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Comments of Governments on part one of the draft articles on State responsibility for internationally wrongful acts

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STATE RESPONSIBILITY

[Agenda item 4]

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Comments of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts

[*Original: English, Russian*]
[*10 April, 2, 29 and 30 June and 24 July 1981*]

CONTENTS

NOTE

The text of part 1 of the draft articles on State responsibility appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Introduction

1. The International Law Commission, having completed at its thirty-second session in 1980 the first reading of the whole of part 1 of the draft articles on State responsibility for internationally wrongful acts, decided to renew its 1978 request[1] to Governments to transmit their comments and observations on the provisions of chapters I, II and III of part 1, and to ask them to do so before 1 March 1981. At the same time, the Commission decided, in conformity with articles 16 and 21 of its Statute, to communicate the provisions of chapters IV and V part 1 of the draft to the Governments of Member States, through the Secretary-General, and to request them to transmit their comments and observations on those provisions by 1 March 1982. The Commission stated that the comments and observations of Governments on the provisions appearing in the various chapters of part 1 of the draft would, when the time came enable the Commission to embark on the second reading of that part without undue delay.[2]

2. The General Assembly, by paragraph 6 of its resolution 35/163 of 15 December 1980, endorsed the Commission's decision. The General Assembly also, by paragraph 4(*c*) of the same resolution, recommended, *inter alia*, that the Commission should, at its thirty-third session:

> Continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need of a second reading of the draft articles constituting part one of the draft;

[1] The previous request for comments and observations on chapters I, II and III of part 1 of the draft articles was made to Governments by decision of the Commission at its thirtieth session, in 1978 (see *Yearbook ... 1978*, vol. II (Part Two), pp. 77–78, para. 92). The comments and observations received following that request were published in *Yearbook ... 1980*, vol. II (Part One), pp. 87 *et seq.*, document A/CN.4/328 and Add.1–4.

[2] *Yearbook ... 1980*, vol. II (Part Two), pp. 29–30, para. 31.

3. Pursuant to the Commission's decision, the Secretary-General, by means of a letter sent by the Legal Counsel, dated 8 October 1980, requested Governments of Member States which had not yet already done so to transmit their comments and observations on the above-mentioned provisions of chapters I, II and III of part of the draft not later than 1 March 1981, and also to transmit their comments and observations on the provisions of chapters IV and V of part 1 of the draft not later than 1 March 1982. The comments and observations received from five Governments by 24 July 1981 are reproduced below.

Bulgaria

[*Original: English*]
[*2 June 1981*]

The Government of the People's Republic of Bulgaria has on many occasions reiterated that it shares the common opinion that the fundamental objective of the United Nations is the maintenance of world peace and security and the strengthening of international law. The codification of norms of international law in the field of responsibility of States for internationally wrongful acts will undoubtedly be conductive to the implementation of this objective.

The Government of the People's Republic of Bulgaria welcomes the texts prepared by the International Law Commission of chapters I, II and III of the draft articles on State responsibility.

Not only has the Commission drawn a general definition of international crime in article 19, paragraph 2 of the draft, but it has, moreover, indicated the categories of especially dangerous international crimes such as aggression, maintenance by force of colonial domination, genocide, *apartheid* and slavery.

The Bulgarian Government, however, is sceptical about the pertinence of regarding massive pollution as an international crime of the same magnitude as aggression, genocide, *apartheid* and slavery. Quite naturally, it subscribes to the idea of qualifying massive pollution as an internationally wrongful act and is of the opinion that the Declaration of the United Nations Conference on the Human Environment[1] can by no means bridge the legal gap which still exists in this field, despite some principles and norms of international law in force.

It is the view of the Bulgarian Government that there exists no pronounced trend toward treating pollution *per se* as an international crime. In the Third Committee of the Third United Nations Conference on the Law of the Sea, for instance, where the problem of pollution of marine environment has been discussed for a number of years, no proposal has ever been made to recognize the pollution of the seas by ships or other sources as an international crime. Therefore, the text of subparagraph 3(*d*) of article 19 raises questions that should be subject to further discussion to clarify whether it might not be more relevant to define pollution as an international delict, rather than an international crime.

The Bulgarian Government supports the definition of international delict as any internationally wrongful act which is not an international crime, as proposed in article 19, paragraph 4, of the draft.

The clear distinction between international crime and international delicts is a major success in the field of codification of international law on State responsibility, for it is consonant with the factual situation in contemporary international law and, more specifically, with such instruments as the Declaration on the Granting of Independence to Colonial Countries and Peoples,[2] the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[3] the Definition of Aggression,[4] and others.

The Government of the People's Republic of Bulgaria also states that the above comments should not be regarded as final or exhaustive, and therefore reserves its right to submit, if necessary, further considerations on the draft.

Czechoslovakia

[*Original: English*]
[*24 July 1981*]

The draft articles of chapters I, II and III, adopted by the International Law Commission on first reading and submitted to the member States of the United Nations for comments and observations, represent as a whole a significant contribution to the progressive development and codification of international law, as well as a good point of departure for continuing codification efforts. Having in mind that for the time being the draft articles are incomplete, the comments and observations of Czechoslovakia are of purely provisional nature.

1. Taking into account the fact that a considerable amount of time has elapsed from the time when the Commission elaborated the first draft articles, it is necessary to make the appropriate corrections in the text of part 1 in the light of more detailed conclusions arrived at in the course of the codification efforts on subsequent articles.

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[1] Stockholm Declaration of 16 June 1972 (*Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part I, chap. I).

[2] General Assembly resolution 1514 XV, of 14 December 1960.

[3] General Assembly resolution 2625 XXV, of 24 October 1970.

[4] General Assembly resolution 3314 (XXIX), of 14 December 1974, annex.

2. The Czechoslovak Government is in full agreement with the principle expressed in article 1, according to which every internationally wrongful act of a State entails the international responsibility of that State, i.e. that no internationally wrongful conduct is possible without legal consequences. The Czechoslovak Government is therefore of the opinion that article 1 is not only the basic principle of the codification draft as a whole, but that it represents at the same time the key principle of international law. Likewise, the principle in article 2, according to which the responsibility of States for wrongful conduct applies to all States without exception, is the expression of mutual connection between the responsibility of States and the sovereign equality of States and has firm support in international practice, jurisprudence and theory.

3. The Czechoslovak Government reserves the right to take a position on article 3, relating to elements of internationally wrongful conduct, later on. For the time being, it is not possible to take a definite stand on the question whether the existence of guilt, of a damage as well as the existence of causal connection, which the Commission had deliberately left aside when considering article 3, should or should not be looked upon as elements of the internationally wrongful conduct. This question is closely connected with the question of content of responsibility obligation, which has not been yet been examined by the Commission.

4. Article 4, defining the notion of an internationally wrongful act of a State, which was already contained in article 1, can be accepted without reservation. The principle under which a State can not invoke its internal law to justify its conduct not in conformity with international law is recognized in international practice, without exceptions.

5. The internal organization of a State is not subject to international law, but is governed by its national law. That is principally why the acts of State organs established as such by national law are to be considered as acts of the State, irrespective of their position within the hierarchy of the organization of that State laid down by national law. This principle has been duly reflected in articles 5 and 6. As far as the acts of organs of entities of territorial division of States are concerned, these organs should be taken as forming part of the structure of a State. Consequently, acts of organs of this kind should be already covered by the provisions of articles 5 and 6. In this light, the provision of article 7, paragraph 1, seems to be superfluous, at least as far as the entities of territorial division of a State without any international personality are concerned.

6. Articles 14 and 15 concern questions relating to the conduct of organs of insurrectional movements. However, neither the articles mentioned nor the commentary to them specify what is meant by the term "insurrectional movement". It seems to be appropriate, then, that the commission pay due attention to the definition of this particular notion during the second reading of the draft. In this respect, it can proceed from the Additional Protocols to the Geneva Conventions of 12 August 1949, in which the definitions of "national-liberation movement" [Additional Protocol I, art. 1, para. 4] and "insurrectional movement" [Additional Protocol II, art. 1, para. 1] are included.[1]

7. The basic idea of article 19—the possibility of establishing varying degrees of responsibility for violations of international law according to the significance of content of the legal rule that had been breached for the strengthening and development of international peace and security—serves, in the opinion of the Czechoslovak Government, as proof of the mounting conviction of the family of nations that in contemporary international law there are rules the respect for eventual violation of which are the concern of each nation individually, as well as for the family of nations as a whole.

That is why the consequent, precise and unequivocal inclusion of this basic idea in the codification draft would be a significant contribution to progressive development of international law. An appropriate inclusion of this principle into the eventual codification instrument, however, calls for detailed consideration of all the possible implications in the context of which the principle could and should find its place. However, in the present stage of the codification work of the Commission, not all the aspects of this kind have yet been examined. The Government of Czechoslovakia, for this reason, is of the opinion that the time is not ripe enough to take a detailed position on draft article 19.

8. Other provisions of chapter III (draft articles 20 to 26) govern some particular aspect of State responsibility and do not, by their substance, invoke any reservations of a principal nature. Like draft article 19, they could serve—provided that necessary changes in substance and drafting as well are made—as a basis for elaboration of an appropriate codification instrument.

Germany, Federal Republic of

[Original: English]
[30 June 1981]

The Government of the Federal Republic of Germany has from the beginning taken a great interest in the Commission's work on this topic and is of the opinion that the codification of the rules governing State responsibility for internationally wrongful acts will constitute another landmark in the codification and progressive development of international law. It is to be hoped that ultimately a convention can be elaborated which meets with the widest possible acceptance.

The Federal Government deeply appreciates the important contribution which Mr. Ago, now Judge on the International Court of Justice, has made to the draft articles in his capacity as Special Rapporteur for the articles to which these comments relate.

The Commission's decision to confine the work on the present draft to the conduct of States on the one hand and to internationally wrongful acts on the other seems to be a wise one, as does the decision not to include any primary rules, that is to say, the material rules of general

[1] ICRC, *Additional Protocols to the Geneva Conventions of 12 August 1949* (Geneva, 1977), pp. 5 and 90 respectively.

international law whose breach entails an international delict.

The Federal Government takes the overall view that the codification of such an important topic as that of the rules governing State responsibility for internationally wrongful acts can only be achieved if the Commission concentrates upon those aspects of the subject-matter which are of a practical importance in international relations and if the Commission resists the temptation to achieve too great a degree of perfection from the theoretical, abstract point of view.

Before commenting on the individual chapters of the draft, the Federal Government wishes to put forward two general proposals for the Commission's further work.

The first is that an article should be included to make it clear that the provisions of a future convention apply only to events that take place after its entry into force. None of the articles should give rise to any uncertainty about disputes that have already been settled or which are a consequence of events that have taken place prior to the convention's entry into force, since this could lead to renewing international controversies or to aggravating them. The second proposal is that the convention should embrace a procedure for the settlement of disputes. Binding decisions by an independent international body recognized by the prospective States parties to the convention would ensure the peaceful settlement of disputes resulting from an internationally wrongful act.

Chapter I (articles 1 to 4)

Chapter I (General principles) of the present draft seems to have achieved its purpose. Articles 1, 3 and 4 in particular reflect the Commission's decision to limit the scope of the topic to the responsibility of States, in that they codify fundamental rules that have developed within the framework of general international law. In this context, special importance attaches to article 4, which reaffirms the principle of the priority of international law over internal law with regard to internationally wrongful acts. This provision will have considerable significance in helping to afford more effective protection of human rights.

However, the Federal Government has some reservations about article 2, although they are of a more formal nature. Much as this clause's purpose of allowing no State an opportunity to avoid having to answer for a breach of international law is to be welcomed, it does seem to express a concept which seems to be self-evident, and the necessity of which may therefore be questioned. In any case, this rule can be deduced from the wording of article 1. Should the Commission not wish this provision to be removed altogether, it might at least be expedient to incorporate its legal substance in article 1.

Chapter II (articles 5 to 15)

The wording of the provisions of chapter II (The "act of the State" under international law) likewise seems to be appropriate. This applies in particular to articles 5, 7, 8, 10 and 11. Taken as a whole, these provisions should help considerably to ensure a larger measure of legal certainty with regard to the law on international delicts.

However, several articles which concern the same subject-matter could be merged, while other provisions might be omitted altogether. For instance, the Federal Government sees no cogent reason for the inclusion of the provision embodied in article 6 of the draft. There is no known case of general international law in which the aspect covered by the provision, that is to say, the position in the organization of the State of the organ committing an act, would have been a point at issue. And the legal content of articles 12 and 13 is, after all, something that can be taken for granted and that could without harm be omitted from the draft, which would help streamline the convention. On the other hand, it is suggested that the purview of article 11 be worked into article 8, so as to ensure a uniform provision on the question of the extent to which the conduct of a person or a group of persons should be considered an act of the State. This would not only merge two provisions dealing with the same subject-matter, but would also make for a better overview of the draft.

Chapter III (articles 16 to 26)

(i) *Articles 16 to 18*

The introductory articles 16 and 17 to chapter III (Breach of an international obligation) are to be welcomed. The wording of these provisions on fundamental aspects of law relating to internationally wrongful acts is an important and clarifying codification of the present state of the law. Consideration should, however, be given to the possibility of incorporating in article 17 the concept embodied in article 19, paragraph 1, that the breach of an international obligation is not conditional upon its subject-matter.

There is no basic objection to article 18, except perhaps for the second paragraph, although it is felt that such specific provisions governing these individual legal aspects are not absolutely necessary. The second paragraph of article 18 introduces for the first time the "peremptory norm of general international law" into the framework of the draft articles. It is true that the concept of *just cogens* is widely accepted in the international community, but in many instances there is disagreement as to the content and limits of corresponding rules.

It would therefore seem appropriate to include in the convention a procedure for the mandatory judicial settlement of disputes, at least on the lines of the provisions contained in article 66 of the Vienna Convention on the Law of Treaties[1] of 23 May 1969 and its annex. There appears to be no reason to depart from this provision in the law on the international responsibility of States.

(ii) *Article 19*

Article 19 raises a number of complex problems.

Paragraph 1 does not appear to contain any provision of fundamental significance in itself. The purport of the

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

first half of the sentence is identical to that of article 3, which in turn follows the wording of Article 36, subparagraph 2(*c*) of the Statute of the International Court of Justice. The idea conveyed in the second part of the sentence can be said to have been covered by article 17, paragraph 1. If not, it might be coupled with that provision ("... and regardless of the subject-matter of the obligation breached"). Moreover, the more important criterion for determining whether a delict has been committed is, in both cases, the question whether international law actually establishes a legal obligation to perform an act or omission in an individual case, as expressed in article 16.

Doubt also exists with regard to *paragraphs 2 and 3* of article 19, on account of the introduction of the notion of international crime into the present codification. The Commission has undertaken the task of establishing provisions governing the liability of States for internationally wrongful acts and the obligation to make good any injurious consequences of such acts. But the notion of crime, culled from the principles of criminal law that have developed in national legal systems, introduces an essentially new concept. Doubts seem to be permitted as to the advisability of introducing the concept of international crime into the present draft—although no objection is raised to the proposition that a specific provision must be found to cover serious violations by States of elementary international obligations.

The distinction between crimes and delicts might, however, find its justification in the treatment of the legal consequences. It is indeed a generally held concept that the gravity of a breach of an obligation shall determine the gravity of the legal consequence. Another justification for distinguishing between international crimes and international delicts may be seen in the possibility of a different position of third States vis-à-vis an international delict and vis-à-vis an international crime. As the delegation of the Federal Republic of Germany has outlined in the debate on the Commission's report to the thirty-fifth General Assembly,[2] it seems that there are nowadays world circumstances, however, exceptional they may be, in which a third State might, with respect to an internationally wrongful act that is committed not to his immediate detriment and not directed against him, nevertheless have the right to take up a non-neutral position. If rules of international law are violated in the observation of which the community of States as a whole has a vested interest, third States, although not immediately involved, might well be entitled to take countermeasures or to participate in such measures.

Returning for a moment to the criteria of international delicts and international crimes, it has to be asked whether it is in the interest of the progressive development of international law to introduce a third category of international crimes beyond the existing categories of normal rules of international law and *jus cogens*. Much seems to speak in favour of a definition of an international crime which refers to peremptory norms of international law, rather than to the criterion used in article 19, paragraph 2.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 45th meeting, para. 11.

Independently of how the norms the breach of which constitutes an international crime are defined, objections must be raised against article 19, subparagraph 3(*d*). The notion of safeguarding and preserving the human environment as a legal duty is a comparatively new one. It comprises a huge complex of rules and obligations, until now characterized in many instances by an apparent lack of precision and definition. In many instances there is a constant interaction between the application of the most basic general rules of international law and specific norms of a more precise ecological character. To include this entire sector of international legal relations in the area where a wrongful act is by its very nature a crime rather than a delict seems to go much too far. It is earnestly urged that article 19, subparagraph 3(*d*), be reconsidered.

On the other hand, it should be pointed out, even at this stage, that the codification should on no account extend to the completely different area of the criminal responsibility of individual persons. These areas of law differ fundamentally in the national law of States and must therefore also be kept strictly separate in international law. If the concept of material or non-material compensation were to be associated with penalities for acts of individuals, international law might prove to be less rather than more reliable and thus defeat the object of the codification.

(iii) *Articles 20 to 26*

Articles 20 to 26 show that the Commission has been at pains to cover all possible courses of conduct in connection with an international delict. However, these provisions have become very abstract and theoretical. Their intention, which is appreciated, is to make it easier to apply the existing law without leaving any gaps, but they are open to many different interpretations which do not tally with the purpose of these provisions and might indeed be open to abuse. In practice, they might defeat their objective of making the law more reliable in international relations. Fewer clauses would be more effective, This group of provisions has therefore to be treated with some reserve. Moreover, since their conceptual framework is to a large extent based on continental European legal theory, their present wording is not likely to be conducive to a later, and as far as possible universal, acceptance of their codification.

Comment can be made on two other points concerning articles in this group. First, although the Commission has obviously tried to cover every possibility, the relationship between article 20 and article 23 is not unequivocal. This may lead to cases of doubt if it is not clear from an international obligation whether it requires a particular course of conduct, the prevention of the occurrence of a given event, or both at the same time. It therefore appears necessary, in the opinion of the Federal Government, to clarify the relationship between these two articles.

The other remark concerns article 22. Doubt arises concerning the treatment of the local remedies rules within the scope of the various courses of conduct constituting an internationally wrongful act. Article 22 makes the requirement that all local remedies must first be exhausted—a concept which has developed in the context of international law relating to aliens—a *substantive* condition for the

breach of an international obligation. The Federal Government, however, has always understood this rule as a procedural condition for the assertion of claims arising out of the breach of an already substantively defined international obligation and considers that this view is consistent with general international law.

The Government of the Federal Republic of Germany would like these comments on chapters I, II and III of the draft articles on the responsibility of States to be seen as a constructive contribution to the further work of the Commission. It will continue to follow the work of the Commission with great interest, and hopes that its comments and proposals will be of value to the Commission in its discussions and decisions.

Mongolia

[Original: Russian]
[29 June 1981]

1. The Mongolian People's Republic, proceeding from its foreign policy aims and objects, welcomes the work done by the International Law Commission on the draft articles on the origin of international responsibility, which form the first part of the draft articles on State responsibility for internationally wrongful acts. The Mongolian People's Republic sees the main purpose of the elaboration of general principles of State responsibility as being to ensure the social orientation and juridical effectiveness of the principles and norms of contemporary international law.

2. The content of chapter I, the general principles (articles 1 to 4 of the draft) is, in the main, consistent with this purpose. The general basis for the international legal responsibility of States is the commission by them of internationally wrongful acts. Put another way, State responsibility can arise both as a result of unlawful action by a State and as a result of unlawful inaction. The Mongolian People's Republic considers that the Commission has taken a correct position in defining the basic principles establishing responsibility for internationally wrongful acts.

3. Chapter II, concerning the "act of the State" under international law (articles 5 to 15), defines the conditions under which specific conduct is to be considered as an "act of the State" under international law. In principle, the Mongolian People's Republic shares the position taken in these articles, which establish both general and special rules relating to organs and persons whose wrongful acts are to be considered as acts of the State itself. However, some provisions clearly need to be made more precise. For example, the provisions of draft article 7, paragraph 2, must in no case and in no circumstances be made the basis for the attribution to a State of the acts of those of its organs which are not State organs. Article 7, paragraph 1, requires appropriate clarification. It appears from this paragraph that the conduct of organs of a State which belongs to a federation should be attributed to the federation as such. However, such a solution of the problem of the attribution to a federal State of the actions of organs of its member States seems too one-sided. In order really to resolve the problem, it is essential to take into account any differences in the status of the individual federated States.

4. Concerning chapter III, which deals with the breach of an international obligation, the Mongolian People's Republic reaffirms the comments made in 1977[1] by its representative to the Sixth Committee concerning the report on the work of the twenty-ninth session of the Commission.

5. As regards the responsibility of one State for an internationally wrongful act of another State, it is noted that article 28 contains such words as one State's being "subject" to another and the "coercion" of another State to perform some wrongful act. Mongolia is, therefore, uncertain of the appropriateness of the present drafting of this article.

6. Articles 29 to 35, which relate to circumstances precluding wrongfulness, generally fall within the framework of the concepts appropriate to the topic. However, the Mongolian People's Republic has some observations on articles 32, 33 and 34. For example, article 32 envisages "distress" as a circumstance which can, in a situation of extreme need, justify conduct differing from that required under normal conditions for the fulfilment by a State of its international obligations. There can be a subjective factor here, in addition to the objective factor. The Mongolian People's Republic therefore feels it desirable that this provision should be made more precise on second reading of the article.

7. The concept of a "state of necessity", which article 33 proposes as one precluding wrongfulness, is by its nature complex and capable of many interpretations. The criterion of an "essential interest" used in the article not only fails to solve the problem, but may even create new problems. It is virtually impossible to establish whose interests are essential when the interests of two States clash. If article 33 is to remain in the draft, it must be so formulated that the state of necessity is subject to strict conditions and limitations which prevent all possibility of abuse.

8. The Mongolian People's Republic is not opposed to article 34. Nevertheless, it has two observations to make on its text. The first observation relates to the words "an act of a State not in conformity with an international obligation of that State", which are incompatible with the concept of "self-defence". Acts of a State constituting self-defence do not violate any international obligation whatsoever of any State. Self-defence is the inalienable right of every State. Hence, what is "unlawful" cannot be part of the concept of self-defence. The second observation is this: in order to avoid differing interpretations of the concept, the article should include a reference to "self-defence" in accordance with Article 51 of the Charter of the United Nations.

9. Article 35 gives no cause for objection, since it is of a precautionary and transitory nature.

10. The Mongolian People's Republic reserves the right to revert to any of these articles as necessary.

[1] *Official Records of the General Assembly, Thirty-second Session, Sixth Committee*, 38th meeting, paras. 25 and 26.

11. The Mongolian People's Republic is gratified by the great efforts made by the Commission to complete the first thirty-five articles of the draft on State responsibility and wishes the Commission success in its further work on the second part of the draft.

Sweden

[*Original: English*]
[*10 April 1981*]

The provisions proposed in chapter IV (articles 27 and 28) and chapter V (articles 29 to 35) relate, for the most part, to the question of the lawfulness of certain acts, rather than to the secondary question of the consequences of the breach of an international obligation. According to article 27, it would be unlawful, that is, "internationally wrongful", for a State to render aid or assistance to another State for the breach by the latter of an international obligation. From the commentary[1] it appears that the Commission has had in mind breaches by the other State of its obligations under general international law, and in particular the case where that State commits an act of aggression against a third State. However, the wording of article 27 is wider and refers to "an internationally wrongful act, carried out by the latter", which includes the breach of a treaty. In this respect, however, article 27 does not seem to be compatible with article 34 of the 1969 Vienna Convention on the Law of Treaties,[2] which lays down that a treaty does not create either obligations or rights for a third State without its consent. Assuming, for example, that State A, by treaty with State B, has undertaken not to increase the size of its navy beyond a certain level, would it be unlawful for a third State to sell warships to State A, if that level is thereby exceeded?

Similar questions can be asked with regard to the provisions of draft article 28, according to which a State, because of its dominant position in relation to another State, or as a result of coercion exercised by it against another State, could be held internationally responsible for the breach by the other State of an international obligation. Is, for example, a State which exercises a power of direction or control over another State under a duty to respect the obligations incumbent upon the latter State under treaties concluded by that State with third States?

Indeed, it seems that the provisions proposed in articles 27 and 28 regarding situations where a State is implicated in the internationally wrongful acts of another State should not apply in cases where the wrongful act of the latter State consists in the breach of a treaty to which the former State is not a party.

Article 29 deals with "consent" as a circumstance precluding wrongfulness. Its provisions are of a descriptive rather than normative nature. No attempt is made to indicate how and by what organs the consent of a State to an act of another State should be given, which indeed can hardly be stated in general terms, since it must depend on the nature of the act in the individual case. The article merely states that the consent should be "validly given". As regards the question to what kind of acts the principle of consent does not apply, the article simply refers to peremptory norms of general international law, defining these norms in the same abstract way as does the Vienna Convention on the Law of Treaties.

Similar observations can be made with regard to article 30, which refers to acts of a State which are "legitimate under international law" as countermeasures against an internationally wrongful act of another State. The article provides no guidance as to what countermeasures may be legitimate. It would seem that the latter question is one of those that could be dealt with in part 2 of the draft articles, in which case there might be no need for article 30.

With regard to articles 31, 32 and 33 regarding *force majeure*, fortuitous events, distress and a state of necessity, it cannot be denied that such exceptional circumstances have in the past sometimes been regarded as justifying acts which would normally be violations of international law. On the other hand, it does seem extremely difficult to formulate general rules on the basis of such precedents. As regards a state of necessity, perhaps all that can safely be said is that necessity is recognized, in principle, as an admissible plea, but that the conditions in which it can be invoked have not been clearly established by international law, which means that each case will have to be judged individually on the basis of moral rather than legal considerations. Under article 33 the possibility of invoking necessity would be subject to certain limitations, which, however, are rather vague in some respects, particularly since the Commission here again has had recourse to the notion of peremptory norms of general international law, without attempting to specify any such norms.

As regards chapters I, II and III of the draft articles on this topic, we refer to the comments of the Swedish delegate in the Sixth Committee of the General Assembly of the United Nations on 14 November 1980; an extract from the statement reads as follows:

Extract from the statement of the Swedish representative[3]

As regards the item "State responsibility", the Swedish delegation wishes to congratulate the Commission and the Special Rapporteur, on having completed the first reading of a complete set of draft articles comprising the first phase of the Commission's work on this topic.

Generally speaking, the Swedish delegation considers that these articles are well drafted and that they accurately reflect generally accepted rules of international law.

We would like, however, to express certain reservations in regard to two articles, namely, articles 18 and 19.

[1] *Yearbook ... 1978*, vol. II (Part Two), pp. 99 *et seq.*

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

[3] For a resumé of the statement of the representative of Sweden, see *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 49th meeting, paras. 1 *et seq.* See also "Topical summary, prepared by the Secretariat, of the discussion of the report of the International Law Commission held in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), para. 105.

In paragraph 2 of article 18 it is stated that an act which, when it was performed, was wrongful ceases to be considered a wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law. According to its wording, this paragraph would seem to give retroactive effect to peremptory norms of international law. An act which was wrongful when it was committed will no longer be regarded as wrongful, once a new rule of *jus cogens* has been created which makes the act compulsory.

It would seem to the Swedish delegation that this paragraph is not compatible with articles 64 and 71 of the Vienna Convention on the Law of Treaties. According to these articles, a treaty which is in conflict with a new, emerging peremptory norm of general international law becomes void and terminates, but it is explictly stated in article 71 that this does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. In other words, the treaty becomes void but is not invalidated *ab initio*. In paragraph 2 of article 18 of the draft articles, however, an act is deprived of its wrongful character *ab initio*.

Moreover, it may be argued that paragraph 2 of article 18 deals with the existence or not of an obligation and not with the consequences of a breach of an obligation and that, therefore, it should not be included in a legal instrument aimed at codifying secondary rules only.

Moreover, it seems strange, as a matter of drafting, that the term "peremptory norm of general international law" is not defined until article 29, paragraph 2, of the draft articles, although the term appears already in article 18, paragraph 2.

The Swedish delegation also has some doubts about paragraphs 4 and 5 of article 18. These paragraphs are drafted in a complicated manner. They are difficult to understand and they deal with problems which could presumably be solved by using ordinary logic. The terminology used in these paragraphs is rather unusual, since they speak about one "act" being composed of several "actions or omissions".

Article 19 of the draft articles—with the exception of its first paragraph—expresses a new doctrine which attempts to divide international obligations in two categories on the basis of their importance to the international community. The breach of an international obligation would be a crime or a delict according to which of the two categories the obligation belongs. We do not think that the Commission has given a satisfactory justification of this theory. The basic problem which it raises is that it assumes that the relative importance attached by the international community to the various obligations of States is an objective criterion on which legal consequences can be based. In reality, however, judgements on such questions as to whether an obligation is essential for the protection of fundamental interests of the international community must necessarily be subjective and political. We doubt, therefore, that the distinction made between different obligations in article 19 is a useful one, and believe, rather, that it would create considerable difficulties in practice.