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A/CN.4/328 and Add.1-4

Observations and comments of Governments on chapters I, II and III of Part I of the draft articles on State responsibility for internationally wrongful acts

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1980, vol. II(1)

DOCUMENT A/CN.4/328 AND ADD.1–4

Observations and comments of Governments on chapters I, II and III of part 1 of the draft articles on State responsibility for internationally wrongful acts

[*Original: English, French, Russian, Spanish*]
[*6 March, 1 and 21 April, 6 and 21 May 1980*]

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NOTE

For the text of chapters I, II and III of part I of the draft articles on State responsibility, see *Yearbook ... 1979*, vol. II (Part Two), pp. 91–93, document A/34/10, chap. II, sect. B.1.

INTRODUCTION

1. The International Law Commission, at its thirtieth session in 1978, decided, in accordance with articles 16 and 21 of its Statute, to communicate to Governments, through the Secretary-General, chapters I, II and III of part 1 of its draft articles on responsibility of States for internationally wrongful acts, and to request them to transmit their observations and comments on the provisions of those chapters. Governments were requested to submit their observations and comments on the provisions in question by 31 December 1979.[1] In the Commission's opinion, because of the complexity of the topic of State responsibility for internationally wrongful acts, Governments must have as much time as possible for preparing the observations and comments in the light of which the Commission will, at the appropriate time, have to undertake the second reading of the draft articles under consideration. The Commission accordingly reached the conclusion that the articles of the draft should be submitted to Governments for observations and comments before the draft as a whole is adopted on first reading. Such a procedure, which has been followed in the past by the Commission in connection with other

[1] See *Yearbook ... 1978*, vol. II (Part Two), pp. 77–78, Document A/33/10, para. 92.

drafts (such as the draft articles on the law of treaties) would make it possible for the second reading to be undertaken by the Commission without too great a delay.[2]

2. The General Assembly, by paragraph 8 of section I of resolution 33/139 of 19 December 1978, endorsed the Commission's decision. The General Assembly also, by paragraph 4(*a*) of the same section of that resolution, recommended that the Commission should:

> Continue its work on State responsibility with the aim of completing at least the first reading of the set of articles constituting part 1 of the draft on responsibility of States for internationally wrongful acts, within the present term of office of the members of the International Law Commission, taking into account the views expressed in debates in the General Assembly and the observations of Governments.

3. At its thirty-first session in 1979, the Commission expressed its intention to conclude its study of the circumstances precluding wrongfulness considered in the Special Rapporteur's eighth report which were still outstanding, namely, state of necessity and self-defence, and thus complete on first reading part I of the draft articles on State responsibility for internationally wrongful acts within the present term of office of the members of the Commission, as recommended by the General Assembly in its resolution 33/139.[3]

4. The General Assembly, by paragraph 4(*b*) of resolution 34/141 of 17 December 1979, recommended *inter alia* that the Commission should:

> Continue its work on State responsibility with the aim of completing, at its thirty-second session, the first reading of the set of articles constituting part one of the draft on responsibility of States for internationally wrongful acts, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly . . ..

5. Pursuant to the Commission's decision, endorsed by the General Assembly, the Secretary-General, by means of a letter signed by the Legal Counsel, dated 18 January 1979, requested Governments to transmit their observations and comments on the provisions of chapters I, II and III of part 1 of the draft articles on State responsibility for internationally wrongful acts, not later than 31 December 1979. By 21 May 1980, replies to the Legal Counsel's letter had been received from the Governments of the following twelve Member States: Austria, Barbados, Byelorussian Soviet Socialist Republic, Canada, Chile, Mali, Mauritius, the Netherlands, Qatar, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Yugoslavia. The Governments of Mauritius and Qatar indicated that they had no comments or observations at present. The comments and observations received from the Governments of the ten other States are reproduced below, in alphabetical order. Further comments and observations that may be received from Governments will be reproduced in addenda to the present document.

[2] *Ibid.*

[3] *Yearbook ... 1979*, vol II (Part Two), p. 90, document A/34/10, para. 71.

Observations and comments of governments

Austria

[*Original: English*]
[*25 April 1980*]

1. General Remarks

1.1 *Form of the draft*

1. In its report on the work of its twenty-fifth session (1973), the International Law Commission states that the final form to be given to the codification of State responsibility will have to be decided upon when the Commission has completed the draft. The Commission states further that, without prejudicing this decision, it has decided to give to the study the form of a set of draft articles, as expressly recommended by the General Assembly in resolutions 2780 (XXVI) and 2926 (XXVII).[1]

2. It should be noted, however, that the language used in these resolutions, like "preparation of draft articles" (resolution 2780 (XXVI)) or "preparation of a first set of draft articles" (resolution 2926 (XXVII)), suggests the unreflected use of familiar words rather than a firm commitment of the General Assembly to the form of a convention. Be that as it may, the present draft articles, and what is known of the remaining parts, have such a highly theoretical character and are so firmly rooted in one conception that it is doubtful whether they could survive a diplomatic conference intact. A single successful amendment to a key article could alter the whole meaning of it.

3. Thought should therefore be given to alternative methods of putting the finished draft to use in the international community.

1.2 *Scope of the draft*

4. Although the Commission has hitherto intentionally refrained from formulating an article or articles on the scope of its draft[2] it had, during the course of its work, to make some decisions concerning it.

[1] *Yearbook ... 1973*, vol. II, p. 169, Document A/9010/Rev.1, para. 36.

[2] See *Yearbook ... 1970*, vol. II, p. 307, document A/8010/Rev.1, para. 72.

1.2.1 *Comprehensive study*

5. The existing draft articles prove that the decision not to limit the study to the international responsibility for injuries to aliens[3] was necessary and useful, although the Commission will now have to take care so as not to adhere too closely to one specific notion of state responsibility to the detriment of other elements. It should bear in mind that the draft it is going to produce ought to be generally acceptable and, accordingly, take into account the various concepts which exist in this respect.

1.2.2 *Limiting the draft to the responsibiltiy of States*

6. In limiting the draft to the international responsibility of States,[4] the Commission is continuing an approach which it had initiated with the matter of diplomatic law and the law of treaties. Even if one does not fully share the theoretical reasons given therefore, on practical grounds it is certainly preferable not to complicate an already stupendous task.

1.2.3 *Exclusion of the liability for risk*

7. It appears further justified to exclude from the study the totally different problem of liability for lawful activities, which is at present regulated exclusively by special multilateral conventions (e.g. nuclear energy and outer space).[5]

8. It is nevertheless commendable that the Commission has in the meantime made this important matter the subject of a separate study[6] which has, as a first result, led to significant clarifications of the terminology.

1.3 *Structure of the draft*

9. The 26 draft articles (Chapters I, II and III of part 1) on which the General Assembly invited comments in Resolution 33/139 are only a fragment of the proposed draft on State responsibility. Since the adoption of that resolution the Commission has adopted more articles,[7] thereby completing, except for two articles, part 1 of the draft. Although these additional articles are not formally within the scope of the present comment, they will be referred to when necessary.

10. According to the general plan, as set forth in the Commission's report on the work of its twenty-seventh session (1975),[8] the draft, when completed, will consist of three parts: the first, dealing with the origin of international responsibility, the second, with the content, forms and degrees of international responsibility, and a possible third, with the settlement of disputes and the "implementation" ("*Mise en œuvre*") of international responsibility.

11. This incomplete state of the draft makes it extremely difficult to judge its usefulness as a whole. Although the general plan seems to indicate that the draft, when finished, will cover the whole subject, the importance of certain issues mentioned for inclusion in the as yet untouched parts cannot be properly assessed. It is, for instance, not altogether clear whether provisions on the settlement of disputes are needed in the context of the draft until it is known what sort of articles are proposed and what function they are intended to have in the draft.

12. Moreover, the lack of precise information as to what questions are to be regulated in the missing parts, and in what manner, makes it impossible to comment in any definite and final way, even on the handling by the Commission of some fundamental issues in the existing draft articles.

13. Two examples may illustrate that point.

1.3.1 *The issue of "fault"*

14. The report submitted in 1963 by Mr. Ago, Chairman of the Sub-Committee on State responsibility, which identified the problems to be dealt with in the study of State responsibility, mentions "fault" as a subjective element of the internationally wrongful act in the form of the following query: "Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault." To this a footnote adds that "it would be desirable to consider whether or not the study should include the very important questions which may arise in connection with the proof of the events giving rise to responsibility".[9]

15. The present draft article 3, however, does not include "fault" among the constituent elements of an internationally wrongful act, but formulates "objectively" that every breach of an international obligation constitutes an internationally wrongful act of the state to which it is attributable. And even though the

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[3] See *Yearbook ... 1963*, vol. II, p. 228, document A/5509, annex I, para. 5.

[4] See *Yearbook ... 1970*, vol. II, p. 306, document 8010/Rev.1, para. 66(*a*), and *Yearbook ... 1973*, vol. II, p. 179, document A9010/Rev.1, chap. II, sect. B, art. 2, para. (11) of the commentary.

[5] See *Yearbook ... 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 83, and *Yearbook ... 1973*, vol. II, p. 169, document A/9010/Rev.1, paras. 38–39.

[6] See *Yearbook ... 1978*, vol. II (Part Two), pp. 149 *et seq.*, document A/33/10, paras. 170–178, and A/CN.4/L.284 and Corr.1, section II of which is reproduced in *ibid.*, pp. 150–152, document A/33/10, annex.

[7] See *Yearbook ... 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

[8] *Yearbook ... 1975*, vol. II, pp. 55 *et seq.*, document A/10010/Rev.1, paras. 38–51.

[9] *Yearbook ... 1963*, vol. II, p. 228, document A/5509, annex I, para. 6.

solution thus adopted can by no means be traced to a consensus of the theory and practice of international law, neither the Special Rapporteur nor the Commission, in their respective reports, discuss the problem at all in relation to article 3, nor do they give any reason for their choice. This is all the more surprising as the Special Rapporteur, in a text entitled "Le délit international", established fault as an essential "subjective" element of the internationally wrongful act. [10]

16. Notwithstanding the above-mentioned choice of the Commission, the term "negligent" creeps in sometimes in the commentaries of the Special Rapporteur[11] or of the Commission,[12] without, however, being anywhere regulated or defined.[13]

17. Even for all that, however, no final opinion can be expressed on the issue, since it may still be the subject of regulation in presently missing parts of the draft.

18. One thing, however, needs to be stated clearly: even if one adheres to the view of the Special Rapporteur[14] which the Commission endorsed—"that the topic of the international responsibility of States was one of those in which progressive development could be particularly important",[15] such progressive development would still require a convincing reasoning in each instance to become acceptable. Passing over a problem in silence cannot be counted as such.

1.3.2 *The issue of grading international obligations according to their importance to the international community*

19. This issue, too, cannot be properly evaluated in the absence of part 2. In the report on the work of its twenty-second session (1970), the Commission endorsed the warning of its Special Rapporteur[16] against confusing the task of determining the principles which govern the responsibility of States for internationally wrongful acts with that of defining the rules that place obligations on States, the violation of which may generate responsibility. It admitted, however, that these "may have to be treated as a necessary element in assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have",[17]—thus presumably in part 2.

20. It appears, however, that for systematic reasons the Commission felt compelled to introduce already in article 19 a distinction between "international crimes" and "international delicts", the distinction being based on the quality of the violated norm, of which several examples are cited in the text of the article.

21. Whether this distinction, which is a particular concern of the Soviet theory of international law, is useful and justified in the present context can only be determined after the consequences of this distinct category of internationally wrongful acts have been formulated in part 2 of the draft.

2. Comments on individual articles

22. The incompleteness of the draft further suggests that comments should be made rather on the handling of fundamental issues in the draft articles than on the formulation of the articles. Individual draft articles are, therefore, commented on only in relation to such fundamental issues.

23. An additional difficulty arises from the fact that the Commission has worked for many years on the draft and during the course of those years, for one or another reason, has changed its position on some points, so that its commentary to later articles is not always consistent with that to earlier ones.

2.1 *General principles* (chapter I, articles 1–4)

Article 1

24. In paragraph (12) of the commentary to article 1 the Commission states that it:

> felt unable to accept the idea of some writers that the rule that any internationally wrongful act of a State involves the international responsibility of that State should allow of an exception in the case where the wrongful act was committed in any of the following circumstances: *force majeure* or act of God, consent of the injured State, legitimate exercise of a sanction, self-defence or emergency.
>
> It was of the opinion that;
>
> the true effect of the presence of such circumstances is not, at least in the normal case, to preclude responsibility that would otherwise result from an act wrongful in itself, but rather to preclude the characterization of the conduct of the State in one of those circumstances as wrongful.[18]

Hence it proposes to deal with the question in chapter V of part 1 of the draft.

25. Although this view seems basically correct, it is inconsistent with paragraph (7) of the commentary to article 2, which reads:

> When a State engages in certain conduct in circumstances such as self-defence, *force majeure* or the legitimate application of a sanction, its conduct does not constitute an internationally wrongful act because, in those circumstances, the State is not required to comply with the international obligation which it

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[10] R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 476–498.

[11] See *Yearbook ... 1970*, vol. II, p. 194, document A/CN.4/233, para. 51; and *Yearbook ... 1971*, vol. II (Part One), p. 222, document A/CN.4/246 and Add.1–3, para. 71.

[12] See *Yearbook ... 1973*, vol. II, pp. 182–183, document A/9010/Rev.1, chap. II, sect. B., para. (11) of the commentary to art. 3.

[13] See also sect. 2.3 below, observations relating to art. 23.

[14] *Yearbook ... 1970*, vol. II, p. 185, document A/CN.4/233, para. 24.

[15] *Ibid.*, p. 307, document A/8010/Rev.1, para. 71.

[16] *Ibid.*, pp. 184–185, document A/CN.4/233, paras. 22–25.

[17] *Ibid.*, p. 306, document A/8010/Rev.1, para. 66, (*c*).

[18] *Yearbook ... 1973*, vol. II, p. 176, document A/9010/Rev.1, chap. II, sect. B.

would normally have to respect, so that there cannot be a breach of that obligation.[19]

26. If one compares that second statement with the wording of article 1, the cases contemplated seem to fall outside the scope of the draft because, according to article 1 it applies only to responsibility for internationally *wrongful* acts. Yet this is precisely the impression which the Commission, according to the commentary to article 1, wishes to avoid. If, however, these seemingly contradictory comments simply are to imply, as paragraph (13) of the commentary to article 1[20] appears to suggest, that international responsibility is not limited to internationally wrongful acts, this should be expressed more clearly in the text and not only in the commentary. The necessity of this conception should, moreover, be reviewed in the light of the decision of the Commission, concerning liability for injuries resulting from lawful activities.[21]

27. In any case, as pointed out in section 1.3 above, this is one of the articles whose final appreciation depends on the completion of the draft.

Article 2

28. In paragraph (5) of the commentary to article 2, the Commission considers the case of States members of a federal union which have retained, within limits, a measure of international personality. In dealing with the argument that "even when it was the member State which, within the limits of its international personality, had assumed an obligation towards another State, it was still the federal State and not the member State which bore the responsibility for a breach of that obligation by the member State", the Commission states:

> Without wishing to take a position at the present stage on the validity of this argument, the Commission noted that, even if it proved to be well-founded, the breach of an international obligation committed by the member State possessing international personality would still constitute an internationally wrongful act by that member State.[22]

29. While the opinion expressed in the last part of the sentence seems to be correct, it cannot be reconciled with the first-mentioned view, and thus the linking part of the sentence, "even if it proved to be well-founded", is misleading. Obviously, two different subjects of law cannot bear responsibility for the same act unless the conditions of article 27 or article 28 apply.[23]

30. What is presumably meant is that the consequences of an internationally wrongful act committed by a member State of a federal union may affect the federal State, for instance if it resulted in the duty to make monetary compensation and the member State did not possess financial autonomy. Although this situation will most likely be dealt with in either part 2 or part 3 of the draft, that should not deter the Commission from eliminating the present inconsistency from the commentary to article 2.

Article 3

31. In what is probably the key article of the whole draft, the Commission establishes two constituent elements of the internationally wrongful act of the State: a breach of an international obligation (objective element), being attributable to that State (subjective element).

32. As has been pointed out in section 1.3.1, it is impossible at the present stage of the draft, in which essential parts are still missing, to determine whether the omission of "fault" from the definition of the subjective elements of the internationally wrongful act leads to a satisfactory result.

33. The same is true for the omission of the element of "damage" or "injury" from the definition of the objective elements of the internationally wrongful act. The arguments which led the Special Rapporteur to his choice[24] and which have been *grosso modo* accepted and repeated by the Commission[25] seem logical and convincing. Still, a final assessment will become possible only after part 2 of the draft has been formulated, since it will only then appear which modes of reparation the Commission had in mind for internationally wrongful acts which cause neither "economic" nor "moral" damage.[26] The successful solution of this problem will be the decisive test of the usefulness of the present formulation of article 3.

2.2. *The "act of the State" under international law* (chapter II, articles 5–15)

Article 7

34. See comments above on article 2.

Article 8

35. The wording of sub-paragraph (*a*) of this article is ambiguous, since it seems to cover cases where a "person or group of persons was in fact acting on behalf of the State" in transactions under private law,

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[19] *Ibid*, p. 178.

[20] *Ibid.*, p. 176.

[21] See sect. 1.2.3 above.

[22] *Yearbook ... 1973*, vol. II, p. 177, document A/9010/Rev.1, chap. II, sect. B.

[23] See *Yearbook ... 1974*, vol II (Part One), pp. 280–281, document A/9610/Rev.1, chap. III, sect. B.2, paras. (9)–(11) of the commentary to article 7.

[24] See *Yearbook ... 1970*, vol. II, pp. 194–195, document A/CN.4/233, paras. 53–54; and *Yearbook ... 1971*, vol. II (Part One), p. 223, document A/CN.4/246 and Add.1–3, paras. 73–74.

[25] See *Yearbook ... 1970*, vol. II, pp. 308–309, document A/8010/Rev.1, para. 81; and *Yearbook ... 1973*, vol. II, pp. 183–184, document A/9010/Rev.1, chap. II, sect. B, para. (12) of the commentary to article 3.

[26] *Yearbook ... 1973*, vol. II, pp. 183–184, document A/9010/Rev.1, chap. II, sect. B, para. (12) of the commentary to article 3.

i.e. in the same manner as private persons. As the Commission has pointed out,[27] it considers the effective exercises of elements of the governmental authority an indispensable condition for cases falling under subparagraph (*b*).

36. The same should apply to subparagraph (*a*). The Special Rapporteur stated in the commentary to his proposed article that "the underlying principle in international law ... requires that the critierion should be the public character of the function or mission in the performance of which the act or omission contrary to international law was committed".[28] It would, therefore, be preferable to qualify the formulation in subparagraph (*a*) in a manner that would limit it to the effective exercise of elements of the governmental authority or, at least, exclude transactions under private law.

Article 13

37. It is doubtful whether the Commission's decision not to include in this article a second paragraph, corresponding to the provisions in articles 11, 12 and 14, meets the requirements of the case. As the Commission has noted, a territorial State might incur international responsibility if it "associated itself with the perpetration, by an organ of the organization, of an action constituting an internationally wrongful act, or if it failed to react in the appropriate manner to such an action ...".[29] Without underestimating the difficulties of formulating a suitable provision, to which the Commission alludes, it is nevertheless unlikely that mere silence of the draft will solve the problem. The uncertainty created by the silence may, on the contrary, give rise to unnecessary international disputes.

Article 14

38. When reading paragraph (12) of the commentary to article 8[30] in conjuction with paragraphs (3), (4) and (5) of the commentary to article 14,[31] it is not clear whether article 14, paragraph 1, includes the case of an insurrectional movement, *recognized by foreign States as a local* de facto *government*, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities. Again, uncertainty may engender unnecessary disputes.

2.3 *The breach of an international obligation* (chapter II, articles 16–26)

Article 18

39. Although the concept underlying paragraph 2 of article 18 is fully in line with present-day international law, the Commission was unfortunately unable to translate that concept, as explained in the commentary to the article,[32] faithfully into the text. The words "ceases to be considered an internationally wrongful act if, subsequently ..." are by no means precise enough to prevent the occurrence of situations which, according to the commentary, the Commission intended to exclude.

Article 19

40. See comments under section 1.3.2 above.

Articles 20, 21 and 22

41. Although under present circumstances it is rare that individuals have legal remedies against the inaction of legislatures, a development in this direction is neither theoretically excluded nor practically impossible. Where such a remedy exists, an alien concerned would have to exhaust the local remedies under the circumstances envisaged in article 22, even when the obligation breached was one requiring the State to adopt a particular course of conduct (art.20).

42. It would therefore seem advisable not to limit the application of article 22 to the obligations mentioned in article 21, but to include obligations demanding the adoption of a particular course of conduct in the introductory sentence of article 22. Since only "effective remedies" require exhaustion, the situation would not change for States which do not provide individuals with legal remedies against the inaction of their legislatures; but the suggested reformulation would leave room for future developments.

Article 23

43. The qualification of the obligations mentioned as examples in the commentary to the article[33] as obligations to prevent a given event, on the understanding that "The State bound by an obligation of this kind cannot assert that it has achieved the required result by claiming that it has set up a perfect system of prevention if in practice that system proves ineffective and permits the event to occur",[34] without taking account of the element of "due diligence", leads to unacceptable results. The statement: "Only when the event has occurred because the State has failed to

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[27] See *Yearbook ... 1974*, p. 285, document A/9610/Rev.1, chap. III, sect. B.2, para. (11) of the commentary to art. 8.

[28] *Yearbook ... 1971*, vol. II (Part One), p. 264, document A/CN.4/246 and Add.1–3, para. 191.

[29] *Yearbook ... 1975*, vol. II, pp. 90–91, document A/10010/Rev. 1, chap. II, sect. B.2, para. (13) of the commentary to art. 13.

[30] See *Yearbook ... 1974*, vol. II (Part One), pp. 285–286, document A/9610/Rev.1, chap. III, sect. B.2

[31] *Yearbook ... 1975*, vol. II, pp. 91–92, document A/10010/Rev.1, chap. II, sect. B.2.

[32] See *Yearbook ... 1976*, vol. II (Part Two), p. 92, document A/31/10, chap. III, sect. B.2, para (18) of the commentary to art. 18.

[33] See *Yearbook ... 1978*, vol. II (Part Two), pp. 81–82, document A/33/10, chap. III, sect. B.2, para. (3) of the commentary to art. 23.

[34] *Ibid.*, p. 82, para. (4) of the commentary.

prevent it by its conduct, *and when the State is shown to have been capable of preventing it by different conduct ...*"[35] taken literally in its unmitigated form, would imply that a State may be required to surround a foreign diplomatic mission with its whole army to prevent an infringement of its inviolability, simply because it will, obviously, be "capable [of that] different conduct". This is, surely, a most undesirable result of the rule as presently phrased.

44. The Commission seems to feel the undesirability of the result, since it uses qualifying phrases in the commentary to balance the aforementioned statements, like "the conduct that it might *reasonably* be expected to have adopted",[36] "lack of prevention",[37] "adopt measures *normally* likely to prevent"[38] but none of this qualifying language transpires into the text of the article itself. On the contrary: the Commission, in eliminating the words "following a lack of prevention" from the text proposed by the Special Rapporteur,[39] eliminated even the last qualifying condition.

45. Although, as stated above in section 1.3.1, the incomplete state of the draft makes a final assessment of the existing draft articles impossible, it is difficult to see how the above-mentioned shortcomings of article 23 can be redressed in another part of the draft without improving the present text of that article and adjusting its commentary.

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[35] *Ibid.*, pp. 82–83, para (6) of the commentary (emphasis not in original text). See also pp. 85–86, para (16) of the commentary.

[36] *Ibid.*, pp. 82–83, para. (6) of the commentary (emphasis not in original text).

[37] *Ibid.*, pp. 83 and 85, paras. (8) and (14) of the commentary.

[38] *Ibid.*, p. 85, para. (13) of the commentary (emphasis not in original text).

[39] *Ibid.*, vol. II (Part One), p. 37, document A/CN.4/307 and Add.1 and 2, para. 19.

Barbados

[*Original: English*]
[*November 1979*]

It is highly desirable that the draft articles, being a full and explicit enunciation of the principles underlying state responsibility for internationally wrongful acts, should be included in a convention.

Byelorussian Soviet Socialist Republic

[*Original: Russian*]
[*9 April 1980*]

1. The consolidation of international relations on the basis of the principles of peaceful coexistence among States with different social systems serves in every way to promote the vast expansion of the role of international law in strengthening and deepening the process of international détente and in [further] developing the progressive principles set out in the Charter of the United Nations.

2. This is also the perspective from which to consider the first three chapters of part 1 of the draft articles prepared by the International Law Commission on State responsibility for internationally wrongful acts, which, on the whole, in the opinion of the Byelorussian SSR must be viewed positively.

3. The Byelorussian SSR attaches great importance to the provisions of article 19 of the draft, which contains a separate enumeration and definition of such internationally wrongful acts of States as aggression, genocide, *apartheid* and the maintenance by force of colonial domination.

4. The inclusion of these internationally wrongful acts in the list of international crimes is unquestionably in keeping with the tasks of the struggle to strengthen peace and international security and with the purposes and principles of the Charter of the United Nations.

5. The Byelorussian SSR reserves the right to make additional observations as work on the draft articles progresses and after the entire draft has been completed.

Canada

[*Original: English*]
[*11 January 1980*]

1. The Government of Canada considers that draft articles 1–26 elaborated by the International Law Commission on the subject of State responsibility for internationally wrongful acts can constitute an important contribution to the codification and progressive development of international law in a sensitive area of inter-State relations. The decision of the Commission to concentrate its efforts on formulating "secondary rules" of State responsibility and to avoid in its present work programme the elaboration of definitions of acts of States that would constitute internationally wrongful acts has materially assisted it in achieving a large measure of success with respect to the 26 draft articles open for observation and comment. In that the implications of these draft articles cannot be fully assessed until the two remaining draft articles in part 1, and the whole of part 2 of the draft, on the content, forms and degrees of international responsibility, have been completed, the observations and comments that follow are necessarily general in nature and tentative.

2. Canada, as a federal State, fully supports the concept contained in paragraph 1 of draft article 7 wherein the conduct, as defined, of a territorial governmental entity within a State is considered to be an act of the State itself. This concept is consistent with the theory and practice of federal States such as

Canada. Concern must be expressed, however, with respect to the breadth of responsibility of a State that is outlined in paragraph 2 of draft article 7. The Government of Canada considers that further study should be given to the question of the attribution to a State of responsibility in respect of the conduct of an entity which is not part of the formal structure of the State or of a territorial governmental entity but which is empowered to exercise elements of governmental authority. In the view of the Government of Canada the circumstances in which a State may be held responsible for such actions must be more restrictively delineated. Its position on this paragraph is therefore reserved.

3. The Government of Canada would make a comment with respect to paragraph (*b*) of draft article 8 similar to that made concerning paragraph 2 of draft article 7, and would therefore reserve its position on this paragraph.

4. In the view of the Government of Canada, paragraph 1 of draft article 18 correctly states the rule with respect to the requirement that a breach of an international obligation may only occur in respect of an obligation that was in force for the State concerned at the time the act in question was performed. It is for further consideration whether paragraphs 3, 4 and 5 of draft article 18, being details of the rule, are necessary. The Government of Canada would agree with the representative of New Zealand at the Sixth Committee that, of the three, paragraph 4, concerning composite acts, would appear to be of greatest importance.[1] However, where possible, the Government of Canada considers that the rules under elaboration should be formulated as simply as possible. Paragraph 2 of draft article 18 appears to give sanction to the concept of retroactivity. As the Government of Canada considers that this concept, in respect of legal provisions, should be circumscribed to the maximum degree possible, its view is that paragraph 2 of draft article 18, along with paragraphs 3, 4 and 5, should be given further consideration. Its position on this draft article is therefore reserved.

5. The Government of Canada considers that the Commission, in its elaboration of draft article 19, has formulated a primary rule of State responsibility and has entered into an area of controversy better left unattended at present. Despite the acceptance, at the highest judicial level in the international community, of the concept of State obligations towards the international community as a whole, it is to be recognized that the impracticability at present of formulating definitions of internationally wrongful acts must *a fortiori* inhibit the possibility of achieving consensus on definitions of international crimes and on the concept of State responsibility for international crimes. At the same time, the Government of Canada associates itself with the generally accepted view as to the seriousness of breaches of the obligations outlined in paragraphs 2 and 3 of draft article 19. In that it is not possible to formulate a definitive position with respect to draft article 19 in the absence of draft provisions on the practical implications of breaches on international crimes as defined, which might be outlined in part 2 of the Commission's present draft (or in part 3, on the "implementation" of international responsibility, if drafted), the Government of Canada reserves its position with respect to this draft article.

6. With respect to draft articles 20, 21 and 23, the Government of Canada expresses the view that while in legal theory the distinction between "obligations of conduct" and "obligations of result" commands a certain logic, it is for consideration whether, in view of the likely difficulty in applying the distinction to actual cases, the distinction is necessary. In the view of the Government of Canada, the Commission should make every effort to elaborate the applicable principles in as simple and brief provisions as possible. These three draft articles should, therefore, be reviewed to ensure that the distinction they outline is necessary and practical. Pending such a review, the Government of Canada reserves its position thereon.

7. While draft article 22 may be considered to formulate the local remedies rule in an acceptable manner, the Government of Canada wishes to express its view, in response to the invitation contained in paragraph 61 of the Commentary on this draft article in the Commission's Report on the work of its twenty-ninth session (1977), on the question of the Commission's decision

> Not to limit the scope of the principle explicitly to cases concerning conduct adopted by the State "within its jurisdiction".[2]

In the view of the Government of Canada both the local remedies rule and the exception to it relating to injury to foreign individuals or to their property that has been caused outside the territory of the State concerned are firmly established in international law. The Government of Canada therefore considers that draft article 22 should be reformulated to take into account this well-known exception. Accordingly, the Government of Canada reserves its position thereon pending such a review.

8. The Government of Canada fully appreciates the significance of draft articles 24, 25 and 26 on the moment and duration of the breach of an international obligation. The practical implications have been graphically illustrated in the Commission's Report on the work of its thirtieth session (1978).[3] Nevertheless,

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[1] See *Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 19th meeting*, para. 14; and *ibid.*, Sessional fascicle, corrigendum.

[2] *Yearbook ... 1977*, vol. II (Part Two), p. 50, document A/32/10, chap. II, sect. B.2, para. (61) of the commentary to art. 22.

[3] See *Yearbook ... 1978*, vol. II (Part Two), pp. 86–87, document A/33/10, chap. III, sect. B.2, para. (5) of the commentary to art. 24.

it is for consideration whether there is a need for the detail and complexity of these three rules as elaborated. In the view of the Government of Canada, the Commission should review these three draft articles with a view to ascertaining whether the rules contained therein are as simply expressed and as practical as possible.

Chile

[*Original: Spanish*]
[*9 October 1979*]

1. At its thirtieth session (1978), the United Nations International Law Commission decided, in conformity with articles 16 and 21 of its Statute, to communicate to Governments of member States, through the Secretary-General, chapters I, II and III of Part 1 of the draft articles on State responsibility for internationally wrongful acts, and to request them to transmit their observations thereon.

2. The above-mentioned decision was communicated to the Government of Chile by note LE 113 (33) of 18 January 1979, which stated that the Secretary-General would be grateful to receive such observations and comments as it might have on the provisions thus far adopted by the Commission, at the Government's earliest convenience and not later than 31 December 1979.

3. In this connection, the Government of Chile is convinced that the Commission, in taking up the topic of State responsibility for internationally wrongful acts, has decided to codify a subject which is one of the most prominent and most deeply rooted in the doctrine of international law—it has rightly been termed the corner-stone of international law. Accordingly, the Commission is to be commended for its achievement in giving preliminary approval to the first three chapters of part 1 of the draft articles, because the fact that there is a consensus on those provisions shows that the structure for regulating international conduct and strengthening harmonious relations among peoples is being soundly constructed.

4. As the Commission points out in its annual report,[1] under the plan adopted by the Commission, part 1 of the draft articles is concerned with the origin of international responsibility and with determining in what circumstances and on what grounds a State is held responsible for an internationally wrongful act attributable to it. This first part has been divided into five chapters which follow a logical sequence, and the first three have now been submitted to the Governments of States Members of the United Nations for their consideration. They relate respectively to general principles, to the act of the State under international law and to the breach of an international obligation.

5. The opening chapter of part 1 of the draft articles on international responsibility clearly sets forth the basis of the institution in question by indicating, in article 1, that every internationally wrongful act of a State awaits international responsibility for that act. Draft article 2, which is closely related to the above, makes that responsibility under international law universal by providing, in essence, that every State is subject to the possibility of being held responsible for a wrongful act it has committed.

6. According to these provisions, State responsibility is based on the legally binding nature of international law. The Commission thus endorses a view that is widely shared both in theory and in practice. To obtain an overall picture, however, it is necessary to read these provisions in conjuction with those of articles 16 and 19, both contained in chapter III of part 1, since together they form the technical legal basis mentioned above. According to article 19, a State commits an internationally wrongful act when its conduct "constitutes a breach of an international obligation ... regardless of the subject-matter of the obligation breached", while article 16 provides a bench-mark for determining when there is a breach of an international obligation by a State: "when an act of that State is not in conformity with what is required of it by that obligation". In addition, article 4 provides that an act of a State "may only be characterized as internationally wrongful by international law", thus endorsing the sound principle that a State cannot evade its international responsibility by invoking its internal law; the very reference to an "internationally wrongful" act presupposes that the international order takes precedence over the domestic order of States.

7. Thus, the Commission has correctly defined the legal grounds for international responsibility of the State by basing it on the binding nature of international law; any breach, any justifiable wrong, suffices to render the offending entity responsible under international law for acts of commission or omission, so that it may be required to fulfil the obligation to make reparation. The draft articles have made the international responsibility of States essentially objective and broad in character so that it is no less rigorous than, and just as universal and strict as, respect for the legal system from which it derives.

8. Lastly, draft article 3 specifies the conditions which together determine the existence of an internationally wrongful act and which consist, in short, of the act of the State and the breach of an international obligation—topics dealt with in chapters II and III respectively. Article 3(*a*) introduces a new element by providing that an internationally wrongful act may be attributable to a State in respect of either an action or an omission on its part. The point is that international law does not always impose active obligations, in the sense that its subjects must conduct themselves in such a way that their actions produce a change in the outside world; there are occasions when international

[1] *Yearbook ... 1979*, vol. II (Part Two), p. 89, document A/34/10, paras. 66–67.

rules provide for or prescribe, in the form of a prohibition, an obligation "not to do". These particular cases of active and passive wrongful acts are regulated at later stages in the draft articles. Article 3(*b*) adds that the conduct of a State becomes internationally wrongful when it constitutes a breach of an international obligation of the State. In view of our previous comments, this subparagraph could well have been omitted, since it is redundant if articles 3(*a*), 4, 16 and 19 are read as a whole, as indicated above.[2] However, the placing of the subparagraph shows, firstly, that the Commission did not wish to leave any room for doubt about what constitutes an internationally wrongful act, and secondly, that article 3, in its present wording, logically links chapter I to the chapters which follow.

9. In sum, chapter I of part 1 of the draft articles on the responsibility of States for internationally wrongful acts constitutes, in letter and spirit, a carefully formed structure resulting from a wide-ranging study of present-day international law; it is judiciously balanced and thus firmly establishes the foundations of this legal institution, which today is regarded as the backbone of the international legal system.

10. Chapter II of part 1 of the draft articles deals with the "act of the State" under international law. Article 5 provides that conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned, provided that organ was acting in that capacity in the case in question. There are obvious reasons for the general rule thus defined. The State, as a legal entity with sovereign powers, manifests its will through its competent organs, which in turn are served by individuals. Thus, in practice, the organs of a State will reflect the decisions of that State as such; one might say that they are its physical extensions. It is this insight which enables one to grasp the fact that, in both internal and external affairs, what is manifested is, not decisions and actions of individuals considered as such, but of the State itself, since the legal rule has been to attribute or impute to the State the conduct and volition of individuals. The rule in question rightly leaves the determination of State organs and their powers to the internal order. From the standpoint of international law, the administrative or functional dispositions of States are of little importance; each State is sovereign when it comes to apportioning its internal powers, in accordance with its own characteristics, with a view to the fulfilment of the general national will. What the rule does concern itself with is the imputation to the State, as a subject of international law, of injurious conduct on the part of those entities which, in accordance with the internal provisions governing them, express the will of the State. Draft article 6 is therefore explicit in considering the conduct of an organ as an act of the State, whether it belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

11. For the purposes of international law, and particularly of responsibility under that system, the State is indivisible. The manifestation of the will of the State is what counts so far as that system is concerned. Draft article 7 therefore supplements the two preceding provisions by indicating, in paragraph 1, that actions and omissions of organs of territorial governmental entities within a State shall also be considered as an act of that State, provided they were acting in that capacity. The article is thus concerned with entities which, for the purposes of the domestic order of a State, have a personality separate from that of the State itself but possess certain governmental prerogatives and powers, as in the case of municipalities, provinces, regions, cantons and the like—a situation that has been widely recognized in international practice. This does not exclude the case of a federal State, as the Commission agreed when commenting on the question in its report.[3] In paragraph 2 of article 7, the Commission completes the range of entities which, like State organs or other governmental entities, perform certain services for the community, thus exercising functions which involve elements of the governmental authority.

12. In its desire to give a comprehensive picture, the Commission, in draft article 8, completes its enumeration of cases in which the action of certain individuals is considered as an "act of the State". While the three preceding articles referred to the conduct of organs which were within the formal structure of the State and to the conduct of organs of territorial governmental entities within the State or of other entities empowered by internal law to exercise certain elements or the governmental authority, article 8 attributes to the State the conduct of persons who, as individuals, were acting in fact on behalf of the State—that is to say, without having been formally appointed as organs of the State system. It is important in this matter to secure the principle of effectiveness in the international order; thus, in accordance with article 8(*a*), the conduct of a person or group of persons is considered as an act of the State if it is established that such person or group of persons was in fact acting on behalf of the State, since it is standard practice, in certain cases, for State organs or entities which are empowered by internal law to exercise governmental functions to employ the services of persons or groups of persons who, as private individuals or private entities, proceed to carry out on behalf of the State the functions entrusted to them. The inclusion of subparagraph (*a*) is therefore fully justified, since the

[2] See para. 6 above.

[3] See *Yearbook ... 1974*, vol. II (Part One), pp. 279 *et seq.*, document A/9610/Rev.1, chap. III, sect. B.2, paras. (5) *et seq.* of the commentary to art. 7.

performance of such work means that the private entities are transformed, at least temporarily, into interpreters of the will and action of the State, entailing the responsibility of the latter. Subparagraph (*b*) of the article is broader in scope than the preceding one, inasmuch as it refers to the conduct of persons or groups of persons who in fact were exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified their so doing. This hypothetical case differs from the preceding one in that there is no assignment of tasks to be performed on behalf of the State: what is involved is a spontaneous assumption of governmental authority; from that standpoint, it is explicable—and the Commission agreed—that the conduct of the individuals concerned should commit the State for whose benefit they are acting.

13. A situation which in practice arises much less frequently than the preceding ones, but regarding which the Commission is correct in harbouring no doubts about the likelihood of its materializing in international relations, is that described in draft article 9. This article provides that the conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed. The article emphasizes the fact that the person or group of persons placed at the disposal of another State must possess the status of organs. In that connection, the Commission observes, by way of example, that "experts" placed at the disposal of a given State under a co-operation agreement cannot be regarded as "organs" of the sending State.[4] The fact that the organ in question must have been placed at the disposal of the other State is also stressed, which tacitly excludes, for instance, cases where the organ is limited to performing in the territory of the other State functions proper to the sending State or organization, since being at the disposal of the beneficiary implies that the organ is subject to the exclusive direction and control of the beneficiary State and not, on the contrary, under instructions from the sending State.[5] As a third condition, article 9 requires that the organ shall have been acting in the exercise of elements of the governmental authority of the beneficiary foreign State; in other words, it must have been exercising official duties normally performed by the organs of the beneficiary State.

14. An organ's acting outside its competence may entail the international responsibility of the State to which it belongs. The same may be said of the organs of territorial entities and governmental entities discussed above. This assertion brought to an end a long debate in the international-law literature. In accordance with the provisions of draft article 10, the conduct of an organ of a State or of one of the entities mentioned above, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. This provision is fully justified and is based on very practical reasoning, since it is impossible for States dealing with each other in the international community to know for certain when State organs or entities of this kind are observing the limits imposed on them by their internal laws and when they are exceeding them. The draft article in question is open to criticism, however, as being too broadly worded, in that what is really relevant is relegated to a secondary level. Without prejudice to acceptance of the underlying principle, the following wording may be suggested:

> "The conduct of an organ or entity, as the case may be, which exceeded its competence according to internal law or contravened instructions concerning its activity shall also be considered as an act of the State under international law."

15. In accordance with the two paragraphs of draft article 11, the conduct of persons or groups of persons not acting on behalf of the State shall not be considered as an act of the State, without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to and which is to be considered as an act of the State by virtue of draft articles 5 to 10. This is an almost pedantic clarification, since the general rule laid down here may be deduced from the interpretation *a contrario* of article 8(*a*).[6] Its philosophy is therefore entirely in keeping with the context of the draft articles, although its provisions might well have been combined with those of article 8(*a*). However, the Commission, setting greater value on certainty than on brevity, has chosen to deal in a manner which leaves no room for doubt with a situation which has been much discussed in the literature.

16. Using similar wording, draft article 12 provides that the conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law, without prejudice to the attribution to a State of any conduct which is related to that referred to and which is to be considered as an act of that State by virtue of draft articles 5 to 10. The precept in question is sufficiently clear not to require lengthy legal disquisitions, since it follows logically from draft article 9.[7] Nevertheless, anything which helps to furnish clarification and to provide the material needed for a proper understanding of inter-

[4] *Ibid.*, pp. 286–287, para. (2) of the commentary to art. 9.

[5] *Ibid.*, p. 287, paras. (4) and (5) of the commentary.

[6] See para. 12 above.

[7] See para. 13 above.

national norms is an extremely worthwhile endeavour, especially in the case of such intrinsically delicate subjects as those now being dealt with by the Commission in the draft articles.

17. Draft article 13 is likewise a provision following from article 9, whereby the Commission emphasizes the precise interpretation to be placed on exceptions to its other rules. It states that the conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

18. The question whether the conduct of an organ that is a product of an insurrectional movement can be attributed to the State, which has been in dispute since the nineteenth century, is decisively disposed of in draft article 14. The general rule laid down in that article is that such conduct shall not be considered as an act of the State under international law unless it is to be so considered under the general provisions of draft articles 5 to 10, without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in cases in which such attribution may be made under international law. This provision is closely linked to article 15, inasmuch as the latter related to the attribution to the State of the act of a successful insurrectional movement or, in other words, of one which has become the Government or has resulted in the formation of a new State. Accordingly, without prejudice to the imputation to the State of the actions of an insurrectional movement in accordance with the general rules governing the "act of the State", draft article 14 refers to cases in which the insurgents were defeated by the authorities of the constituted Government. In such cases, therefore, the conduct of the insurgents cannot be attributed to the State, but is to be considered as a wrongful act affecting only the internal order of the State.

19. Article 15 of part 1 of the draft, which concludes chapter II, deals with the attribution to the State of the act of an insurrectional movement which becomes the new Government of a State; however, such attribution shall be without prejudice to the consideration as an act of the State of conduct which would have been previously so considered by virtue of articles 5 to 10. Similarly, if an insurrectional movement has resulted in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration, its act shall be considered as an act of the new State. Writers on international law and international judicial bodies have uniformly taken the view that, if the insurrection is successful, its authorities must be regarded as representative of the collective will of the nation from the time when the conflict began, which means that their conduct is to be considered as an act of the State. Thus, the Commission's draft takes the right course in definitively establishing a view that is fully shared by the international community.

20. In the light of the foregoing, it can be said that the work of the Commission on chapter II of part 1 of the draft articles on State responsibility for internationally wrongful acts has, like its work on chapter I, produced a well-conceived and methodically structured set of provisions in which one appreciates the effort to define a system whose purpose, as in this case, is to establish the true dimension of the international conduct of States and make a precise appraisal of the rules governing it.

21. Chapter III deals with the breach of an international obligation. Article 16, which opens this chapter, is a defining clause; it states that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation. Thus, the precept is perfectly clear; the existence of an infringement of a norm of international law will be objectively determined by the lack of conformity between what is prescribed by that norm and the conduct engaged in by the State, acting as has been seen, through its relevant organs or entities. A material finding that the requirements of the norm are not reflected in the actions of the State to which it is directed is sufficient ground for establishing the existence of the international offence constituting the basic prerequisite for State responsibility, the modern conceptual characteristics of which are here set forth.

22. As was pointed out earlier, a State has many opportunities to maintain that its conduct is in accordance with the international order, since that depends on whether the act of the State the conduct engaged in by enitities whose acts are attributed to the State is in conformity with what is provided for and required by the norm; and the same may be said with regard to the possibility of a breach. As noted above,[8] the cases in which international responsibility is incurred as a result of infringements of the norms of international law are to be determined by international law itself. The origin of the international obligation covered by this rule may be of various kinds (customary, conventional or other), as stated in draft article 17, and its origin does not in any way affect the international responsibility arising from the internationally wrongful act of the State concerned. The subject-matter of the international obligation breached is likewise irrelevant (draft article 19).

23. There is no doubt that, in order to give rise to international responsibility, the obligation which a State disregards through actions attributable to it must be in force for that State, and the purpose of the five paragraphs of draft article 18 is to spell out this requirement with sufficient clarity to ensure a proper understanding of it. However, the scope of paragraph 2, which states that, even where the conduct of a State constituted a breach of an international obligation, it

[8] See para. 6.

ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law, should be made clearer. A reading of this paragraph shows the need to state expressly that it would apply only during the interval between the occurrence of the breach and the utilization of the mechanisms for "implementing" the resulting international responsibility, because a State cannot be allowed to evade its duty to redress the wrong caused by its wrongful act by claiming that the injurious event is now lawful. There is an old legal maxim to the effect that the law shall apply only to future events and, unless expressly otherwise provided, shall never have retroactive effect. Hence, it would be advisable to spell out explicitly the function to be served by the period during which this paragraph would apply, and it might be suggested that that period should be the time which elapses between the breach and the utilization of the instruments for "implementing" the international responsibility arising out of it; for, if the injured State does not manifest its will to obtain compensation and during its silence the injurious conduct becomes compulsory under a norm of general international law, it would not be wrongful for it to resort to means of enforcing the obligation to answer for the breach (since a State can hardly be allowed to derive advantage from its own guile by means of a special or conventional norm).

24. In dealing with the question of a breach of an international obligation as an internationally wrongful act, draft article 19 lists various kinds of conduct which, because of their gravity and consequences for the international community, are more reprehensible and more clearly entail the international responsibility of the State engaging in them than the general run of cases. Certain types of conduct involving a breach of international norms *stricto sensu*—i.e., international delicts—are here classified according to circumstances such as to elevate them to the category of international crimes. The article states that the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime constitutes an international crime, and proceeds to list some examples of such conduct, including, for example, a serious breach of the international obligation to maintain international peace and security, such as that prohibiting aggression, and a serious breach of the obligation to safeguard the right of self-determination of peoples. Article 19 thus expressly distinguishes between international delicts and international crimes, the latter being so reprehensible to the international community as to place a considerable blemish on the conduct of the offender, without prejudice to the "implementation" to the latter's consequent responsibility, as appropriate. Thus, the Commission has sought to embody in specific legal texts numerous types of conduct which customary international law has described as highly offensive to the conscience of the civilized international community, thereby acknowledging the concept of an international crime, which previously was primarily a matter for theoretical discussion, and classifying some of its major manifestations and the legal treatment accorded to it by contemporary international law.

25. Articles 20 and 21 of the draft prepared by the Commission refer to two closely related aspects: the breach of an international obligation "of conduct" or "of means" and the breach of an international obligation "of results". These aspects have been thoroughly dealt with in French legal theory concerning the internal laws of States, and it is therefore logical to assume that the obligations laid down by international law are not all of the same kind. In some cases, States will be called on specifically to conduct themselves in a certain manner, either actively or passively; in others, they will be required only to achieve a specified result. Article 20 is concerned solely with the breach of international obligations whose fulfilment requires a State to use specifically determined means, as is often the case in direct relations between States. As the Commission rightly points out in its report, it should be noted that the sphere in which an international obligation "of conduct" produces its effects will depend, in the last analysis, on the international legal interests which the obligation is intended to protect.[9] Thus, where an international obligation requires the adoption of a particular course of conduct by a given branch of the State machinery, the obligation will be fulfilled if the conduct specifically required by the obligation is adopted; if not, it must be held that the obligation has been breached.

26. Draft article 21 refers to obligations "of result", which relate to cases in which the aim is to achieve a situation in the context of the State's internal legal system. Here, the obligation requires a concrete, specified result, and the State is free to choose whatever means it deems appropriate; in other words, the State is not required to adopt a particular course of conduct. In this part of its draft, the Commission touches on another aspect of the manifold configuration of international obligations, inasmuch as a breach of an obligation of the kind referred to in this article quite often may engage the responsibility of the State at the international level. A breach of an obligation "of result" calls for careful appraisal as regards the comparison of the result required by the primary norm with what the State has in practice achieved; this is not so in the case of an obligation "of means", where the conduct adopted by the State is simply compared with the instruments which the obligation required it to use. Hence the importance of the role of international practice and international

[9] See *Yearbook ... 1977*, vol. II (Part Two), p. 14, document A/32/10, chap. II, sect. B.2, para. (9) of the commentary to art. 20.

judicial decisions in determining how the primary obligation "of result" is to be interpreted, with a view to specifying its precise scope and significance. It is hardly necessary to point out in this connection that both the cases covered by article 21 refer to the "specified result" called for under the international obligation in force—or, where the obligation so allows, an "equivalent" result. Accordingly, the provision in question is consistent with the entirely logical plan adopted by the Commission for this important draft.

27. Draft article 22 provides for the exhaustion of local remedies. The practical and legal reasons for this principle of general international law, which is being increasingly incorporated in international agreements, are obvious, for there will be no need to resort to international remedies if the victim of a breach of international law has obtained in the local courts reparation which he considers commensurate to the injury. As the Commission rightly notes in its report, failure to fulfil this preliminary condition of using the effective local machinery available "therefore has the effect of excluding the wrongfulness of the failure to achieve the internationally required result."[10] Obviously, in order for this course to be taken, the State must have means of recourse available to individuals, since otherwise the breach of an international obligation by the State will be consummated as from the moment of the breach and not from the time when judgement is rendered by the domestic courts competent to make good the injurious act at the petition of those involved. It should be added that these means are not only appropriate for redress of the international offence but remain effectively available to all who are injured by the wrong in question.

28. The Commission rounds off its work of defining the scope of the breach of an international obligation by considering, in article 23, another special type of obligation "of result", namely that where the result required of the State is to ensure that a given event does not occur—a residual circumstance which does not involve any action by the State as such but rather an act of man or of nature. Thus, the State bound by an obligation of this kind cannot claim to have achieved the required result by assenting that it has set up a good system of prevention if, in practice, that system proves ineffective and permits the event to occur. The Commission's commentary rightly points out that the "event" whose occurrence the State is required to prevent must not be understood as being "damage" in the sense in which that term is used in the general theory of State responsibility, as one of its constituent elements, although of course it is true that such an event will generally be an injurious event.[11] The comparison between the conduct actually adopted by the State and the conduct which it might reasonably be expected to have adopted in the particular case concerned in order to prevent the event from occurring is therefore sufficient to establish responsibility under this provision.

29. Another aspect of international wrongfulness that is of considerable importance in connection with State responsibility is the determination of the *tempus commissi delicti*, a term which covers the continuance in time of the breach and the exact determination of the moment when it occurred. The Commission also touched on this question in article 21, paragraph 2, and in article 22 of the draft. Similarly, the provision now under discussion, article 24, is closely linked to the two following ones, articles 25 and 26, which constitute together a fully consistent set of rules on the subject. Article 24 states that the breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. Furthermore, the time of commission of the breach of an international obligation by a State does not extend beyond that moment, even if the effects of the act of the State continue subsequently. There is no doubt that the temporal element involved in a breach of an international obligation may be decisive in solving important problems in the matter under discussion, since the exact determination of the moment when the wrongful act occurred is a prerequisite for determining the moment when international responsibility is engaged and, consequently, the moment when the affected State is able to take international action to invoke that responsibility. The time factor also has a bearing on decisions concerning the "national character of the claim", which a broad spectrum of opinion maintains is a prerequisite for the extension of diplomatic protection; in other words, such protection may validly be sought as from the moment of commission of the internationally wrongful act—apart from the obvious fact that the determination of the *tempus commissi delicti* will be essential for the purpose of asserting, in due course, that the *claim has lapsed* by prescription.

30. As previously noted, draft article 25 introduces new elements for the exact determination of the moment when the breach of an international obligation occurs, concerning three possible cases of injurious circumstances that can arise in the course of the activities of States. Generally speaking, these are cases in which the breach does not result from an act whose duration coincides with the moment of commission of the breach but extends in time after or before that moment. Paragraph 1 of the article deals with a "continuing" act, measuring conduct involving an action or omission attributable to the State which proceeds unchanged over a given period of time. Paragraph 2 relates to a "composite" act, that is to say, an act which, although like the "continuing" act is spread over a certain period of time, consists not of a single act but rather of a series of individual courses of State conduct succeeding each other in an extended

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[10] *Ibid.*, p. 30, para. (3) of the commentary to art. 22.

[11] See *Yearbook ... 1978*, vol. II (Part Two), p. 82, document A/33/10, chap. III, sect. B.2, para. (5) of the commentary to art. 23.

sequence of actions or omissions which amount, precisely, to an aggregate act. Finally, paragraph 3 of the article governs the case of a "complex" act, where a succession of acts extending in time relate to a single case and, taken as a whole, represent a certain position adopted by the State towards other States. As can be appreciated, the Commission uses precise and careful language, covering the various possible cases of conduct constituting a breach of primary rules of international law and also showing commendable zeal in examining and co-ordinating sound contemporary legal principles.

31. Chapter III concludes with article 26, which provides that the breach of an international obligation requiring a State to prevent a given event occurs when the event begins, but that the time of commission of the breach extends over the entire period during which the event continues. This serves as a fitting conclusion to the chapter on the breach of an international obligation.

32. Consequently, the Government of Chile would like to reiterate what was said at the beginning of these comments and to express its gratification with the important draft articles under consideration and its hope that they will be brought to a successful conclusion and will become rules of general international law. It commends the Commission for submitting to the Governments of Member States a carefully studied draft conducive to the progressive development and codification of international law.

Mali

[*Original: French*]
[*27 August 1979*]

The Republic of Mali attaches very special importance to the drafting of articles on State responsibility, a topic on which the International Law Commission has been working since 1953. The strengthening of the international legal order makes the codification and development of rules and principles governing State responsibility particularly significant.

It is encouraging to note that the Commission expects to complete the first reading of the articles comprising part 1 of the draft articles on State responsibility. The Commission works slowly because it must have a deep understanding of State practice, judicial practice and doctrine, which differ considerably. Its work is made even more difficult by the profound political and social transformations in the international community.

The Malian Government wishes to make the following observations on those draft articles.

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

This article, which deals with the *tempus commissi delicti*, is closely related to articles 24 (Moment and duration of a breach of an international obligation by an act of the State not extending in time), 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time) and 26 (Moment and duration of the breach of an international obligation to prevent a given event). It would therefore be better to emphasize that link, either by bringing those articles closer to article 18 or through cross-references.

2. *Article 19* (International crimes and international delicts)

This article will have to be one of the corner-stones of the future treaty. It would be more comprehensive if paragraph 2 described as an internationally wrongful act the breach by a State of an international obligation designed to protect fundamental interests of a State, a group of States or the international community.

3. *Article 22* (Exhaustion of local remedies)

The exhaustion of local remedies is a highly complex problem. In any event, the article should reflect the fact that the breach of an obligation may occur when the local remedies process drags on indefinitely.

4. *Article 23* (Breach of an international obligation to prevent a given event)

The present wording of this article appears to be too categorical.

It is rather difficult to differentiate in the article between an "obligation of conduct" and an "obligation of result". Moreover, the relationship between this article and paragraph 1 of article 21 (Breach of an international obligation requiring the achievement of a specified result) must be defined. Any new wording should also take into account the fact that if the obligation merely requires the State to prevent an event, rather that to adopt a particular course of conduct, there may be much controversy concerning what constitutes appropriate or inappropriate conduct with regard to that event.

5. *Article 27* (Aid or assistance by a State to another State for the commission of an internationally wrongful act)

Before it can be determined that aid has been "rendered" for the commission of an internationally wrongful act, several factors must be taken into consideration. This article is, however, of vital importance, and the Malian Government urges that it should be maintained, if not made more forceful.

On the basis of this article, a legal determination of the responsibility of any State rendering aid or assistance to the racist régimes of southern Africa should be possible.

These then are a few preliminary observations which the Malian Government would like to make. It reserves

the right, however, to submit its overall comments when chapters IV and V are added to the present draft, for it is only when the entire text of the draft is available that it will be possible to evaluate *in toto* the meaning of each article and its implications for international practice.

The Netherlands

[*Original: English*]
[*8 May 1980*]

1. The Netherlands Government would make the following general comments before discussing the articles in detail.

The codification of rules governing the responsibility of a State for its wrongful acts is of the utmost importance, in particular, in view of the steady increase of primary rules of international law, developed in response to the needs of the international community in respect of the international economic order and the utilization of common areas of the seas and outer space. The codification of rules governing State responsibility is also a necessary supplement to the codification of the law of treaties. Efforts should therefore be made to complete the work on this subject in the near future.

2. Articles 1 to 27, which have been submitted to the various Governments, constitute only part of the draft to be drawn up by the International Law Commission. A sound opinion on the approach decided upon by the commission and on the individual provisions will not be possible until the entire draft is available. Both the part concerning implementation, including the settlement of disputes, and the part on the content, forms and degrees of international responsibility will explain and supplement to a considerable extent the draft articles now being considered. The comments below have therefore been made with the reservation that observation on one part of the draft can only be of a provisional nature. This means that before adopting the draft on first reading, Governments should be given the opportunity to express their opinion on the draft as a whole, and not on the remaining provisions only.

Chapter I (General Principles)

3. The Netherlands Government agrees with the general principles taken by the Commission as the basis of the draft. With respect to the order of the articles, it would seem more logical to begin the draft with an article (corresponding to the present article 3) which states the conditions which in any case have to be met by an action or omission before it can be described as a wrongful act within the meaning of the draft.

Only then can the consequence of a wrongful act committed by the State be established, namely the responsibility of the State (the present article 1). By placing the articles in this order, it also becomes clear that the term "act" means both "action" and "omission".

4. The Netherlands Government also agrees with the Commission's decision not to make damage a constituent element of a wrongful act. This decision ensues, indeed, from the structure of the draft; whether or not damage is required is a matter of primary rules. The Commission's decision is also correct from another point of view: a State could have a legitimate interest in the fulfilment of an international obligation which has been breached in a specific case even though it has suffered no damage.

This principle should be observed in the rest of the draft, notably with regard to the consequences which an injured party may attach to a wrongful act. The element of damage should not be introduced into the draft indirectly either, for example as a general requirement for admissibility. Moreover, it should be pointed out that the omission of the element of damage is consonant with draft article 19, which recognizes that the breach of an obligation resting upon a State can affect the interests of the international community as a whole.

5. From the point of view of the progressive development of international law, article 2 is a valuable element in the draft, although it is certain that it will be of no importance in practice unless States are prepared to submit to the judgement of a higher authority.

Chapter II (The "Act of the State" under international law)

6. In this chapter concerning the attribution to the State of certain conduct, the Commission has decided to work on the principle that the conduct of private persons cannot be attributed to the State. The Netherlands Government agrees with this principle. It ensues from this, however, that the term "State organ" must be defined broadly, in the sense of any person or group of persons acting *de jure*, and in certain circumstances *de facto*, on behalf of the State. If article 8 in particular can be interpreted in this way, the lack of a definition of the term "State organ" need present no problem.

7. It is not entirely clear how the cases in article 8(*a*) and (*b*) differ. It would seem that paragraph (*a*) could be omitted if the phrase "in the absence of the official authorities" were also omitted from paragraph (*b*).

8. Article 10 lays down that even if an organ acts outside its competence or contravenes instructions concerning its activity, its conduct is still attributable to the State. It would seem that this rule applies not only to the organs listed (those referred to in articles 5 and 7) but also to the organ referred to in article 9.

Chapter III (Breach of an international obligation)

9. The principal rule of the draft is that a wrongful action or omission must be judged on the basis of the

rule or rules of law which apply at the time of the action or omission. Article 18 elaborates on this rule for a number of cases. The Netherlands Government agrees with the rule. Legal security demands that certain conduct cannot be considered as wrongful by applying a posterior rule.

Draft article 18, paragraph 2, provides for an exception to this principal rule for the opposite situation.

While agreeing with the basic consideration behind this provision, the Netherlands Government would consider it more appropriate to include such an article—if indeed it belongs at all in a codification confined to secondary rules—in the part dealing with circumstances precluding wrongfulness. An objection to the present wording of the second paragraph of article 18 is that it does not make it sufficiently clear that it is the primary norm of peremptory law itself which determines its effect: either retroactive force or immediate effect.

10. Article 19 is without doubt the most fundamental of all the articles now being considered. It is a very interesting attempt to distinguish between a crime and a delict. However, the lack of further details of the distinction makes it very difficult to make any observations.

The Netherlands Government reserves judgement on both the point of such a distinction and the list of international crimes in article 19, paragraph 3, (*a*), (*b*), (*c*) and (*d*), until the Commission has made known what consequences it attaches to the distinction.

It is remarkable, however, that the article contains no indication whatsoever of how to differentiate between the various crimes with respect to the legal consequences. In view of the consequences of the crime of aggression (the right of self-defence, enforcement measures by the Security Council) described in the Charter of the United Nations, there is cause to re-examine the matter in connection with parts 2 and 3, which have still to be drawn up.

11. The only difference between the rules stated in article 21, paragraph 1 and article 23 seems to be that of the description of the content of the primary norm, namely the achievement of a specified result or the prevention of the occurrence of a given event. This difference would seem too slight to justify separate treatment, which has been emphasized in the draft by the position of article 22.

12. With respect to article 22, the Commission raises the question of whether or not the requirement of exhaustion of local remedies should be restricted to those cases where the breach of an international obligation of which a State is accused took place within the jurisdiction of that State.

The opinion of the Netherlands Government is that the question should be answered in the affirmative—i.e., the requirement should be so restricted—for the following reasons. The application of the local remedies rule will not infrequently fail to bring about the desired result (the conduct of a State which is in conformity with its international obligations), since the national courts are often not authorized to check a State's conduct against its international obligations. On the other hand, the reason for establishing the requirement of the exhaustion of local remedies is that the alien is within the jurisdiction of a third State. It is therefore not right, when a State has acted outside its jurisdiction, to require that the alien with respect to whom the State has breached its international obligations must first follow the prescribed national procedure before it can be established that there has been a breach of an international obligation.

Ukrainian Soviet Socialist Republic

[*Original: Russian*]
[*30 April 1980*]

1. The United Nations has no more lofty and humanitarian goal than the strengthening of peace and international security and the creation of conditions to safeguard States from encroachments on their rights and legitimate interests. The codification of norms of international law in the field of State responsibility is contributing to the attainment of this goal.

2. In general, the Ukrainian SSR takes a favourable view of chapters I, II and III of the draft articles on State responsibility prepared by the International Law Commission. Among the most important provisions set forth in these chapters is the definition of international crime in article 19. Under paragraph 2 of that article, an international crime is an internationally wrongful act which results from the breach by a State of an international obligation which is essential for the protection of the fundamental interests of the international community.

3. It is highly significant that the list of international crimes includes aggression, the maintenance by force of colonial domination and genocide. As a member of the Special Committee against *Apartheid*, the Ukrainian SSR is particularly satisfied to note that the wrongful act of *apartheid* is included in the list of international crimes. The categorization of these offences as international crimes fully accords with the purposes and principles of the Charter of the United Nations and rightly takes into account the major goals of the struggle to strengthen universal peace and international security.

4. The Ukrainian SSR reserves the right to make additional comments about the draft articles on State responsibility being prepared by the Commission at later stages of their consideration, if necessary.

Union of Soviet Socialist Republics

[*Original: Russian*]
[*28 April 1980*]

Chapters I, II and III of the draft articles on State responsibility prepared by the International Law

Commission on the whole merit a positive assessment. Article 19, in which internationally wrongful acts of States constituting a breach of obligations essential for the protection of fundamental interests of the international community are expressly mentioned and defined as international crimes, is an important provision of the draft. The inclusion in the list of international crimes of such wrongful acts as aggression, the maintenance by force of colonial domination, genocide and *apartheid* is in keeping with the objectives of the struggle to strengthen peace and international security and with the purposes and principles enunciated in the Charter of the United Nations. The Soviet Union reserves the right to make additional observations as work on the draft articles progresses.

Yugoslavia

[*Original: French*]
[*26 March 1980*]

1. In compliance with the request communicated to it by the International Law Commission, through the Secretary-General of the United Nations, the Government of the Socialist Federal Republic of Yugoslavia wishes to emphasize, first of all, that it considers the proposed draft articles on State responsibility a useful basis for the continuation of work on this subject. The Yugoslav Government is mindful of the high quality of chapters I to III of part 1 of the draft and appreciates the excellent work done by the Commission, and in particular by its Special Rapporteur, Mr. Roberto Ago. The draft articles and commentaries are an important contribution to the study of an extremely complex question of international law, which thus far has not been examined thoroughly enough and the regulation of which is essential—and increasingly so—in order to ensure the normal conduct of international relations. Considering that, in the conditions prevailing in the international community, it is particularly important to strengthen the role of international law and to consolidate the international legal order based on the purposes and principles of the Charter of the United Nations, the Yugoslav Government attaches special importance to the codification of the rules concerning State responsibility as something which can constitute a major contribution to the attainment of this objection.

2. Since chapters I and II constitute only a portion of the future draft articles on State responsibility, of which part 1 will eventually comprise five chapters, the Yugoslav government would like to emphasize that its observations are only of a preliminary nature and that their purpose, pending completion of the provisional draft, its to offer comments and suggestions at a stage when the Commission is still working on the rest of the text. Accordingly, these remarks do not in any way prejudge the position which the Yugoslav Government may deem it appropriate to adopt at a later stage of the work. In anticipation of a complete text, the Government will therefore confine itself to stating its views on the general plan and approach adopted by the Commission with regard to the draft as a whole and on the overall solutions embodied in chapters I, II and III of part 1, which deals with the origin of international responsibility. The observations and suggestions relating to certain draft articles should be understood accordingly, inasmuch as the Yugoslav Government might perhaps reconsider the positions it has taken, once the Commission has completed the entire text.

3. First of all, the Yugoslav Government fully supports the Commission's basic plan of considering, in connection with the draft articles, only the responsibility of States for internationally wrongful acts, and of considering the question of such responsibility as a general and independent topic. Experience shows that any other approach to this topic is irrational and would therefore offer no prospect of success. Underlying this plan is the assumption that any departure from international law, viewed as a global, general and well-ordered system of binding rules of international conduct, is a wrongful act reduced to the common denominator expressed in the notion of the internationally wrongful act which always, and in every circumstance, entails *international responsibility*. This initial assumption, which, in the view of the Yugoslav Government, the Commission consistently develops in the provisions proposed thus far, makes it possible to establish a solid and indispensable connection between obligations and responsibilities and to close any loophole through which responsibility for non-compliance with international obligations might be avoided.

4. As the Commission sees it, the final result of its efforts should be expressed in the elaboration of general rules, the purpose of which is to govern a whole series of legal relations among States from the time when, from the standpoint of international law, an "abnormal" situation arises, or in other words, from the time when the conduct of a particular State is not in conformity with what is required of it by an international obligation. In order to accomplish this task, the Commission broke the topic of responsibility down into a number of narrower subject areas and planned to formulate them in several stages, the first of which is in progress. Since, of course, the subject areas covered by the successive stages planned by the Commission form a coherent whole, it may even now be concluded that the work must continue until all the elements of responsibility have been fully examined and formulated.

5. The Commission's plan, understood in this way, is acceptable to the Yugoslav Government and, in its opinion, presents several advantages. The first is that the general rules concerning responsibility are to be regarded as a vital addition to all the other rules ("primary" rules, as the Commission calls them) of international law—as a further development of the

general system of international law, the rules of which should ensure that responsibility is established and regulated for every breach, in whatever area, of international law. The formulation of such rules will undoubtedly be conducive to that certainty of the law which is so necessary in international relations. Another advantage is that their adoption will help to reinforce the binding nature of all rules of international law and will result in more responsible conduct by every State, particularly in connection with the obligations it has assumed, which in turn will help to strengthen the international legal order. The aspirations of most of the international community today are undeniebly directed towards the establishment of an "international public order", which should ensure, first and foremost, peace, security and justice for all States. Lastly, unlike the hitherto somewhat elusive rules on State responsibility (which, being unclear and scattered throughout the various areas of international law, have been relatively ineffective, mainly because they are difficult to establish), a single set of general rules on responsibility in the form of a convention could, and Yugoslav Government hopes would, make the system of international responsibility much more stringent and effective. As regards the effective application of the rules which the Commission is formulating, this Government believes that it could be stated even at this stage that the elaboration of an "implementation" and settlement of disputes system is unquestionably necessary. Although the formulation of the relevant rules is a matter to be considered at a later stage, the Yugoslav Government wishes to emphasize that it is prepared even now to support any initiative in that direction.

6. In accordance with its usual practice, the Commission has combined the method of codification with that of progressive development. However, whenever possible, and particularly when no sound legal principles could be deduced from customary law, the Commission, in proposing solutions, has taken into account not only modern legal concepts but also the current needs of the international community. As a result of this attitude and of the inductive method employed, which consists in not relying on preconceived theoretical premises and in focusing on State practice and international judicial decisions, the proposed draft articles contain solutions resulting primarily from the application of the method of progressive development of international law.

7. The Yugoslav Government welcomes this approach, since it testifies to the Commission's determination to ensure that the proposed rules are norms possessed of such modernity and actuality that the draft articles as a whole, and those still to come, will meet the demands which an international community undergoing profound change places on international law.

8. Following this general review, the Yugoslav Government would like to make some specific observations on chapters I, II and III of the draft.

9. Generally speaking, the four basic principles are well presented and therefore acceptable to the Yugoslav Government as the general basis on which the entire set of draft articles rests. Establishment of the fact that every internationally wrongful act entails international responsibility is in conformity with what should be the generally accepted view, namely, that any wrongful act is a departure from international law, which is binding in all its parts without exception. The principle that a State committing such an act cannot be exempted from responsibility is entirely correct. The Yugoslav Government agrees with the Commission's reasoning that this principle follows from the principle of sovereign equality, because if all States are equal where rights are concerned, they must also be equal in the matter of responsibility.

10. The essential principles proposed are formulated succinctly and concisely, that in fact being one of the characteristics and one of the qualities of the draft articles as a whole. However, one might ask whether, during the second reading of the text, it would be appropriate to consider the possibility of further elaborating the general principles, particularly those set out in article 3. Similarly, once the text is completely finished, consideration might be given to the possibility of deriving from its content other general principles, which would have a place in chapter I. In the opinion of the Yugoslav Government, it would be very useful if the Commission would agree to consider that point.

11. Chapter II is an elaboration of the "subjective" element of an internationally wrongful act, as described in article 3(*a*). The general rule in article 5, namely, that "conduct of any State organ having that status under the internal law of that State" is an act attributable to the State, "provided that organ was acting in that capacity in the case in question", adequately reflects the Commission's general conception and does not give rise to any objection. In view of that provision, the Yugoslav Government does not consider article 6 essential, especially since the commentary to article 6 states that its purpose is to prevent the invocation of the old, obsolete practice of exempting certain State organs from responsibility.[1]

12. The Yugoslav Goverment supports the principle set forth in article 10 that "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority", acting outside its competence or contrary to instructions concerning its activity, cannot constitute the basis for precluding the responsibility of the State. However, there arises the question why the same principle should not also apply in the case of such conduct by organs of another State or of an international organization placed at the disposal of the State in question and acting on its behalf (the situation

[1] See *Yearbook ... 1973*, vol. II, p. 198, document A/9010/Rev.1, chap. II, sect B., para. (17) of the commentary to art. 6.

covered by article 9). The Yugoslav Government considers that the principle laid down in article 10 should apply in that case also. Yet it is not clear from the wording of article 10 whether it also covers the situation under article 9. The Yugoslav Government therefore suggests that the possibility of redrafting article 10 should be considered.

13. It would also seem more logical for draft article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) to follow the provisions relating to the conduct of State organs, and it would therefore be better placed after articles 9 and 10.

14. It should be stressed that, in the application and interpretation of the provisions of chapter II the question will probably arise of the meaning of the terms ... "a territorial governmental entity" and, in particular, "an entity ... empowered ... to exercise elements of the governmental authority". These terms may be understood differently in different States, and it would therefore be very useful, should the Commission decide to adopt a special clause containing definitions of the terms used—an action which the Yugoslav Government would welcome—to define exactly what the above terms mean.

15. The Yugoslav Government particularly wishes to express its agreement with the provisions of articles 14 and 15, on the responsibility of an insurrectional movement. Those provisions constitute a major contribution to the clarification of certain situations which now frequently emerge in international relations and in connection with which the question of responsibility was not sufficiently clear.

16. As the Commission has rightly indicated, chapter III constitutes the very essence of this part of the draft. It elaborates the "objective" element of an internationally wrongful act, as described in article 3(*b*). Article 16, which serves the same purpose here as article 5 does in chapter II, establishes as the main rule that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation. Although the provision is very succinct and extremely general, it is satisfactory, in the view of the Yugoslav Government, precisely because of its general scope, and it constitutes a very broad basis on which the Commission was able to formulate cases and situations which, considered from various aspects, may occur in practice and which are regulated by subsequent articles. The Yugoslav Government thinks that these articles are, as a whole, well drawn up and that the solutions they contain are in principle acceptable.

17. However, it should be pointed out that the formulation and language of draft article 18 are very complicated and that paragraph 2 can only be understood after a reading of the commentary. In the opinion of the Yugoslav Government, it would be useful if the Commission could try to simplify the wording of this article, of course without touching the substance, and include in paragraph 2 some material from the commentary so that the proposed provisions would be clearer from a reading of the text itself.

18. The Yugoslav Government particularly welcomes draft article 22, concerning exhaustion of local remedies. This provision is especially important because, by indicating the course to be followed in order to reach a settlement in such situations and by providing for international responsibility only if local remedies have been exhausted or there has been a denial of justice, it confirms the principle of sovereignty and prevents unnecessary outside interference in matters within national jurisdiction.

19. In chapter III, draft article 19 is undoubtedly the most important. The Yugoslav Government therefore deems it necessary to examine the proposed rule in detail. In its opinion, the Commission's decision to propose different treatment for international crimes and international delicts should be welcomed and unreservedly supported. Since the time of the Nuremberg principles, a conception has gradually taken shape in the international community, namely that there are extremely serious breaches of international law which must be characterized as international crimes. In the view of the Yugoslav Government, there is no doubt that this conception is now part of prevailing international law.

20. Paragraph 2, which specifies the breaches that are to be considered "international crimes", is clearly the key provision of this article. The Yugoslav Government regards the draft of this provision as a good basis for future work and supports it in principle. However, it would be very useful to improve its wording by establishing explicitly that such a breach of an international obligation entails not only condemnation but also a concrete reaction by the entire international community. In others words, it is extremely important to make it more conclusively apparent from the wording that an international crime is not only a violation of the interests of the State directly affected by the crime, but that an internationally wrongful act of this kind affects the overall social interest of all States without exception.

21. The Yugoslav Government also supports the provisions of paragraph 3 because, in that paragraph, the Commission has cited as examples of international crimes those which can in fact be considered extremely dangerous. The question arises, however, of the placement of this provision in the draft as a whole. After the text of paragraph 2 has been finalized, and depending on its content, a decision can be taken as to whether the present paragraph 3 should remain in article 19 or whether that provision should be placed in part 2 of the draft, dealing with the content, forms and degrees of international responsibility.