf der Haager Kodifikationskonferenz 1930. Leipzig, Noske, 1932.
- ROUGIER, A.
Les guerres civiles et le droit des gens. Paris, Larose, 1903.
- ROULET, J.-D.
Le caractère artificiel de la théorie de l'abus de droit en droit international public. Neuchâtel, Histoire et Société d'aujourd'hui, Editions de la Baconnière, 1958.
- ROUSSEAU, C.
"L'aménagement des compétences en droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. IV, 1930.
"Chronique des faits internationaux", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXV, No. 4, October-December 1964.
Droit international public, Paris, Sirey, 1953.
Idem, rev. ed., 1970, vol. I.
"La non-intervention en Espagne", *Revue de droit international et de législation comparée* (Brussels) 3rd series, vol. XIX, Nos. 2-3-4, 1938, and vol. XX, No. 1, 1939.
- RUEGGER, P.
Die völkerrechtliche Verantwortlichkeit des Staates für die auf seinem Gebiete begangenen Verbrechen. Société suisse de droit international, publ. No. 17, Zurich, Orell Füssli, 1924.
- RUILOBA SANTANA, E.
"Consideraciones sobre el concepto y elementos del acto ilícito en derecho internacional", *Temis* (Zaragoza), Nos. 33-36, 1973-1974.
- RUZIÉ, D.
Droit international public (mémentos Dalloz), 3rd ed. Paris, Dalloz, 1978.
- SACERDOTI, G.
"Epuisement préalable des recours internes et réserve *ratione temporis* dans la déclaration italienne d'acceptation du droit de requête individuelle", *Les clauses facultatives de la Convention européenne des droits de l'homme*. Bari, Levante, 1974.
- SALDAÑA, Q.
"La justice pénale internationale", *Recueil des cours de l'Académie de droit international de La Haye*, 1925-V, Paris, Hachette, 1927, vol. 10.
- SALMON, J. J. A.
"Les accords Spaak — U Thant du 20 février 1965", *Annuaire français de droit international*, 1965 (Paris), vol. XI.

- SALVIOLI, G.
 "Gli accordi di Locarno", *Rivista di diritto internazionale* (Rome), XVIIIth year, 3rd series, vol. V, 1926.
- SÁNCHEZ DE BUSTAMANTE Y SIRVÉN, A.
Droit International public. Paris, Sirey, 1936, vol. III.
- SANDULLI, A. M.
Manuale di diritto amministrativo. 10th ed. Naples, Jovene, 1969.
- SAYAGUÉS LASO, E.
Tratado de derecho administrativo. Montevideo, Bianchi Altuna, 1953, vol. I.
- SCELLE, G.
Précis de droit des gens—Principes et systématique. Paris, Sirey, 1934, part II.
- SCERNI, M.
L'abuso di diritto nei rapporti internazionali. Rome, Anonima Romana Editoriale, 1930.
 "Responsabilità degli Stati", *Nuovo Digesto Italiano* (Turin), vol. XI, 1939.
- SCHEUNER, U.
 "L'influence du droit interne sur la formation du droit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939—II*. Paris, Sirey, 1947, vol. 68.
 "Der Notenwechsel zwischen der Schweiz und Italien in der Angelegenheit Cesare Rossi", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin), vol. I, part 2, 1929.
- SCHINDLER, D.
 "Le principe de non-intervention dans les guerres civiles" (rapport provisoire à l'Institut de droit international), *Annuaire de l'Institut de droit international, 1973* (Basel), vol. 55.
- SCHLOCHAUER, H. J.
 "Die Entwicklung des völkerrechtlichen Deliktsrechts", *Archiv des Völkerrechts* (Tübingen) vol. 16, No. 3, 1975.
 "Die Theorie des abus de droit im Völkerrecht", *Zeitschrift für Völkerrecht* (Breslau), vol. XVII, No. 3, 1933.
- SCHOEN, P.
 "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau), Supplement 2 to vol. X, 1917.
- SCHÖNKE, A. and H. SCHRÖDER
Strafgesetzbuch: Kommentar, 19th ed., rev. by T. Lenckner. Munich, Beck, 1978.
- SCHROEDER, E.
Die Grenzen der staatlichen Verantwortlichkeit für Handlungen von Staatsorganen im völkerrechtlichen Verkehr. Zurich, Lang, 1939.
- SCHÜLE, A.
 "Ausschluss der Rechtswidrigkeit", *Wörterbuch des Völkerrechts*, ed. K. Strupp, 2nd ed. rev. by H. J. Schlochauer. Berlin, de Gruyter, 1962, vol. III.
 "Völkerrechtliches Delikt", in *Wörterbuch des Völkerrechts*, ed. K. Strupp, 2nd ed. rev. by H. J. Schlochauer. Berlin, de Gruyter, 1960, vol. I.
- SCHUTTER, B. de
 "Competence of the national judiciary power in case the accused has been unlawfully brought within the national frontiers", *Revue belge de droit international, 1965—I* (Brussels).
- SCHWARZENBERGER, G.
 "The fundamental principles of international law", *Recueil des cours de l'Académie de droit international de La Haye, 1955—I*. Leyden, Sijthoff, 1956, vol. 87.
International Law, 3rd ed. London, Stevens, 1957, vol. I.
Idem, London, Stevens, 1968, vol. II.
A Manual of International Law, 4th ed. London, Stevens, 1960, vol. I.
 "The problem of an international criminal law", *International Criminal Law*, G. O. W. Mueller and E. M. Wise, eds., South Hackensack, N.J., Rothman, 1965.
 "Uses and abuses of the 'abuse of rights' in international law", in: The Grotius Society, *Transactions for the Year 1956—Problems of Public and Private International Law*. London, vol. 42, 1957.
- SCHWEBEL, S. M.
 "Aggression, intervention and self-defence in modern international law", *Recueil des cours de l'Académie de droit international de La Haye, 1972—II*. Leyden, Sijthoff, 1973, vol. 136.
- SCHWOEBEL, J.
 "Le raid israélien et la Charte de l'ONU", *Le Monde*, Paris, 9 July 1976.
- SCISO, E.
 "Il raid egiziano a Larnaca", *Rivista di diritto internazionale* (Milan), vol. 61, No. 4, 1978.
- SCOTT, J. B., ed.
Diplomatic Documents Relating to the Outbreak of the European War. New York, Oxford University Press, 1916, part I.
- SEIDL-HOHENVELDERN, I.
 "Actio popularis im Völkerrecht?" in: Istituto di Diritto internazionale e straniero della Università di Milano, *Comunicazioni e Studi*. Milan, Giuffrè, 1975, vol. XIV.
- SERENI, A. P.
Diritto internazionale. Milan, Giuffrè, 1958, vol. II—1, and 1960, vol. II—2.
Idem, 1962, vol. III.
Idem, 1965, vol. IV.
La rappresentanza nel diritto internazionale. Padua, CEDAM, 1936.
- SEYERSTED, F.
United Nations Forces in the Law of Peace and War. Leyden, Sijthoff, 1966.
- SIBERT, M.
 "Contribution à l'étude des réparations pour les dommages causés aux étrangers en conséquence d'une législation contraire au droit des gens", *Revue générale de droit international public* (Paris), vol. XV—I (1941—1945).
Traité de droit international public. Paris, Dalloz, 1951, vols. I and II.
- SILVANIA H.
 "Responsibility of States for acts of insurgent governments", *The American Journal of International Law* (Washington D.C.), vol. 33, No. 1, January 1939.
Responsibility of States for Acts of Unsuccessful Insurgent Governments. New York, Columbia University Press, 1939.

- SILVING, H.
 "In re Eichmann: A dilemma of law and morality", *The American Journal of International Law* (Washington, D.C.), vol. 55, No. 2, April 1961.
- SIMPSON, J. L. and H. FOX
International Arbitration Law and Practice. New York, Praeger, 1959.
- S.I.O.I. (Società Italiana per l'Organizzazione Internazionale)—C.N.R. (Consiglio Nazionale delle Ricerche)
La prassi italiana di diritto internazionale. Dobbs Ferry, N.Y., Oceana Publications, 1970, 1st series (1861–1887), vols. I and II.
- SKAKUNOV, E. I.
 "Samooborona i vopros o sanktsiakh v mezhdunarodnom prave", *Pravovendenie* (Leningrad), No. 3 (May–June 1970).
- SKUBISZEWSKI, K.
 "Use of force by States. Collective security. Law of war and neutrality", *Manual of Public International Law*, ed. M. Sørensen. London, Macmillan, 1968.
- SOCIÉTÉ SUISSE DE DROIT INTERNATIONAL
Annuaire suisse de droit international, 1956 (Zurich), vol. XIII.
Idem, 1969–1970, vol. XXVI.
- SOLDATI, A.
La responsabilité des Etats dans le droit international. Paris, Librairie de jurisprudence ancienne et moderne, 1934.
- SØRENSEN, M.
 "Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, 1960–III. Leyden, Sijthoff, 1961, vol. 101.
 "Le problème dit du droit intertemporel dans l'ordre international" (Provisional report), *Annuaire de l'Institut de droit international*, 1973 (Basel), vol. 55.
 "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos*. Paris, Pedone, 1968.
- SPERDUTI, G.
 "Introduzione allo studio delle funzioni della necessità nel diritto internazionale", *Rivista di diritto internazionale* (Padua), XXXVth year, 4th series, vol. XXII, Nos. 1–2, 1943.
 "Sulla colpa in diritto internazionale", in: Istituto di diritto internazionale e straniero della Università di Milano, *Comunicazioni e studi*. Milan, Giuffrè, 1950, vol. III.
- SPIEGEL, H. W.
 "Origin and development of denial of justice" *The American Journal of International Law* (Washington, D.C.), vol. 32, No. I, January 1938.
- SPIROPOULOS, J.
Die de facto-Regierung im Völkerrecht (Beiträge zur Reform und Kodifikation des Völkerrechts, n° 2). Kiel, Verlag des Instituts für Internationales Recht an der Universität Kiel, 1926.
Traité théorique et pratique du droit international public. Paris, Librairie générale de droit et de jurisprudence, 1933.
- STARKE, J. G.
 "Imputability of international delinquencies", *The British Year Book of International Law*, 1938 (London), vol. 19.
- STEINIGER, P. A.
 "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin* (Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe), vol. XXII, No. 6, 1973.
- STONE, J.
Aggression and World Order—A Critique of United Nations Theories of Aggression. London, Stevens, 1958.
Legal Controls of International Conflict. London, Stevens, 1959.
- STOWELL, E. C.
Intervention in International Law. Washington, D.C., Byrne, 1921.
- STREBEL, H.
 "Nochmals zur Geiselfreiung in Entebbe", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 37, Nos. 3–4, 1977.
- STRISOWER, L.
 Rapport sur "La responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne ou aux biens des étrangers", *Annuaire de l'Institut de droit international*, 1927 (Brussels), vol. 33, No. I.
- STROZZI, G.
Interessi statali e interessi privati nell'ordinamento internazionale—La funzione del previo esaurimento dei ricorsi interni. Milan, Giuffrè, 1977.
- STRUPP, K.
Eléments du droit international public: universel, européen et américain. Paris, Editions internationales, 1930, vol. I.
 "Le règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, 1934–I. Paris, Sirey, 1934, vol. 47.
 "Responsabilité internationale de l'Etat en cas de dommages causés aux ressortissants d'un Etat étranger en cas de troubles, d'émeutes ou de guerres civiles", dans: ILA, *Report of the Thirty-first Conference, held at the Palace of Justice, Buenos Aires, 24th August–30th August, 1922*. London, Sweet and Maxwell, 1923, vol. I.
 "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, comp. by F. Stier-Somlo. Stuttgart, Kohlhammer, 1920, vol. III, part I.
 "Die völkerrechtliche Haftung des Staates insbesondere bei Handlungen Privater", *Abhandlungen zur fortschreitenden Kodifikation des internationalen Rechts*. Kiel, Verlag des Instituts für Internationales Recht an der Universität Kiel, 1927, vol. I.
Das Werk von Locarno. Berlin, de Gruyter, 1926.
- STRUPP, K., ed.
Wörterbuch des Völkerrechts, 2nd ed., rev. by H. J. Schlochauer. Berlin, de Gruyter, 1960, vol. I; 1961, vol. II; 1962, vol. III.
- SVARLIEN, O.
An Introduction to the Law of Nations. New York, McGraw-Hill, 1955.
- SWAN SIK, K.
 "Netherlands State practice for the parliamentary year 1968–1969", *Netherlands Yearbook of International Law*, 1970 (Leyden), vol. I.
- TAOKA, R.
The Right of Self-defence in International Law. Osaka, Osaka University of Economics and Law, 1978.

TAVERNIER, P.

Recherches sur l'application dans le temps des actes et des règles en droit international public (Problèmes de droit intertemporel ou de droit transitoire). Paris, Librairie générale de droit et de jurisprudence, 1970.

TÉNÉKIDÈS, C. G.

"L'épuisement des voies de recours internes comme condition préalable de l'instance internationale", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIV, No. 3, 1933.

"Les jugements nationaux 'manifestement injustes' envisagés comme source de la responsabilité internationale des Etats", *Revue générale de droit international public* (Paris), 3rd series, vol. XIII, No. 4, July–August 1939.

TÉNÉKIDÈS, G.

"Responsabilité internationale", *Répertoire de droit international*. Paris, Dalloz, 1969, vol. II.

THIERRY, H. et al.

Droit international public. Paris, Montchrestien, 1975.

THOMAS, A. J., JR. and A. VAN WYNEN THOMAS

The Dominican Republic Crisis 1965: Background Paper and Proceedings of the Ninth Hammarskjöld Forum. Dobbs Ferry, N.Y., Oceana Publications, 1967.

THOMAS, A. VAN WYNEN and A. J. THOMAS, JR.

Non-Intervention: The Law and its Import in the Americas. Dallas, Southern Methodist University Press, 1956.

TRAÏNIN, A. N.

Zashchita mira i borba s prestupleniami protiv chelovechestva. Moscow, Vishinsky Law Institute, Academy of Sciences of the Soviet Union, 1956.

TRIEPEL, H.

Völkerrecht und Landesrecht. Leipzig, Hirschfeld, 1899.

Idem. Tübingen, Mohr (Siebeck), 1907.

Droit international et droit interne, French trans. by R. Brunet. Paris, Pedone, 1920.

TRIFU, S.

La notion de l'abus de droit dans le droit international. Paris, Domat-Montchrestien, 1940.

TUCKER, R. W.

"Reprisals and self-defense: The customary law", *The American Journal of International Law* (Washington, D.C.), vol. 66, No. 3 (July 1972).

TUNKIN, G. I.

"Alcuni nuovi problemi della responsabilità dello Stato nel diritto internazionale", in: Istituto di diritto internazionale e straniero della Università di Milano, *Comunicazioni e Studi*. Milan, Giuffrè, 1963, vol. XI (1960–1962).

Droit international public—Problèmes théoriques. Paris, Pedone, 1965.

Teoria mezhdunarodnogo prava. Moscow, Mezhdunarodnye otnosheniya, 1970.

TWISS, T.

The Law of Nations (considered as Independent Political Communities), rev. ed. Oxford, Clarendon Press, 1884.

ULLMANN, E. VON

Völkerrecht. Tübingen, Mohr, 1908.

ULLOA, A.

Derecho internacional público, 4th ed. Madrid, Ediciones Iberoamericanas, 1957, vol. II.

UNITED KINGDOM, WAR OFFICE

The Law of War on Land, being Part III of the Manual of Military Law. London, H.M. Stationery Office, 1958.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY

The Law of Land Warfare (Field Manual, FM 27–10). Washington, D.C., U.S. Government Printing Office, 1956.

URBANEK, H.

"Das volkerrechtsverletzende nationale Urteil", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), vol. IX, No. 2, 1958–1959.

VAN HILLE, W.

"Etude sur la responsabilité internationale de l'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. X, No. 3, 1929.

VATTEL, E. DE

Le droit des gens, ou Principes de la loi naturelle (1758), *The Classics of International Law*, vol. III. Washington D.C., Carnegie Institution of Washington, 1916. English translation.

VENEZIA, J.-C.

"La notion de représailles en droit international public", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXI, No. 1, January–March 1960.

VERDROSS, A.

"Règles générales du droit international de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, 1929–V. Paris, Hachette, 1931, vol. 30.

"Theorie der mittelbaren Staatenhaftung", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), new series, vol. I, No. 4, May 1948.

Völkerrecht, 5th ed. Vienna. Springer, 1964.

VERZIJL, J. H. W.

International Law in Historical Perspective. Leyden, Sijthoff, 1973, vol. VI.

"La règle de l'épuisement des recours internes", *Annuaire de l'Institut de droit international*, 1954 (Basel), vol. 45, No. I.

VISSCHER, C. DE

"Le déni de justice en droit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1935–II. Paris, Sirey, 1936, vol. 52.

"Les lois de la guerre et la théorie de la nécessité", *Revue générale de droit international public* (Paris), vol. XXIV, 1917.

"Notes sur la responsabilité internationale des Etats et la protection diplomatique d'après quelques documents récents", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VIII, No. 3, 1927.

"La responsabilité des Etats", *Bibliotheca Visseriana*. Leyden, Brill, 1924, vol. II.

Théories et réalités en droit international public. Paris, Pedone, 1953.

Idem, 4th ed., 1970.

VISSCHER, P. DE

"Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de droit international et de droit comparé* (Brussels), vol. XXXX, Nos. 3–4, 1963.

VITTA, E.

"La necessità nel diritto internazionale", *Rivista italiana per le scienze giuridiche* (Rome), new series, vol. XI, 1936.

- "Responsabilità degli Stati", *Novissimo Digesto Italiano* (Turin), vol. XV, 1968.
La responsabilità internazionale dello Stato per atti legislativi. Milan, Giuffrè, 1953.
- VON GLAHN, G.
Law among Nations: An Introduction to Public International Law. New York, Macmillan, 1965.
Idem, 2nd ed., 1970.
- VON DER HEYDTE, F. A.
Völkerrecht, Ein Lehrbuch. Cologne, Verlag für Politik und Wirtschaft, 1958, vol. I.
- VONLANTHEN, A.
Die Völkerrechtliche Selbstbehauptung des Staates [thesis]. Fribourg (Switzerland), Paulusdruckerei, 1944.
- WALDOCK, H.
 "General course on public international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1962–II. Leyden, Sijthoff, 1963, vol. 106.
 "The regulation of the use of force by individual States in international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1952–II. Paris, Sirey, 1953, vol. 81.
- WALINE, M.
Droit administratif, 8th ed. Paris, Sirey, 1959.
- WEHBERG, H.
 "L'interdiction du recours à la force—Le principe et les problèmes qui se posent", *Recueil des cours de l'Académie de droit international de La Haye*, 1951–I. Leyden, Sijthoff, 1952, vol. 78.
- WEIDEN, P.
 "Necessity in international law", *Transactions of the Grotius Society*, vol. 24, *Problems of Peace and War*. London, Sweet and Maxwell, 1939.
- WEIL, P.
 "Problèmes relatifs aux contrats passés entre un Etat et un particulier", *Recueil des cours de l'Académie de droit international de La Haye*, 1969–III. Leyden, Sijthoff, 1970, vol. 128.
- WENGLER, W.
Völkerrecht. Berlin, Springer, 1964, vols. I and II.
- WESTLAKE, J.
Chapters on the Principles of International Law. Cambridge, University Press, 1894.
International Law, 2nd ed. Cambridge, University Press, 1910, part I.
- WHEATON, H.
Elements of International Law, 8th ed. Boston, Little, Brown, 1866.
Idem, 6th ed., rev. by A. B. Keith. London, Stevens, 1929, vol. I.
- WHITEMAN, M. M.
Damages in International Law. Washington, D.C., U.S. Government Printing Office, 1937, vols. I and II.
- Idem*, 1943, vol. III.
Digest of International Law. Washington, D.C., U.S. Government Printing Office, 1963, vol. I.
Idem, vol. 2.
Idem, 1965, vol. 5.
Idem, 1967, vol. 8.
- WOLFF, C.
Jus gentium methodo scientifica pertractatum [1764], in: *The Classics of International Law*, vol. II. Oxford, Clarendon Press, 1934. English translation.
- WOLFF, K.
 "Les principes généraux du droit applicables dans les rapports internationaux", *Recueil des cours de l'Académie de droit international de La Haye*, 1931–II. Paris, Sirey, 1932, vol. 36.
- WOODHOUSE, J. T.
 "The principle of retroactivity in international law", in: The Grotius Society, *Transactions for the Year 1955—Problems of Public and Private International Law*. London, 1956, vol. 41.
- WRIGHT, Q.
 "Responsibility for injuries to United Nations officials", *The American Journal of International Law* (Washington, D.C.), vol. 43, No. 1, January 1949.
 "Subversive intervention", *The American Journal of International Law* (Washington, D.C.), vol. 54, No. 3, July 1960.
 "United States intervention in the Lebanon", *The American Journal of International Law* (Washington, D.C.), vol. 53, No. 1, January 1959.
- WYTRHLIK, J.
 "Eine Stellungnahme des Reichskanzlers Bismarck zu dem Problem der mittelbaren Staatenhaftung", *Zeitschrift für öffentliches Recht* (Vienna), vol. XXI, Nos. 3–4, 1941.
- YOKOTA, K.
 "War as an international crime", *Grundprobleme des internationalen Rechts—Festschrift für Jean Spiropoulos*. Bonn, Schimmelbusch, 1957.
- ZANNAS, P. A.
La responsabilité internationale des Etats pour les actes de negligence [thesis]. Montreux, Imprimerie Ganguin et Laubscher, 1952.
- ZANOBINI, G.
Corso di diritto amministrativo, 8th ed. Milan, Giuffrè, 1958, vol. I.
- ZELLWEGER, E.
Die völkerrechtliche Verantwortlichkeit des Staates für die Presse. Zurich, Polygraphischer Verlag, 1949.
- ZORGBIBE, C.
 "La protection d'humanité", *Le Monde*, Paris, 7 July 1976.
- ŽOUREK, J.
 "La notion de légitime défense en droit international", *Annuaire de l'Institut de droit international*, 1975 (Basel), vol. 56.