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NOTE

Bilateral and multilateral accords cited in the present document

BILATERAL ACCORDS

	Sources
Definitive Boundary Treaty between France and Spain (Elissonde, 27 August 1785)	G. F. de Martens, *Recueil des principaux Traités*, 2nd ed., vol. IV, p. 26.
Treaty concerning the Frontiers between the Netherlands and Hanover (Mappen, 2 July 1824)	United Nations, *Legislative Texts . . .*, Treaty No. 205.
Procès-verbal of demarcation between France and Neufchatel (Neufchatel, 4 November 1824)	Ibid., Treaty No. 195.

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Convention between Italy and Switzerland for the Settlement of the Disputed Frontier between Lombardy and the Canton of Ticino (Lugano, 5 October 1861)	G. F. de Martens, *Nouveau Recueil général de Traités*, vol. XX, p. 186.
Treaty between Austria and Bavaria concerning the regime of the frontier line and other territorial relations between Bohemia and Bavaria (24 June 1862)	United Nations, *Legislative Texts . . .*, Treaty No. 135.
Spain-Portugal boundary treaty (Lisbon, 29 September 1864)	Ibid., Treaty No. 241.
Agreement between the Governments of Great Britain and France with regard to the Somali Coast (London, 2 and 9 February 1888)	BFSP, *1890-1891*, vol. 38, p. 672 and United Nations, *Legislative Texts . . .*, Treaty No. 16.
Treaty between Switzerland and Austro-Hungary for the regulation of the Rhine from the confluence of the Rhine, upstream, to the point downstream where the river flows in the Lake of Constance (Vienna, 30 December 1892)	BFSP, *1891-1892*, vol. 84, p. 690 and United Nations, *Legislative Texts . . .*, Treaty No. 141.
Exchange of notes between France and Great Britain relating to the Gold Coast-French Soudan boundary (London, 8 April 1904)	See BFSP, *1902-1904*, vol. 97, p. 31.
Agreement relative to Frontier Delimitation between Persia and Turkey (Teheran, 21 December 1913)	*The Consolidated Treaty Series*, C. Parry, ed., vol. 215, 1911-1912, p. 138.
Provisions relating to the common frontier between Belgium and Germany, drawn up by a Boundary Commission made up of representatives of the British Empire, France, Italy, Japan, Belgium and Germany under the terms of the Treaty of Versailles of 28 June 1919 concerning that frontier (Aix-la-Chapelle, 6 November 1922)	United Nations, *Legislative Texts . . .*, Treaty No. 118.
Protocol between France and Great Britain defining the boundary between French Equatorial Africa and the Anglo-Egyptian Sudan (London, 21 January 1924)	BFSP, *1924*, Part One, vol. 119, p. 354; see also United Nations, *Legislative Text . . .*, Treaty No. 25.
Agreement between Egypt and Italy fixing the frontier between Cyrenaica and Egypt (on the Ramla Wells) (Cairo, 6 December 1925)	BFSP, *1930*, Part Two, vol. 133, p. 976; see also United Nations, *Legislative Texts . . .*, Treaty No. 6.
Exchange of notes constituting an Agreement between the British and Italian Governments respecting the regulation of the utilization of the waters of the River Gash (Rome, 12 and 15 June 1925)	LON, *Treaty Series*, vol. XXXVIII, p. 200.
Treaty between France and Germany regarding the delimitation of the frontier (Paris, 14 August 1925)	Ibid., vol. LXXV, p. 104.
Convention between the Governments of the Union of Soviet Socialist Republics and Persia regarding the mutual use of frontier rivers and waters (Ashkabad, 20 February 1926)	United Nations, *Legislative Texts . . .*, Treaty No. 103.
Agreement between Belgium and Germany concerning the common frontier (Aix-la-Chapelle, 7 November 1929)	LON, *Treaty Series*, vol. CXXI, p. 328; see also United Nations, *Legislative Texts . . .*, Treaty No. 150.
Treaty of Peace, Friendship and Arbitration between the Dominican Republic and the Republic of Haiti (Santo Domingo, 20 February 1929)	Ibid., vol. CV, p. 216; see also United Nations, *Legislative Texts . . .*, Treaty No. 68.
Agreement between Persia and Turkey on the fixing of the frontier (Teheran, 23 February 1932)	BFSP, *1932*, vol. 135, p. 671; see also United Nations, *Legislative Texts . . .*, Treaty No. 101.

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Agreement between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and Ruanda-Urundi (London, 22 November 1934)	LON, *Treaty Series*, vol. CXC, p. 103.
Agreement between the Austrian Federal Government and the Bavarian State concerning the diversion of water in the Rissbach, Dürrach and Walchen districts (16 October 1950)	United Nations, *Legislative Texts . . .*, Treaty No. 136.
State Treaty between the Grand Duchy of Luxembourg and the *Land* Rhineland-Palatinate in the Federal Republic of Germany concerning the construction of a hydro-electric power plant on the Sauer (Trier, 25 April 1950)	Ibid., Treaty No. 201.
Agreement between the Hashemite Kingdom of Jordan and the Republic of Syria concerning the utilization of the Yarmuk waters (Damascus, 4 June 1953)	United Nations, *Treaty Series*, vol. 184, p. 25.
Agreement between the Government of the Federal People's Republic of Yugoslavia and the Government of the Hungarian People's Democratic Republic concerning water-economy questions (Belgrade, 8 August 1955)	United Nations, *Legislative Texts . . .*, Treaty No. 228.
Agreement between the Federal People's Republic of Yugoslavia and the People's Republic of Albania concerning water-economy questions (Belgrade, 5 December 1955)	Ibid., Treaty No. 128. See also Yugoslavia, *Federativne Narodne Republike Jugoslavije, Medunarodni Ugovori*, 1957, No. 74, p. 16.
Convention between the French Republic and the Federal Republic of Germany on the regulation of the upper course of the Rhine between Basel and Strasbourg (Luxembourg, 27 October 1956)	United Nations, *Legislative Texts . . .*, Treaty No. 180.
Agreement between the Government of the Italian Republic and the Government of the Federal People's Republic of Yugoslavia concerning the supply of water to the Commune of Gorizia (Nova Gorica, 18 July 1957)	Ibid., Treaty No. 236.
Minutes of the meetings of the delegations of the Government of the Federal People's Republic of Yugoslavia and the Kingdom of Greece from 26 August to 1 September 1957 concerning hydro-electric studies of the drainage area of Lake Dojran (1 September 1957)	Ibid., Treaty No. 223.
Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters (Prague, 21 March 1958)	United Nations, *Treaty Series*, vol. 538, p. 89.
Agreement between the Government of the Federal People's Republic of Yugoslavia and the Government of the People's Republic of Bulgaria concerning water-economy questions (Sofia, 4 April 1958)	Ibid., vol. 367, p. 104.
State Treaty between the Grand Duchy of Luxembourg and the *Land* Rhineland Palatinate in the Federal Republic of Germany, concerning the construction of hydroelectric power installations on the Our (Trier, 10 July 1958)	United Nations, *Legislative Texts . . .*, Treaty No. 202.
Evian Declaration (Algeria-France) (Evian, 6 November 1962)	United Nations, *Treaty Series*, vol. 507, p. 25.
Convention between France and Switzerland on the protection of Lake Léman waters against pollution (France, 16 November 1962)	Ibid., vol. 922, p. 49.

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Agreement between Poland and the Union of Soviet Socialist Republics concerning the use of water resources in frontier waters (Warsaw, 17 July 1964)	Ibid., vol. 552, p. 175.
Convention between the French Republic and the Federal Republic of Germany concerning development of the Rhine between Strasbourg/Kehl and Lauterburg/Neuburgweier (Paris, 4 July 1969)	Ibid., vol. 760, p. 305.
Australia-Netherlands Agreement concerning wrecks of former Dutch ships	Australia, *Treaty Series*, No. 18, 1972, p. 17.
Agreement between Finland and Sweden concerning frontier rivers (Stockholm, 15 December 1971)	United Nations, *Treaty Series*, vol. 825, p. 191.
Agreement of 1973 (Minute 242) of the International Boundary and Waters Commission (Mexico-United States of America) concerning the salinity problems of the Colorado River (Mexico City and Tlatelolco, 30 August 1973)	Ibid., vol. 915, p. 203.
Agreement on intervention by the agencies responsible for combating accidental pollution of the waters by hydrocarbons or other substances capable of altering the waters, and recognized as such under the Franco-Swiss Convention of 16 November 1962 concerning the protection of the waters of Lake Léman against pollution (Bern, 5 May 1977)	Ibid., vol. 1080, p. 155.
Agreement of 1978 between Canada and the United States of America on Great Lakes water quality (Ottawa, 22 November 1978)	*United States Treaties and Other International Agreements, 1978-79*, vol. 30-2.
Agreement between Austria and Czechoslovakia to settle certain issues of common interest concerning nuclear installations of 18 November 1982	United Nations, *Treaty Series*, vol. 1365, p. 273.
Agreement between the Kingdom of Spain and the Government of the French Republic concerning the admission of illegal aliens at border stations (Madrid, 8 January 1988)	RGDIP, vol. 92, pp. 696 and 697.

MULTILATERAL AGREEMENTS

Convention relating to Certain Rules of Law relating to Assistance and Salvage at Sea (Brussels, 23 September 1910)	G. F. de Martens, *Nouveau Recueil général de traités*, 3è série, vol. VII (Leipzig, 1913).
Treaty of Versailles (Versailles, 28 June 1919)	Ibid., vol. XI, pp. 323 et seq.
Convention on Nationality (Montevideo, 26 December 1933)	M. O. Hudson, *International Legislation*, Washington, D.C., vol. VI (1932-1934), p. 589.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	United Nations, *Treaty Series*, vol. 213, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	Ibid., vol. 189, p. 137.
Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)	Ibid., vol. 249, p. 215.
Convention establishing an International Organisation of Legal Metrology (Paris, 12 October 1955)	Ibid., vol. 560, p. 3.
Convention on the High Seas (Geneva, 29 April 1958)	Ibid., vol. 450, p. 11.
Single Convention on Narcotic Drugs (New York, 30 March 1961)	Ibid., vol. 520, p. 151.

	Sources
Convention on the Reduction of Statelessness (New York, 30 August 1961)	Ibid., vol. 989, p. 175.
Treaty Banning Nuclear Weapons Tests in the Atmosphere, in outer Space and under Water (Moscow, 5 August 1963)	Ibid., vol. 480, p. 43.
Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965)	Ibid., vol. 575, p. 158.
Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Moscow, London and Washington, 27 January 1967)	Ibid., vol. 610, p. 205.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	Ibid., vol. 606, p. 267.
Protocol to amend the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910 (Brussels, 27 May 1967)	Ministère des Affaires Étrangères, du Commerce Extérieure et de la Coopération de Belgique, Direction des Traités, *Conventions de droit maritime (Conventions de Bruxelles) — Textes*, 1 April 1982, p. 127.
African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968)	United Nations, *Treaty Series*, vol. 1001, p. 3.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970)	Ibid., vol. 823, p. 231.
Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (The Hague, 1 February 1971)	Ibid., vol. 1144, p. 258.
Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974)	United Nations, *Juridical Yearbook 1974*, p. 99.
Protocol amending the Single Convention on Narcotic Drugs, 1961 (Geneva, 25 March 1972)	United Nations, *Treaty Series*, vol. 976, p. 3.
Convention for the Protection of World Cultural and Natural Heritage (Paris, 16 November 1972)	Ibid., vol. 1037, p. 151.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	*Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10).
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	United Nations, *Treaty Series*, vol. 1302, p. 218.
Agreement Governing the Activities of States on the Moon and other Celestial Bodies (New York, 5 December 1979)	Ibid., vol. 1363, p. 3.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (Sales No. E.84.V.3), p. 157, document A/CONF.62/122.
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983)	A/CONF.117/14.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, United Kingdom, 1991), vol. 2, p. 309.

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European Convention on Offences relating to Cultural Property (Delphi, 23 June 1985)	Council of Europe, *European Treaty Series*, No. 119.
Convention establishing the Multilateral Investment Guarantee Agency (Seoul, 11 October 1985)	United Nations, *Treaty Series*, vol. 1508, p. 99
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	UNEP, *Selected Multilateral Treaties in the Field of Environment* (Cambridge, United Kingdom, 1991), vol. 2, p. 309.
International Convention on Salvage (London, 28 April 1989)	IMO, 1989.
Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Dublin, 15 June 1990)	*Bulletin of the European Communities*, No. 1/2, 1990, p. 165.
Convention applying the Schengen Agreement on the gradual abolition of checks at their common borders (Schengen, 19 June 1990)	RGDIP, vol. 94, 1990, No. 4, p. 1047.
Protocol on the Antarctic Treaty on Environmental Protection (Madrid, 4 October 1991)	ILM, vol. XXX, No. 6, p. 1461.
Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)	Council of the European Communities/Commission of the European Communities, Luxembourg, 1992.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	ILM, vol. XXXI, No. 4, p. 851.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	Ibid., p. 822.

Introduction

1. At the forty-fourth session (1992) of the Commission, the Planning Group of the Enlarged Bureau of the Commission established a Working Group with the following membership: Mr. Derek Bowett (Chairman); Mr. Awn Al-Khasawneh; Mr. Mohamed Bennouna; Mr. Peter Kabatsi; Mr. Mochtar Kusuma-Atmadja; Mr. Guillaume Pambou-Tchivounda; Mr. Alain Pellet; Mr. Jiuyong Shi; Mr. Alberto Szekely; Mr. Vladlen Vereshchetin and Mr. Chusei Yamada. The Working Group was to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission.[1]

2. Under the procedure proposed by the Planning Group on the Working Group's recommendation, which was subsequently endorsed by the Commission, designated members of the Commission, with Mr. Bowett acting as coordinator, were asked to prepare short outlines or explanatory summaries, on topics included in a pre-selected list. Each outline or explanatory summary was to indicate:

(*a*) The major issues raised by the topic;

(*b*) Any applicable treaties, general principles or relevant national legislation or judicial decisions;

(*c*) Existing doctrine;

(*d*) The advantages and disadvantages of preparing a report, a study or a draft convention if the Commission decided to include the topic in its programme of work.

3. The outlines prepared in accordance with this procedure were considered by the Working Group at the forty-fifth session of the Commission.

4. At the same session, the Commission decided, on the Working Group's recommendation, that the outlines would be published in an official document of the Commission in the A/CN.4/ series, for subsequent inclusion in the *Yearbook* of the Commission for 1993. The general document has been prepared further to this request. It reproduces the outlines in alphabetical order of the surnames of the respective authors.[2]

[1] See *Yearbook . . . 1992*, vol. II (Part Two), document A/47/10, para. 369.

[2] *Yearbook . . . 1993*, vol. II (Part Two), document A/48/10, paras. 425-443

OUTLINES PREPARED BY MEMBERS OF THE COMMISSION ON SELECTED TOPICS OF INTERNATIONAL LAW

The legal conditions of capital investment and agreements pertaining thereto, by Mr. Mohamed Bennouna

1. The past decade has seen a worsening of the indebtedness of most third world countries, a decline in North-South investment flows, and a glut of aid and assistance policies whose impact on the real development of populations has been negligible.

2. Promotion of direct private foreign investment in those countries is justified by the following advantages:

(*a*) Achievement of long-term financing;

(*b*) Infusion of a spirit of enterprise, acquisition of know-how and introduction of new technologies;

(*c*) Absence of any adverse effect on balance-of-payments that are already heavily in deficit. Income is repatriated only if the operation shows a profit, whereas, in the case of loans, fixed interest must be paid regardless of profitability.

However, a prerequisite for attracting private capital is the creation of a climate of confidence in which to offer the investor certain guarantees.

3. In classical international law, the question is dealt with from the standpoint of the status of foreigners and their property, and thus in terms of relations between the place of nationality and territorial sovereignty. However, classical law doctrine, which was strongly favourable to capital-exporting countries, gave protection of the "acquired rights" of foreigners precedence over the prerogatives of the territorial State.

4. The challenging of that doctrine by third world countries during the 1960s was to result in the conclusion of a considerable number of bilateral agreements governing the status of foreign investment. The development and complexity of international economic relations also produced a need for a new legal regime.

5. As Jean-Pierre Laviec remarks :

> [. . .] The concept of investment has no equivalent in any specific categories of private law. It retains a generic aspect and a functional dimension. Frequently, an investment operation is performed by means of a series of legal acts which, taken in combination, constitute that investment; if each of those acts was considered in isolation, some of them could not be regarded as such.[1]

That point had already been made by an arbitral tribunal in the *Holiday Inns/Occidental Petroleum* v. *Government of Morocco* case (the first judgement delivered by the World Bank's International Centre for the Settlement of Investment Disputes in 1975).[2]

6. The fact remains that what characterizes direct investment is that the foreigner controls the final operation. Thus, the unconditional link of nationality is no longer sufficient to determine the national or foreign nature of an investment; the criterion of control must always be applied.

7. In addition, the phenomenon of transnational corporations will complicate the interaction of those criteria and determination of the nationality of an investment. A transnational corporation consists of a series of private enterprises, subject to different territorial sovereignties and bound together by a common strategy laid down by the parent company.

8. In the absence of any legal codification, or of an exact and generally accepted definition, the criterion of control, like the concept of a transnational corporation, is a de facto determination based on an assessment of the actual economic situation.

9. The legal status of a foreign investment should be sought both in domestic law (national investment codes), and also in international law, by examining international jurisprudence, international bilateral and multilateral agreements and international customary practice.

1. National legislation

10. National legislation is designed to govern investment on the national territory; in some countries it is consolidated in codes; in others, it is spread among the various relevant fields of local law (commercial, financial, social, etc.). It may be consolidated in a single code applicable to all investments, or take the form of sectoral codes for the various economic sectors concerned.

11. National legislation spells out the conditions for admissibility of the foreign investment (prior approval, contractual procedure), whether or not it needs to be associated with local capital, the specific advantages accorded (tax advantages, customs advantages, etc.), the legal guarantees and procedures for settlement of disputes. More often than not, the legislation refers to procedures established under international agreements.[3]

12. In any attempt at codification, it would be useful to list the broad legal principles set forth in the national legislation with regard to protection of foreign investment (such as the principles of non-discrimination and national treatment).

2. International jurisprudence

13. An analysis of international jurisprudence helps to define where general international law stands on this

[1] *Protection et promotion des investissements—Étude de droit international économique*, Paris, Presses universitaires de France, 1985, p. 25.

[2] See United Nations, *Juridical Yearbook 1976* (Sales No. E.8.V.5), p. 116.

[3] This is the case, for example, with conciliation and arbitration in the case of the Convention on the Settlement of Investment Disputes Between States and Nationals and Other States.

matter. Reference is made briefly to two recent cases brought before ICJ: *Barcelona Traction, Light and Power Company, Limited (Second Phase)* and the *Elettronica Sicula S.p.A.* case.

14. In the *Barcelona Traction, Light and Power Company, Limited* case,[4] the Court stressed that, with regard to unlawful acts directed against a foreign capital company, the general rule of international law was that only the national State of that company could bring a claim (the company in question was of Canadian nationality, the majority of the shareholders were Belgians, and it conducted its operations in Spain). In these circumstances, apart from the stipulations of conventions, the question of the protection of shareholders remains unresolved. The Court did, however, admit two exceptions, which allow the national State of the shareholders to act:

(*a*) Where the company has ceased to exist; or

(*b*) Where the national State of the company has no authority to act on behalf of the company.

The Court did not consider the case where the State whose responsibility is at issue is at the same time the national State of the company (whereas the shareholders are foreign). The Court was called upon to consider that question in 1989.

15. In the *Elettronica Sicula S.p.A. (ELSI)*[5] case, the national State of the company is Italy. Italy is also the State having committed the unlawful acts cited in the claim, and the shareholders are of United States nationality.

16. Although the Court[6] dismissed the United States application on the basis of its interpretation of a treaty between the two countries, it seems to allow the possibility of a State applying diplomatic protection to shareholder nationals of that State, at least where the foreign company has the nationality of the respondent State. The question consequently arises whether the Court failed to take into account the trend in a great number of bilateral agreements towards the protection of the shareholders and due regard for the control criterion.

3. Bilateral agreements

17. Bilateral agreements for the promotion and protection of investment have appeared relatively recently (in the past 30 years).

18. As a result of decolonization and the challenging of customary law, the industrialized countries have sought other mechanisms for protecting their nationals abroad.

19. The agreements show great similarity since they are based on prototypes devised by the capital-exporting industrialized countries. It follows that this legal regime essentially involves North-South relations.

20. As of 1987, 265 bilateral treaties for the promotion and protection of investment have been counted.[7] Most of these agreements refer to the control criterion: "The investment must belong to or be controlled by a national or company of one of the parties." The protected juristic person is defined as ". . . a company in which either natural persons who are nationals of a State, or that State itself, its agencies or its agents have a substantial interest". These agreements repeat a number of customary rules regarding the treatment of foreigners: (*a*) non-discrimination; (*b*) fair and equitable treatment; and (*c*) most-favoured-nation status. They also provide detailed procedures for the settlement of disputes.

4. Multilateral agreements

21. Two conventions are particularly noteworthy in this connection. One is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which came into force on 14 October 1966. Under the Convention, a State in exchange for the national State's waiver of diplomatic protection, enables its nationals to have recourse to conciliation and arbitration with the host State.

22. This Convention makes it possible to internationalize the relationship between the host State and the investor; it defines investment and authorizes recourse to the control criterion. Although we cannot go into a detailed analysis here of the arbitral jurisprudence it has generated, it does contain elements of judgement found in general international law.

23. The other is the Convention establishing the Multilateral Investment Guarantee Agency (MIGA). This Convention establishes an agency which insures the foreign investor and also contains several substantive norms defining investment and the investor (the control criterion). Insurance is made contingent on minimum legal guarantees provided by the host State.

5. International custom

24. Custom in this field has traditionally centred on the host country's obligation to respect a minimum standard in its treatment of the foreign investor. In the event of a breach of this obligation, the State is liable. From this minimum standard the principles of non-discrimination and national treatment are derived.

25. The third-world States have contested this custom, alleging that it provides absolute protection for the "acquired rights" of foreign investors and limits the prerogatives of the host State with respect to the management of the natural resources and economic activities in its territory (principle of permanent sovereignty over natural resources).[8]

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[4] Second phase, Judgment, *I.C.J. Reports 1970*, p. 3.

[5] Judgment, *I.C.J. Reports 1989*, p. 15.

[6] This dispute was decided by a Chamber of the Court.

[7] See the study by the United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties*, 1988 (ST/CTC/65), Part One, para. 15.

[8] See Samuel K. B. Asante, "Droit international et investissements," *Droit international: bilan et perspectives*, Bedjaoui, ed., and Georges Abi-Saab, "La souveraineté permanente sur les ressources naturelles et les activités économiques" (ibid.), chap. XXVII, pp. 640 et seq.

6. Conclusions

26. To date, it has not been possible to adopt either a multilateral regime for the protection of investments or a code of conduct for transnational corporations but there are a great number of bilateral and multilateral agreements dealing with some aspects of the legal regime for investments. There is likewise no ample international jurisprudence from which to glean the main themes in the evolution of general international law.

27. Furthermore, the proliferation of market economies and economic liberalism is one more reason to scrutinize all these legal instruments and the jurisprudence in order to identify common principles that reflect universal legal opinion and are therefore eligible for codification.

28. This codification might well take the form of a general multilateral convention which would be capable of correcting the existing imbalances of bilateral agreements imposed by one of the parties. Such a convention could make a valuable contribution to the regulation of North-South relations in the vital field of investment.

Ownership and protection of wrecks beyond the limits of national maritime jurisdiction, by Mr. Derek William Bowett

Introduction

1. Advances in the science and technology of underwater exploration have facilitated the discovery and recovery of wrecks and their cargoes.

2. Competing interests surrounding this topic include (*a*) sport and leisure (the "amateur"); (*b*) economic (valuable cargo); (*c*) governmental (security, national heritage, etc.); and (*d*) scientific (marine scientific research).

1. Definition of a wreck

3. The legal definition for the purpose of the law of salvage concentrates on the notion of a vessel "in peril", and the law of salvage presumes that there is an owner and that the salvor is entitled to a reward from the owner for effective salvage.

4. But there is considerable uncertainty over whether a "wreck" is subject to salvage, as being "in peril". The following United States federal cases are of relevance to this issue: *Treasure Salvors, Inc.* v. *The Unidentified Wrecked and Abandoned Sailing Vessel,*[1] *Platoro Limited, Inc.*, v. *The Unidentified Remains of a Vessel*[2] and *Hener* v. *United States of America.*[3]

5. In addition, the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, and the 1967 Protocol amending the Brussels Convention, as well as the IMO's 1989 International Salvage Convention are of relevance to this issue. (These Conventions do not resolve the question, but leave the matter to national law.)

2. Coastal State jurisdiction

6. Coastal State jurisdiction can take various forms, including:

(*a*) Power to remove wrecks in the interests of the safety of navigation;

(*b*) Jurisdiction to entertain salvage claims;

(*c*) Jurisdiction to "protect" the wreck and regulate access to the site of the wreck; and

(*d*) Jurisdiction to entertain claims to ownership of the wreck and/or its cargo.

7. In principle, the points made in (*a*) and (*b*) are limited to internal and territorial waters.[4]

8. But in relation to archaeological objects and objects of historical origin found at sea, the United Nations Convention on the Law of the Sea, article 303, paragraph 2, provides:

> In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

Thus, there is this additional jurisdiction in the contiguous zone.

9. The areas of the continental shelf/exclusive economic zone and the high seas beyond the limits of national jurisdiction remain subject to great uncertainty in this regard, and it is clear that the Convention has not established any comprehensive regime to cover wrecks.

(a) *The continental shelf/exclusive economic zone*

10. Despite the efforts of some States, notably Greece, to extend coastal State jurisdiction to cover wrecks of archaeological or historic interest within 200 miles, the majority opposed these attempts to extend coastal State jurisdiction to resources other than "natural" resources. But there is some State practice to support such a power (see paragraphs 21 and 22 below), and the more limited duty of protection of archaeological and historic objects (United Nations Convention on the Law of the Sea, art. 303, para. 1) certainly covers these areas.

[1] *Federal Reporter*, Second Series, vol. 569 (United States Court of Appeals, Fifth Circuit, 13 March 1978), pp. 330 et seq.

[2] *Federal Supplement*, vol. 518 (United States District Court W.D. Texas, Austin Division, 6 May 1981), p. 816 et seq.

[3] Ibid., vol. 525 (United States District Court, S.D. New York, 15 October 1981), pp. 350 et seq.

[4] See Whiteman, *Digest of International Law*, United States Government Printing Office, Washington, D.C., 1965, vol. 4, pp. 4-5.

11. However, Australia and Papua New Guinea, in a maritime boundary agreement of 1978, article 9 have assumed a general jurisdiction over wrecks within their sea-bed jurisdiction. Australia has also legislated to this effect in the Historic Shipwrecks Act, 1976.[5]

(b) *High seas beyond national jurisdiction*

12. Here, too, there is no general regime, but there is in article 149 of the United Nations Convention on the Law of the Sea a special provision dealing with archaeological and historic objects:

> All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

13. The failure to establish the Seabed Authority, however, means that this provision is largely devoid of content, and no authority exists with clear power to protect wrecks, and regulate their disposal, in areas beyond national jurisdiction, at least in cases where ownership has been abandoned.[6]

3. THE ISSUE OF OWNERSHIP OR TITLE

14. Several questions remain concerning ownership or title:

(*a*) Are there agreed criteria for determining whether ownership has been retained or abandoned, so that the property is *res derelicta*?

(*b*) What law provides these criteria? (The options are the law of the coastal State, the law of the flag, the law of the nationality of the owners, or the law of the State before whose courts the issue is to be adjudicated.)

(*c*) Wrecks may lose a flag registration, and therefore nationality, under the law of some States after a certain time has elapsed, and they are "de-registered": but this does not affect ownership.

(*d*) Does the law of State succession adequately deal with problems of a State-owned vessel, where that State has disappeared (i.e. the vessels of Troy and Carthage)?

(*e*) Are certain categories of vessels subject to special rules?

(a) *Naval vessels, military aircraft, and other State-owned vessels operated for non-commercial purposes*

15. Current practice suggests that there is a presumption against abandonment of title over such vessels, and that an explicit act of transfer or abandonment is required. The rationale for this view lies in part in the security implications of the vessel or aircraft falling into the possession of unauthorized persons, and in part in the desire to keep the wreck untouched as a "war grave".[7]

(b) *Wrecks of archaeological or historical interest*

16. The attempt by some States to introduce a special regime for such wrecks in the Convention on the Law of the Sea failed, but the Convention does contain certain limited provisions in article 149 (cited in para. 11 above) and article 303, paragraphs 1 and 3, which read:

> 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> [...]
>
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

17. It is difficult to extract from this a general duty of protection, utilizing the State's legislative, administrative and judicial powers, beyond the contiguous zone. So, beyond this zone, the primary issue is: who protects such wrecks? There are consequential issues too relating to ownership and disposal of the wreck and its cargo. Certain States, such as Greece, have argued for a latent right of ownership vested in the State to whose cultural heritage the vessel belongs.

18. Reference is made to a number of articles on the subject which are relevant to this issue.[8]

19. Furthermore, there are a number of UNESCO Conventions dealing with the cultural heritage, i.e. the Convention for the Protection of Cultural Property in the Event of Armed Conflict; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and the Convention for the Protection of the World Cultural and Natural Heritage. But none of these deals explicitly with

[5] *Acts of the Parliament of the Commonwealth of Australia*, No. 190, p. 1596.

[6] See Anastasia Strati, "Deep seabed cultural property and the common heritage of mankind", *The International and Comparative Law Quarterly*, vol. 40 (Part 4), 1991, pp. 859 et seq.

[7] See United States Department of State memorandum of 1980 (Marian Lloyd Nash, *Digest of United States Practice in International Law* (Washington, D.C.), p. 1005); Michael G. Collins, "The salvage of sunken military vessels", *The International Lawyer*, vol. 10, No. 4 (1976), p. 681; Alfred P. Rubin, "Sunken Soviet submarines and Central Intelligence: laws of property and the Agency", AJIL, vol. 69, No. 4 (1975), p. 855; Frederic A. Eustis III, "The *Glomar Explorer* incident: implications for the law of salvage", *Virginia Journal of International Law*, vol. 16, No. 1 (1975), p. 177; *Exchange of notes between the United Kingdom of Great Britain and Northern Ireland and South Africa concerning the regulation of the terms of settlement of the salvaging of the wreck of H.M.S. Birkenhead* (United Kingdom *Treaty Series*, No. 3 (1990)); Protection of Military Remains Act 1986 (cap. 35), *Current Law Year Book 1986*, "Statutes and orders", para. 130; and J. Ashley Roach, "France concedes United States has title to the *CSS Alabama*", AJIL, vol. 85, No. 2 (1991), p. 381.

[8] See Anthony Clark Arend, "Archaeological and historical objects: the international legal implications of UNCLOS III", *Virginia Journal of International Law*, vol. 22, No. 4 (1982), p. 777; Jean-Pierre Beurier, "Pour un droit international de l'archéologie sous-marine", RGDIP, vol. 93 (1989), p. 45; Lucius Caflisch, "Submarine antiquities and the international law of the sea", *Netherlands Yearbook of International Law*, vol. XIII (1982), p. 3; John P. Fry, "The treasure below: jurisdiction over salving operations in international waters", *Columbia Law Review*, vol. 88, No. 4 (1988), p. 863; Bruce E. Alexander, "Treasure salvage beyond the territorial sea: an assessment and recommendations", *Journal of Maritime Law and Commerce*, vol. 20, No. 1 (1989), p. 1; and Lyndell V. Prott and P. J. O'Keefe, *Law and the Cultural Heritage*, London, Butterworths, 1984.

wrecks, and the obligations imposed on States will presumably not apply beyond the territorial sea.

20. The Council of Europe has the Convention on Offences relating to Cultural Property (likewise not extending beyond the territorial sea); and, more to the point, there is a draft Convention on the Underwater Cultural Heritage, drawn up following the Prott report.[9]

21. But there is little specific legislation. The exceptions include:

(*a*) Australia: Historic Shipwrecks Act of 1976;[10] and

(*b*) United States of America: The R.M.S. Titanic Maritime Memorial Act of 1986,[11] and the Abandoned Shipwrecks Act of 1987[12] (which essentially regulates powers between State and Federal authorities in United States waters and established a register of wrecks).

22. Moreover, there are few treaties. The known exceptions include:

(a) An agreement between Australia and the Netherlands which concerns old Dutch shipwrecks; and

(*b*) An agreement between Australia and Papua New Guinea on the Delimitation of Maritime Boundaries, 1978, article 9 of which confers jurisdiction over wrecks within the area of sea-bed jurisdiction, and obliges the Parties to consult over historic wrecks, but excludes military vessels of either Party wrecked after the date of the Agreement.

4. Disposal of recovered vessels or objects found therein

23. Assuming access to the site is lawful, does the "finder" acquire title? This raises various questions:

(*a*) Which Courts have jurisdiction to adjudicate disputes over title? (If coastal States were given this jurisdiction out to 200 miles, most cases would be covered. Most wrecks are found within this distance offshore, since, traditionally, the trade routes have followed the coasts and wrecks have occurred where weather or error has forced a vessel too close inshore); and

(*b*) Should certain States have prior, or preferential, rights to either prohibit sale, or purchase the wreck or its contents?

[9] Lyndell V. Prott and P. J. O'Keefe, "Final report on legal protection of the underwater cultural heritage," *The Underwater Cultural Heritage*, Council of Europe, 1978, appendix II, p. 45.

[10] See footnote 6 above.

[11] *United States Code Congressional and Administrative News*, 99th Congress, Second Session, 1986, vol. 2, p. 2082.

[12] *United States Code*, 1994 ed., vol. 24, title 43, para. 2101.

Jus cogens, by Mr. Andreas Jacovides

1. One of the topics proposed for inclusion in the Commission's programme of work is *jus cogens*, or peremptory norms of international law from which no State may derogate by agreement or otherwise. First incorporated into international law by the Vienna Convention on the Law of Treaties (hereafter referred to as the 1969 Vienna Convention) it has had a considerable historical background and was preceded by substantial preparatory work in the Commission and the Sixth Committee of the General Assembly.[1] Considerable material can also be found in the records of the Vienna Conference on the Law of Treaties[2] relative to articles 53, 64 and 66.

2. In the nearly quarter of a century since the Convention was adopted, no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status. While *jus cogens* has frequently been referred to in debates at the United Nations, including the Security Council, has been the subject of in-depth studies by scholars, has been raised in the proceedings of learned societies, has been alluded to by ICJ, is often referred to in debates and documents of the Commission (particularly in relation to the current items of State responsibility and the draft Code of Crimes against the Peace and Security of Mankind), there exists no definitive statement of what peremptory norms are or where they may be found. It is frequently said, and correctly so, that the principle of the prohibition against the use of force in international relations contained in Article 2, paragraph 4, of the United Nations Charter is *jus cogens*.[3] Undoubtedly, other principles and rules of international law exist for which the same status may be claimed. Evidently, there is a need to define the exact parameters of what comes under the rubric of *jus cogens* since the situation as it now stands is not conducive to the objectivity, transparency and predictability which should characterize a legal principle, especially one which has been solemnly accepted not only in the landmark 1969 Vienna Convention already mentioned, but also, identically, in the subsequent Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereafter called the 1986 Vienna Convention).

3. As it now stands, *jus cogens* can mean a great deal to some and very little to others. The selection of topics for inclusion in the Commission's long-term programme of work provides the opportunity for a highly qualified, authoritative body of experts (which can be credited with codifying the concept in the first place) to study the subject with a view to establishing which rules of interna-

[1] See article by Mr. Jacovides, entitled "Treaties conflicting with peremptory norms of international law and the Zurich-London 'Agreements' " in the annex below.

[2] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); ibid., *Second Session, Vienna, 9 April-22 May 1969* (Sales No. E.70.V.6); and ibid., *First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969* (Sales No. E.70.V.5), documents A/CONF. 39/11 and Add.1-2.

[3] See, for example, *Yearbook . . . 1992*, vol. II (Part Two), document A/47/10, para. 227.

tional law are indeed peremptory. On the basis of the Commission's findings, States would have the opportunity, through their representatives in the Sixth Committee and through written comments, to express their views, thereby carrying forward the process of giving exact meaning to *jus cogens* and filling the legal vacuum which surrounds the concept. It is therefore submitted that the topic merits a place in the Commission's long-term programme of work for the purpose of study and the preparation of a report. A proposal to this effect was submitted to the Sixth Committee of the General Assembly at its forty-sixth session and repeated at the forty-seventh session.[4] What follows is an attempt to set out more analytically the issues involved in order to facilitate the consideration of this proposal by Mr. Derek Bowett and the other members of the Commission.

4. The concept of *jus cogens* raises a number of issues at the core of public international law.[5] These may be organized under two basic headings: the effect of *jus cogens* on international jurisprudence; and, the nature of *jus cogens* itself. Existing doctrine on the subject speaks much more clearly to the first of these areas than to the second. The *jus cogens* regime created by the Vienna Convention on the Law of Treaties represents the modern validation of an important and well-established precept of traditional international law.[6] It suggests that treaties may be invalidated not only by virtue of the conditions under which they are concluded, but also because they may offend overarching legal principles governing the international system. As a result, *jus cogens* impinges directly upon the customary freedom of States to enter into agreements as they see fit. Otherwise, validly concluded treaties may fall simply because they govern a particular object impermissibly under higher principles of international law.

5. According to the Vienna Conventions, peremptory norms necessarily void all subsequent, inconsistent treaties *ab initio*. In the event that they clash with pre-existing treaties, those treaties terminate and are voided from that moment onwards.[7] The relevant provisions read as follows:

Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[...]

Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.[8]

6. Because peremptory norms are, by definition, non-derogable, they may only be superseded by other, later norms of the same character. The restraints imposed by *jus cogens* on a State's treaty-making powers are therefore absolute. Furthermore, in identifying peremptory norms as an integral part of general international law, article 53 of the Vienna Conventions strongly suggests that *jus cogens* transcends the law of treaties and applies more broadly to the whole range of State practice.[9] In short, the Vienna Conventions place *jus cogens* firmly at the conceptual pinnacle of international law.

7. As clear as they may be on the jurisprudential standing of *jus cogens*, the Vienna Conventions do not adequately address a second, more basic area of concern, namely the nature of peremptory norms. In its draft articles on the Law of Treaties, the Commission chose to leave the full content of *jus cogens* "to be worked out in State practice and in the jurisprudence of international tribunals."[10] Regrettably, the expected elucidation has not been forthcoming.[11] Although the concept is solidly a part of international law, ICJ has to date avoided decisively grounding any of its decisions on a principle of *jus cogens*. Arguably waiting for further guidance, the Court has only sympathetically noted various assertions that certain norms may constitute *jus cogens* to support its conclusions on other grounds.[12] As to State practice, despite

[4] See "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session, prepared by the Secretariat (A/CN.4/L.469), para. 411 and statements by the representative of Cyprus (*Official Records of the General Assembly, Forty-sixth Session, Sixth Committee*, 23rd meeting, paras. 71 to 90, and ibid., *Forty-seventh Session, Sixth Committee*, 21st meeting, paras. 82 to 96).

[5] For lengthy, comprehensive studies of the topic, see Sztucki, *Jus cogens and the Vienna Convention on the Law of Treaties* (Vienna, Springer-Verlag, 1974); Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (Amsterdam, North-Holland Publishing Company, 1976); Gómez Robledo, "Le *ius cogens* international: sa genèse, sa nature, ses fonctions", *Collected Courses... 1981-III*, p. 9; Hannikainen, *Peremptory Norms (jus cogens) in International Law* (Helsinki Lakimiesliiton Kustannus, 1988); and Stefan Kadelbach, *Zwingendes Völkerrecht* (Berlin, Duncker and Humblot, 1992).

[6] See annex below for a brief summary of the legal and intellectual pedigree of *jus cogens*. For a more detailed survey of the contemporary development of the concept antecedent to the Vienna Convention, see also Erik Suy, "The concept of *jus cogens* in international law", Carnegie Endowment for International Peace, Conference on International Law, Lagonissi, Greece, 3-8 April 1966, *Papers and Proceedings*, vol. 2 (1967), pp. 26-49.

[7] Neither the 1969 nor the 1986 Vienna Convention contemplates an *actio popularis* whereby third parties might attack the congruence of a given treaty with *jus cogens*. Rather, only the parties to the treaty in question obtain the right to challenge it on peremptory grounds. Disputes between parties to a particular treaty over the compatibility of that treaty with a rule of *jus cogens* are to be settled first by negotiation, and failing that, by arbitration or adjudication (see common articles 65-66 of the two Conventions).

[8] The same provisions appear verbatim in both the 1969 and 1986 Vienna Conventions.

[9] See also article 29 of part 1 of the Commission's draft articles on State responsibility, which declares that States acting in violation of a peremptory norm of international law may not be released from responsibility (*Yearbook... 1980*, vol. II (Part Two), p. 33).

[10] *Yearbook... 1963*, vol. II, p. 53, para. 3 of the commentary to art. 13 *in fine*.

[11] For an excellent, brief critique of the existing, unfocused state of *jus cogens* jurisprudence, see Anthony D'Amato, "It's a bird, it's a plane, it's *jus cogens*!" *Connecticut Journal of International Law*, vol. 6, No. 1 (1990), p. 1.

[12] In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, for example, ICJ invoked the frequently heard argument that the prohibition on the use of force contained in Article 2, paragraph 4, of the Charter of the

near-unanimous support for *jus cogens* in the international community, the prediction by one delegate to the Vienna Conference that "what might be *jus cogens* for one State would not necessarily be *jus cogens* for another" has in large part proved to be correct.[13]

8. Among the most central, unanswered questions regarding *jus cogens* are: by what means does a norm of international law rise to the level of *jus cogens*? How may one distinguish such a norm from other more ordinary principles of international law? How may one peremptory norm come to replace another? What are the possible candidates for *jus cogens* today? All in all, the remarkable lack of certainty prevailing over these and other issues has precluded the effective utilization of *jus cogens* in contemporary international jurisprudence. As the birthplace of *jus cogens* in codified international law, the Commission, in conjunction with the Sixth Committee, offers an excellent and highly qualified forum in which to clarify these ambiguities authoritatively.[14]

9. At the forefront of the uncertainty are the related matters of how ordinary legal norms reach peremptory status and what qualities set them apart from the balance of international law. The commentaries to the Commission's 1963 draft articles on the law of treaties provide little guidance.[15] Nonetheless, from the remarks of Sir Humphrey Waldock at the Vienna Conference and the text of the Vienna Convention itself, the germ of a test may be extracted. In Sir Humphrey's words, the Commission "based its approach to the question of *jus cogens* on positive law much more than on natural law."[16] To this end, article 53 implies a consensual requirement of acceptance and recognition by "the international community of States as a whole" before a candidate norm may actually become *jus cogens*. What remains unclear in this formulation, however, is the precise shape this consensus must take and whether it has the power to impose obligations *erga omnes* on dissenting States.

10. The phrase "the international community of States as a whole" has, in practice, generally been interpreted to mean something less than absolute unanimity. In 1976, for example, the Commission suggested that acceptance and recognition "by all the essential components of the international community" was sufficient to elevate the breach of an obligation to the level of an international crime.[17] Under this formula, the dissent of one State or even a small group of States, no matter how powerful, could not block the formation of a new peremptory norm. Similarly, and more to the point, the Chairman of the Drafting Committee at the Vienna Conference, Mr. Mustafa K. Yasseen, stated that "[t]here was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so . . .".[18]

11. Others, by contrast, have argued that to allow majorities to bind dissenting States would conflict with already well-established principles of international law.[19] The French representative to the Vienna Conference expressed the view that if consensus was "interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result would be to create an international source of law subject to no control and lacking all responsibility."[20] This claim finds support in both judicial doctrine and State practice. The *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* opinion of ICJ maintains, for example, that in international law, there are no rules, other than such rules as may be accepted by the States concerned.[21] Furthermore, an

United Nations represents *jus cogens* to support its contention that the same principle exists under customary law (*I.C.J. Reports 1986*, p. 100, para. 190; see Christenson, "The World Court and *jus cogens*", in "Appraisals of the ICJ's decision: United States *v.* Nicaragua (Merits)", AJIL, vol. 81, No. 1 (1987), p. 93). To be sure, individual justices of the Court have on occasion made bolder statements in support of *jus cogens* in their separate or dissenting opinions, but these cannot be said to speak for the Court as a whole. See Sztucki, op. cit., pp. 12-22 and Ian M. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 209-215.

[13] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (see footnote 2 above), p. 305, para. 64.

[14] The Commission introduced *jus cogens* to codified international law in article 15 of Sir Hersch Lauterpacht's first report on the law of treaties (*Yearbook . . . 1953*, vol. II, pp. 154-156, document A/CN.4/63). For a discussion of the genesis and evolution of *jus cogens* in the Commission, see Nageswar Rao, "*Jus cogens* and the Vienna Convention on the Law of Treaties", *The Indian Journal of International Law*, vol. 14 (1974), p. 362 and Egon Schwelb, "Some aspects of international *jus cogens* as formulated by the International Law Commission", AJIL, vol. 61 (1967), p. 946.

The language of *jus cogens* continues to pervade the work of the Commission even today. Article 19 of part 1 of the draft articles on State responsibility, for example, describes international crimes in terms of the breach of an obligation "essential for the protection of fundamental interests of the international community" (para. 2) (*Yearbook . . . 1980*, vol. II (Part Two), p. 32). During the discussions on the draft Code of Offences against the Peace and Security of Mankind, one member of the Commission suggested framing the proposed universality of the Code by saying that "an offence against the peace and security of mankind was a breach of rules recognized by the international community as a whole, from which no State could derogate" (*Yearbook . . . 1987*, vol. I, 1993rd meeting, para. 39).

[15] According to paragraph 2 of the commentary to draft article 13, for example, there is no generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens* (*Yearbook . . . 1963*, vol II, p. 52).

[16] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (see footnote 2 above), p. 327.

[17] *Yearbook . . . 1976*, vol II (Part Two), p. 119, para. (61) of the commentary to article 19. Roberto Ago expressed a similar view with respect to *jus cogens* in "Droit des traités à la lumière de la Convention de Vienne", *Recueil des cours . . . , 1971-III*, pp. 296 et seq., especially p. 323.

[18] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (see footnote 2 above), p. 472.

[19] Perhaps the seminal article in this regard is Georg Schwarzenberger, "International *jus cogens*?" *Texas Law Review*, vol. 43 (1965), p. 455.

[20] *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (see footnote 2 above), p. 94, para. 17. See also Michel Virally, "Réflexions sur le *jus cogens*", AFDI, vol. 12 (1966), p. 5.

[21] *I.C.J. Reports 1986*, p. 135 (see also footnote 12 above). It is important to note that while ICJ has on occasion referred to *jus cogens* abstractly, it has cautiously declined to invoke the concept as a dispositive ground for any of its decisions or to identify authoritatively possible candidates for peremptory status. By contrast, in 1965, the German Supreme Constitutional Court specifically endorsed *jus cogens* and offered its own definition of peremptory norms as

> ". . . such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance

(*Continued on next page*)

attempt by many developing States in the General Assembly and at the United Nations Conference on the Law of the Sea to elevate the concept of "the common heritage of mankind" to peremptory status failed after a small group of primarily Western nations refused to endorse the proposal.[22] The representative of the United States expressed the view that "[t]he United States could not accept the suggestion that, without its consent, other States would be able, by resolutions or statements, to deny or alter its rights under international law."[23] In the end, no compelling resolution of these two conflicting approaches to the question of consensus has yet emerged and the topic remains controversial.[24] The question of how one peremptory norm may replace another has also raised considerable debate. As *jus cogens*, by its very nature, prohibits countervailing State practice, any attempt to alter the existing peremptory normative order may entail violations of international law. This will especially be the case where *jus cogens* arises by way of international custom. A commonly proposed solution to this conundrum involves creating and substituting peremptory norms only through the mechanism of general international treaties or conventions.[25] These instruments would, of course, be subject to the requirement of broad consensus mentioned above and should also contain a clear expression of the international community's intent to modify existing peremptory law. Anything short of such a decisive statement might encounter serious doctrinal and practical difficulties.

12. A final principal area of uncertainty surrounds the identification of candidates for *jus cogens* status. In its commentary to the draft articles on the law of treaties, the Commission stated that

> It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.[26]

The Commission declined at the time to endorse any specific examples of *jus cogens* out of fear that such a list might prejudice the consideration of other potential peremptory norms and deflect attention of the Commission from the draft articles before it.[27] It did, however, suggest possible examples, including a prohibition on the use of force; a prohibition on acts constituting international crimes; and proscriptions against slavery, genocide and piracy.[28] Among other broadly supported possibilities are the obligation to settle disputes peacefully and the international principle prohibiting torture.[29] Indeed, because *jus cogens* offers a powerful vehicle for the transformation of contemporary international law, some have suggested the incorporation into the concept of principles as diverse as the "Brezhnev doctrine" and the right to life.[30] Clearly, some distinctions must be drawn. The further proliferation of competing norms will only contribute to the confusion surrounding *jus cogens* and may sap the concept of its credibility, elegance and power. Alternatively, and highly preferably, the elucidation and crystallization of *jus cogens* would mark a substantial step forward in the progressive development of an already integral and well-established segment of international law. It is submitted that the Commission, in combination with the Sixth Committee, is uniquely suited to this task.

13. Reproduced as an annex to this outline is the text of a paper submitted by the writer to the Dag Hammarskjöld Seminar on the Law of Treaties, held at Uppsala, Sweden, from 16 June to 16 July 1966. This paper, including the footnotes, is reproduced in the form and language in which it was submitted by the author.

(*Footnote 21 continued.*)

of which can be required by all members of the international community." (*Entscheidung des Bundesverfassungsgerichts*, vol. 18, 1965, p. 449).

See also, Stefan A. Riesenfeld, "*Jus dispositivum* and *jus cogens* in international law: in the light of a recent decision of the German Supreme Constitutional Court", Editorial Comment, AJIL, vol. 60, No. 3 (1966), p. 511. In the United States, Federal courts in the Ninth Circuit and the District of Columbia have confirmed the presence and relevance of *jus cogens* in international law: *Trajano* v. *Marcos* (*Federal Reporter, Second Series*, vol. 978, p. 493 (United States Court of Appeals, Ninth Circuit, 1992), p. 493; *Siderman de Blake* v. *The Republic of Argentina* (ibid., vol. 965, esp. p. 717; *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, ibid., vol. 859 (United States Court of Appeals, District of Columbia Circuit, 1988), pp. 929 et seq., especially p. 940.

[22] Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (General Assembly resolution 2749 (XXV). Chile proposed at the Conference on the Law of the Sea to introduce a draft article into the Convention attesting to the peremptory nature of the common heritage principle. See also Gennady M. Danilenko, "International *jus cogens*: issues of law-making", *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 42 et seq., especially, p. 59; see also Antonio Gómez Robledo, loc. cit.

[23] *Official Records of the Third United Nations Conference on the Law of the Sea, Seventh Session, Geneva, 28 March-19 May 1978 and Resumed Seventh Session, New York, 21 August-15 September 1978*, vol. IX (Sales No. E.79.V.3), p. 104, para. 27 *in fine*.

[24] Danilenko, loc. cit., p. 64. Related to the debate over consensus is also the question of whether *jus cogens* may arise at a regional or subglobal level. Although the Vienna Conventions apparently contemplate only broad-based peremptory norms, the fact that the possible regional evolution of international custom has been recognized has led some to suggest a similar process for *jus cogens*. Certainly nothing in the Conventions explicitly precludes such a mechanism.

[25] See, for example, the Commission's commentary to draft article 13 on the law of treaties (*Yearbook . . . 1963*, vol. II, p. 54).

[26] *Yearbook . . . 1966*, vol. II, p. 248, para. (2) of the commentary to art. 50.

[27] Ibid., para. 3.

[28] Ibid. Some of the other more serious contenders are considered in Schwelb, loc. cit., and Hannikainen, op. cit.

[29] Mr. Gaetano Arangio-Ruiz recently discussed peremptory norms in his third and fourth reports on State responsibility (*Yearbook . . . 1991*, vol. II (Part One); p. 1, document A/CN.4/440 and Add.1, paras. 118-122; and *Yearbook . . . 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3, paras. 89-96, respectively). He reached the conclusion that the prohibitions against the use of force and against massive violations of human rights both raised questions of *jus cogens*. In draft article 14, para. 1 (*b*) (iii) appearing in his fourth report, he also proposed to prohibit countermeasures "contrary to a peremptory norm of general international law". A line of recently decided cases in United States Federal courts has recognized that the international prohibition against torture is a norm having the character of *jus cogens*: *Trajano* v. *Marcos*, *Siderman de Blake* v. *The Republic of Argentina* and *Committee of United States Citizens Living in Nicaragua* v. *Reagan* (see footnote 21 above).

[30] Grigory Tunkin, *Theory of International Law*, (Cambridge, Mass., Harvard University Press, 1974), p. 444 and Karen Parker and Lyn Beth Neylon, "*Jus cogens*: compelling the law of human rights", *Hastings International and Comparative Law Review*, vol. 12, No. 2 (1989), p. 411. In the context of international environmental law, the Special Representative of the National Commission for the Environment of Uruguay recently argued that the principles of conduct, responsibility and compensation arising from the Stockholm Declaration and reaffirmed in the Rio Declaration are true criteria of *jus cogens* valid *erga omnes* (*Official Records of the General Assembly, Forty-seventh Session, Plenary meetings*, 57th meeting).

ANNEX

Treaties Conflicting with Peremptory Norms of International Law and the Zurich-London "Agreements" by Andreas J. Jacovides

The purpose of the present paper is to consider the question whether international law recognizes the existence within its legal order of rules having the character of *jus cogens* i.e. rules from which the law does not permit any derogation by agreement between the parties *inter se* as distinct from *jus dispositivum* i.e. rules which the parties may freely regulate by such agreement.[1] This inquiry will touch upon such material as is available in the writings of scholars, the pronouncements of international tribunals and international practice, with particular emphasis on the work of the International Law Commission on the subject and the views expressed thereon by the representatives of States, both in the Sixth (Legal) Committee of the United Nations General Assembly and through written comments of Governments.

Certain considerations and reflections will be put forward regarding the theoretical justification for the existence of the *jus cogens* doctrine, its effect upon the law of treaties generally and the means for determining whether a given rule does or does not merit the description of *jus cogens* at a given time . . .

[. . .]

Historical background and recent developments

It may be readily accepted that the general rule of the law of treaties is that States are competent, by agreement between themselves, to conclude treaties on any subject whatsoever and thus regulate their relations with each other at discretion.

From a very early stage of the development of international law, however, this sweeping character of this rule did not remain unchallenged. As early as the middle of the eighteenth century, eminent writers such as Christian Wolff[2] and Emeric Vattel[3] were distinguishing between the necessary law, which nations cannot alter by agreement, and the voluntary law created by the will of the parties. Likewise, A. W. Heffter[4] declared, a century later, that treaties were void if their object was physically or morally impossible and by moral impossibility he understood that the object of the treaty was contrary to the ethics of the World.

In more recent times opinion among writers was more divided. Nineteenth century positivism had a significant effect and it was widely accepted that international law did not impose any restrictions upon the freedom of States to conclude any treaty irrespective of its object. Modern writers who, with various degrees of emphasis, have shared this view include such prominent scholars as Charles Rousseau,[5] Gaetano Morelli,[6] Paul Guggenheim[7] and G. Schwarzenberger.[8]

On the other hand, certain recent developments in international law, such as the conclusion of the Kellogg-Briand Pact of 1928 and the decisions of the Nuremberg and Tokyo tribunals and even more important, such fundamental landmarks in the direction of organized international society as the Covenant of the League of Nations and the Charter of the United Nations, have served to reverse this trend. Another such factor is the recent transformation in the composition of the society of nations through the emergence of a considerable number of new States which put their own imprint on the process of developing international law. All these factors have had a decisive effect in reviving and reinforcing the notion that, besides *jus dispositivum* rules which can be departed from by agreement, there exist certain rules and principles of general international law having the character of *jus cogens* from which the parties cannot derogate by agreement between themselves.

It has been persuasively argued[9] that the very fact of the existence of norms determining which persons are endowed with the capacity to act in international law, what intrinsic and extrinsic conditions must be fulfilled so that an international treaty may come into existence, what juridical consequences are attached to the conclusion of an international treaty, militates against accepting the view that the whole international law system is dependent on the agreement of the wills of States.

These rules of *jus cogens* do not exist in order to satisfy the needs of individual States but in order to serve the higher interests of the international community as a whole, and the ultimate justification for their existence is that they rest upon the common expression of the conscience of the international community.

Various terms have been used to describe this notion and to explain the basis upon which it rests. Lauterpacht, referring to the Covenant of the League of Nations, wrote in 1936 that ". . . the substance of its law differs so radically from other international conventions in its scope and significance as a purposeful instrument in the process of political integration of mankind as to deserve the designation of a 'higher law'. . .".[10] McNair writing in 1930 and referring both to the Covenant and to the Kellogg-Briand Pact, says[11] that these instruments created "a kind of public law transcending in kind and not merely in degree the ordinary agreements between States". These views, expressed in the inter-war years, would have equal, if not greater, validity in relation to the United Nations Charter. The terms "international public policy" and "international public order" (*ordre public*) have also been used to underscore the notion that these rules of *jus cogens* or peremptory norms are firmly based upon the conscience of mankind, that they represent some higher social needs and that they are the minimum of rules of conduct necessary to make orderly international relations possible.

Writers who have shared and promoted a position in favour of the existence of *jus cogens* include, in addition to Lauterpacht[12] and McNair[13] such eminent jurists as Balladore Pallieri,[14] Kelsen[15] and Tunkin.[16] The eminent Austrian international jurist Verdross[17] deserves a particular place among these writers. It now appears to be the general trend, even among those who previously held different views, with the notable exception of Schwarzenberger, to accept the notion of *jus cogens*.[18]

The issue of *jus cogens* received scant attention before international tribunals. The instances quoted where the matter was touched upon are not directly on point. These are the celebrated individual opinion of Judge Anzilotti in the *Austro-German Customs Union* case[19] (where he questioned whether there is not a contradiction in the fact of obliging a State to live and of putting it at the same time into a situation which renders its life extremely difficult—and see below, on the principle of sovereign equality) and of the dissenting opinion of Judge Schucking in the *Oscar Chinn* case,[20] where he stressed that the Court would never apply a convention the contents of which were contrary to *bonos mores*. In its Advisory Opinion concerning *Reservations to the Genocide Convention*[21] the Court, referring to the Genocide Convention,

[1] For bibliography, see generally Wright, 2., Conflicts between international law and treaties, AJIL, vol. 2 (1917), pp. 566-579; Lauterpacht, H., The Covenant as the "Higher Law", BYIL, 1936, pp. 54-65; Jenks, C. W., The conflict of law-making treaties, BYIL, 1953, pp. 401-453; Verdross, A. Von, Forbidden Treaties in international law, AJIL, vol. 31 (1937), pp. 571-577; Verdross, A. Von, *Jus dispositivum* and *Jus cogens* in international law, AJIL, vol. 60 (1966), pp. 55-63; Schwarzenberger, G, "International *jus cogens*", *Texas Law Review*, March, 1965, pp. 455-478; Suy, E., "Le *jus cogens* en droit international public", Conference de droit international, Lagonissi (Greece), 3-8 April 1966; Murty, B. S., *Jus cogens* in international law, International Law Conference, Lagonissi (Greece), 3-8 April 1966.

[2] Wolff, *Jus Gentium*, paras. 5 and 25 (1764).

[3] Vattel, *Le droit des Gens*, Introduction, paras. 9 and 27 (1758).

[4] A. W. Heffter, *Das Europäische Völkerrecht der Gegenwart*, 156 (4th ed., 1861).

[5] Rousseau, *Principes du droit international public*, 340-341 (1944).

[6] Morelli, *Nozioni di Diritto Internazionale* 37 (3rd ed., 1951).

[7] Guggenheim, *Traité de droit international public*, 57 (1953)—but see footnote (19).

[8] Schwarzenberger, *International Law*, 352-3, 425-7 (1957) and op. cit. footnote (1).

[9] Verdross, op. cit. footnote (1).

[10] Lauterpacht, op. cit., footnote 1.

[11] McNair, "The functions and differing legal character of treaties", BYIL 11 (1930), 112.

[12] See also Oppenheim-Lauterpacht, 8th edition (1955), p. 896 to the effect that "immoral obligations cannot be the object of an international treaty".

[13] See also McNair, *Law of Treaties*, 213-4 (1961).

[14] Balladore Pallieri, *Diritto internazionale publico*, 282 (8th ed., 1962).

[15] Kelsen, *Principles of international law*, 89, 323, 344 (1952).

[16] Tunkin, *Das Völkerrecht der Gegenwart*, 95-96 (1963).

[17] Verdross, op. cit. footnote (1).

[18] Suy, op. cit. footnote (1), p. 55.

[19] *P.C.I.J., Series A/B*, No. 41.

[20] *P.C.I.J., Series A/B*, No. 63, p. 149.

[21] *I.C.J. Reports*, 1951, 23.

"adopted for a purely humanitarian and civilizing purpose", commented that "the contracting States do not have any interest of their own: they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the Convention".[22]

The work of the International Law Commission and issues arising therefrom

The process of the acceptance of the *jus cogens* doctrine as part of contemporary international law was further promoted through the work of successive Special Rapporteurs of the International Law Commission on the law of treaties and culminated during the fifteenth session of the Commission in 1963. It will be recalled that the Commission, after extensive discussion of the subject[23] and after fully considering the various aspects of the text submitted by its latest Special Rapporteur, Sir Humphrey Waldock,[24] reached the unanimous conclusion that:

"A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". (Draft Article 37).[25]

The Commission also took the further step, which was only the logical corollary of its adoption of the draft Article cited above, of adopting a further draft Article, 45,[26] covering the case of the emergence of a new peremptory norm of general international law, through either custom or a general multilateral treaty, and its effect upon treaties:

"1. A treaty becomes void and terminates when a new peremptory norm of general international law of of the kind referred to in Article 37 is established and the treaty conflicts with that norm.

"2. Under the conditions specified in Article 46,[27] if only certain clauses of the treaty are in conflict with the new norm those clauses alone shall become void."[28]

The close study of the records of the Commission's debate of this matter,[29] the commentary accompanying the text,[30] the records of the debate in the Sixth (Legal) Committee of the General Assembly on the Commission's Report,[31] the comments of Governments[32] regarding draft Article 37, as well as the Special Rapporteur's comments as set out in his Fifth Report,[33] furnishes a wealth of evidence to demonstrate that the principle as stated in the draft Article meets with general approval, if not with complete unanimity.[34]

The examination of these records also reveals the significant role which the new States which came into existence subsequently to the Second World War, as well as the East European States,[35] played in helping establish the existence of this rule, although the contribution of the Latin American as well as of several Western European States is in no way underestimated. On the whole, it may be said that it is particularly the smaller and weaker States which have a greater interest in the recognition of the existence and the strengthening of a public order placing checks upon an unlimited freedom of contract, as opposed to a situation which, under the respectable guise of the unlimited freedom of contract, exposes them to the real danger of unequal and inequitable treaties under which the stronger State would, in the nature of things, take the lion's share.[36]

The rule which finds expression in draft Article 37 corresponds to the rule in municipal systems of law[37] to the effect that an agreement to commit a crime or one which is otherwise contrary to public policy is null and void and cannot be construed as conferring any rights upon the parties to it (*ex injuria non oritur jus*). The recognition on the part of the Commission of the existence of the equivalent rule in public international law constitutes a most constructive contribution by the Commission in pursuance of its mandate not only to codify but also to further the progressive development of international law. As was epigrammatically put by Dr. El Erian, in the course of the subsequent debate in the Sixth Committee of the General Assembly, "the recognition of the notion . . . marked a transition from classical international law to the modern law of the United Nations".

The Commission has been criticized for its formulation of draft Articles 37 and 45 on two grounds. Firstly, that they involve the creation of a new ground on which treaty obligations can be denied; and secondly, that they would furnish to third States the right to discuss the legal validity of agreements to which they are not parties and which normally would not be their concern. It is argued that particularly the former ground creates the great danger that, since the rules of *jus cogens* cannot be precisely identified and stated, the recognition of their existence enables every State wishing to denounce a treaty, to put forward a plea of nullity alleging the repugnance of such a treaty with *jus cogens*.

While this danger cannot be denied and the principle of *jus cogens* can indeed be abused, it is believed by the present writer that it can, and should, be minimized if not completely eliminated through as exact a delimitation of the rules of international law falling within the category of *jus cogens* as possible (see post) rather than by ignoring the existence of such rules altogether. In this respect the analogy with the equivalent municipal law rule is instructive: No one denies the existence in municipal law of rules of public policy even though these, too, are not always clearly and exactly defined or definable. It may of course be retorted that in the case of municipal law systems, whenever there arises a doubt as to whether in a given case such a rule does or does not apply, the matter can always be referred to and be settled by a competent tribunal.

There may indeed be a lot to be said in favour of making the determination as to whether a given situation is or is not covered by a rule of *jus cogens*, especially when the plea of nullity is contested by one of the parties, subject to the decision of an impartial tribunal. In his Report to the Commission, Lauterpacht phrased the relevant Article as follows:

"A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."[38]

Likewise, Verdross[39] had suggested that all disputes concerning the interpretation and application of a norm having the character of *jus cogens* must be submitted to arbitration.

It is axiomatic that if the rule of law among nations is to acquire its full meaning, the jurisdiction of an International Court (whether in its present or other form) ought to be universal and the means should be provided whereby its decisions would be enforced. International institutions, however, cannot be raised from the cooperative to the organic level until we have a society of States which is far more closely bound together than are the States of today. In the present imperfect stage of development of the international society, with the Court's jurisdiction dependent on the consent of the individual States and suffering from a variety of other inhibiting factors, it would, it is believed, be plainly

[22] For an extensive collection of material from the international jurisprudence, including references to individual and dissenting opinion, on the subject see Suy, op. cit. footnote No. (1), pp. 76-84.

[23] *Yearbook . . . 1963*, vol. I, pp. 62-78.

[24] A/CN.4/156.

[25] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9* (A/5509), p. 11.

[26] Op. cit., footnote 26, p. 23.

[27] Op. cit., footnote 23, p. 26.

[28] As is pointed out by the Special Rapporteur in the course of the debate in the ILC, the nineteenth century conventions for regulating the slave-trade were valid when drawn up but subsequently became void by the development of a new rule of international law prohibiting the slave-trade altogether.

[29] Op. cit., footnote 23.

[30] Op. cit., footnote 25.

[31] *Official Records of the General Assembly, Eighteenth Session*, Report of the ILC (item 69).

[32] A/CN.4/175 and Addenda.

[33] A/CN.4/183 and Add.1.

[34] While comments on the part of Governments were favourable, with several shades of enthusiasm, only the Government of Luxembourg was openly negative to the notion, while the Government of Turkey took also a negative but more guarded approach.

[35] Both of these categories of States are characterized by their own approach to international law. For a Western view of these approaches see e.g. Higgins, *Conflicts of Interest*, London, 1965, and Lissytzin, *International Law Today and Tomorrow*, New York, 1965.

[36] In the course of the discussion in the ILC on draft article 37 the distinguished Spanish jurist Dr. de Luna observed: "The contractual conception of international law, which did not recognize *jus cogens*, belonged to the time when international law had been only a law for the Great Powers. But modern international law has become universalized and socialized."

[37] A rule which may undeniably be described as a general principle of law recognized by civilized nations within the meaning of Article 38 of the Statute of ICJ.

[38] *Yearbook . . . 1953*, vol. II, p. 154.

[39] Op. cit., footnote 1.

unrealistic to tie the principle *jus cogens* to adjudication by the International Court and the International Law Commission acted in accordance with the hard facts of the international life of today.

The absence of compulsory adjudication, however, does not mean that international law in general, or its *jus cogens* in particular, lacks binding legal force. Moreover, there exist a number of other means for the peaceful settlement of disputes between States including, in addition to negotiation, conciliation, mediation and arbitration, recourse to the Security Council and the General Assembly of the United Nations. In particular, Article 14 of the Charter, which empowers the General Assembly to make recommendations for the peaceful adjustment of any situation regardless of origin, is certainly sufficiently broad to enable the General Assembly to pronounce itself upon disputes between Member States involving the inconsistency of treaty provisions with rules of *jus cogens*,[40] especially if such disputes are basically political in nature.

As for the second ground of criticism, viz. the possibility for third States to concern themselves with situations to which they were not parties, it may be said that this may have been well-founded in the past. However, it must be accepted that in an interdependent world intended to be regulated in a number of respects by such a fundamental instrument as the Charter of the United Nations, it would be anachronistic to claim that third States should have no voice when patent illegalities are perpetrated against one or more of the members of the society of nations.

Turning now to the question of what effect the conflict of a *jus cogens* rule has upon a treaty, the members of the Commission were unanimous in their view that the treaty becomes null and void *ab initio*, rather than simply voidable at the instance of one or more of the parties. The legal consequences of this view are far-reaching for "the consequence of voidance *ab initio* was simply that there was no treaty".[41] Likewise, Verdross[42] takes the view that the formal voidance of immoral contracts is unnecessary and that the burdened State has the right simply to refuse the fulfilment of such an obligation. It would therefore, appear that, at least according to these views, and in the absence of any provision in the Article for third party determination, such treaties as conflict with *jus cogens* can simply be taken as non-existent i.e. as not requiring any further act declaring such treaty to be not binding.[43]

The Commission, after considering the possibility of severance of the offending provisions from the rest of the treaty, under the conditions laid down in Article 46 of the Draft, took the view of the majority of its members who considered that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid and the sanction of nullity should extend to the whole transaction.

By contrast, in the case of a new peremptory norm emerging (Article 45, *supra*) the effect of the rule is not to render the treaty provision in question void *ab initio* but to invalidate it only from the date when the new rule of *jus cogens* was established i.e. to forbid further performance. Likewise, the Commission took the view that, under the conditions provided in Draft Article 46, severance is permitted in the case of Draft Article 45, with the result that provisions not affected by the emergence of the *jus cogens* rule in question would be regarded as still valid.

The relationship between Article 103 of the Charter and Article 37 of the International Law Commission's draft

The interesting question which arises in this connection is the relationship between the effect of Article 103[44] of the Charter of the United Nations and Article 37 (and 45) of the International Law Commission's draft. Reference to the preparatory work regarding Article 103 shows that the Article does not provide for the automatic abrogation of treaties conflicting with the Charter, but rather requires that obligations under the Charter shall prevail.[45]

In the course of the discussion of the International Law Commission's draft by the Sixth Committee of the General Assembly many representatives pointed out that Article 103, by proclaiming that obligations under the Charter prevailed over obligations under any other international agreement, had aided greatly in creating the *jus cogens* rule. Yet, as various representatives stated, its logical consequences had not been recognized, and it was that gap which the International Law Commission had filled by stating that an international treaty was void if it conflicted with a peremptory norm of international law.[46] The matter occupied again the attention of the Commission when, in its commentary on draft Article 63, it recognized the primacy of the rule in Article 103, in the context of the relative priority of incompatible treaty obligations. As the Special Rapporteur pointed out, however, while the Commission appreciated that there may be certain areas of overlap in the application of the *jus cogens* provisions of Articles 37 and 45 and of Article 103 of the Charter because certain provisions of the Charter, notably those of Article 2(4), are of a *jus cogens* character, it nevertheless considered the invalidity of a treaty under Articles 37 and 45 of the draft Articles, by reason of a conflict with a rule of the *jus cogens*, to be a distinct and independent question.[47] In other words, while Article 103 refers to *priority* or conflicting obligations, draft Articles 37 and 45 refer to *invalidity* of obligations—yet they may, and do, overlap in certain areas. While the writer shares the view of Sir Humphrey Waldock that not all rules contained in the Charter are necessarily peremptory norms and, conversely, there are peremptory norms that are not contained in the Charter, it is believed that the area of overlap is considerably greater than merely the principle contained in Article 2(4) of the Charter (see post).

The question of what rules of international law fall within the category of peremptory norms

While it appears that the principle of the existence of peremptory norms from which no derogation by treaty is permitted, has won overwhelming approval both within and outside the International Law Commission, the question of what specific rules of international law fit under this description, in other words, what is the exact juridical content of this principle, is considerably less clear.

The International Law Commission was unable to arrive at any generally recognized criterion by which to identify a general rule of international law as having the character of *jus cogens*. Certain examples were suggested by some of the members of the Commission "of the most obvious and best settled rules of *jus cogens*" in order to indicate the general nature and scope of the rule, and indeed some of these had originally appeared in the body of the draft Article as presented by the Special Rapporteur. These included, in addition to the case of the threat or use of force contrary to the principles of the Charter (a subject to which we shall return, see post), a treaty contemplating the performance of any act criminal under international law; a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate; treaties violating human rights; treaties violating the right to

[40] Indeed General Assembly resolution 2077 XX, on the question of Cyprus, furnishes a good illustration of the point. And see the statement of Mr. Paredes who, in the course of the debate in the International Law Commission on the more specific rule of a treaty imposed upon a State by the threat or use of force in violation of the principles of the Charter and consequently in violation of the relevant *jus cogens* rule, stated that, in the absence of compulsory international adjudication, "the only remedy would be . . . that the victim of aggression should be able to appear before the United Nations Security Council and declare the treaty void because of vitiation", *Yearbook . . . 1963*, vol. I, p. 61.

[41] Rosenne, op. cit., footnote 40, p. 55.

[42] Op. cit., footnote 1.

[43] This might indeed in some cases be too drastic a remedy and it might, when the illegality is disputed, strengthen the argument that the doctrine is subject to abuse. One might wonder whether, on the analogy of null marriages, it would not be appropriate for a formal act to take place in order to "take it off the book". In that case, however, it would seem that it would be for the party contesting the plea of nullity and relying on the treaty in question to prove its legality.

[44] Which provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[45] The Committee on Legal Problems, Committee 2, decided that "it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof. It has been deemed preferable to have the rule depend upon and be linked with the case of a conflict between the two categories of obligations. In such a case the obligations of the Charter would be pre-eminent and would exclude any other"—Report of the Rapporteur of Committee IV/2, United Nations document 933, IV/2/42, United Nations Conference on International Organizations, 12 June 1945.

[46] *Official Records of the General Assembly, Eighteenth Session*, agenda item 69, document A/5601, para. 18.

[47] A/CN.4/183/Add.1, pp. 23-24.

self-determination.[48] Some members of the Commission[49] stressed that the examples given should include unequal treaties.

In the end, however, the Commission, bearing in mind the comparatively recent emergence of these rules and the rapid development of international law, decided against including any specific examples and of leaving "the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals". The Commission reached this conclusion (*a*) because it thought that to include certain examples and not others might lead to a misunderstanding regarding the position of other cases not expressly mentioned; and (*b*) because it feared that, if it were to draw up, even on a selective basis, a list of the rules meriting the description of *jus cogens*, it might find itself engaged in a prolonged study of matters which did not fall within the ambit of the law of treaties. It may well be that the Commission, in the particular circumstances of its work, acted wisely in adopting this cautious approach. While the first reason given is not a very convincing one (it would always be possible to furnish an illustrative list of examples, thereby giving concrete expression to the principle generally stated in the draft Article, and to stress that this is not an exhaustive list) the second reason, which in any case is connected with the first, presents a much more real problem. As was pointed out in the course of the Commission's debate,[50] the problem, reduced to its simplest terms, was how to define illegality in international law and this, in view of the widely divergent political theories and conflicting interests involved, is indeed a formidable task[51] if the unanimity which prevailed in the adoption of the principle was to be preserved. The danger of opening a Pandora's box of disagreements and the consequent weakening of the very principle which was so painstakingly reached by unanimity is only too clearly visible to be ignored.

At the same time the impression should not be permitted to be created that the notion of *jus cogens* is merely a philosophical or theoretical idea devoid of any real meaning. Nor can the suggestion be entertained that the principle so clearly formulated by the Commission means all things to all people but has no practical significance in present day international law. The almost unanimous reception of the principle by the representatives of Governments[52] militates against any such cynical evaluation of the Commission's work on this subject—an evaluation which offends the legitimate expectations of the vast majority of the members of the international community and outrages the social conscience of mankind upon which, in the last analysis, the notion of *jus cogens* ultimately rests.

It is therefore to be regretted that the difficulties which confronted the Commission prevented it from going the full way and from spelling out the content of the principle it enunciated, thereby completing the process which it had so admirably initiated and advanced. The door is left open to the danger on the one hand of too broad a definition of what constitutes *jus cogens* with the consequent risk of abuse and stretching the principle to the point of breaking and, on the other hand, to too narrow or restrictive a definition thereby robbing the principle of any real meaning and negating its effect.

The question arises whether there exists no other body within the machinery of the organized international society of today, which might usefully undertake the task of the point where the International Law Commission left it. One such possible forum which comes readily to mind is the Sixth (Legal) Committee of the General Assembly. If one bears in mind that *jus cogens* is formed through the expression of the collective conscience of the community of nations there might be a lot to recommend to the Sixth Committee—where, unlike the International Law Commission, all Member States are represented—acting possibly through a special committee, whereon States would be represented by jurists, to undertake the task of defining what rules of general international law constitute peremptory norms for the purpose of the *jus cogens* doctrine. Undoubtedly the Committee would be faced by the same real difficulties as the Commission was. Likewise any resolution, or declaration, that it might be able to arrive at by the requisite majority might be open to the objection that it did not itself constitute a source of law and was not binding. Nonetheless any such resolution, especially a unanimous or near-unanimous one though not in itself a source of law, might be taken as confirming the existing law on the subject and would in any case carry considerable weight as the expression of the general opinion of States.[53]

Another possibility might be offered by the proposed Conference of Plenipotentiaries to be convened in 1968 in order to adopt a multilateral convention on the Law of Treaties.

Quite independently, however, of these possibilities there is no doubt that in the light of the principle unanimously adopted by the Commission and overwhelmingly approved by States and by international jurists, there exists considerable material upon which to base the conclusion that there exist today a considerable number of rules of general international law which have a legitimate claim to be regarded as peremptory norms (*jus cogens*). Indeed several were mentioned in the Commission's discussion and are referred to above.[54] The present writer shares the view of Mr. Rosenne who stated in the course of the International Law Commission's discussion[55] that "there existed elements which made it possible to determine with a reasonable degree of accuracy whether a given rule constituted *jus cogens*".

[48] Op. cit., footnote 25.

[49] Mr. Lachs and Mr. Tunkin, op. cit., footnote 23.

[50] Mr. Amado, op. cit. Footnote 23.

[51] As the efforts to define aggression and, more recently, the current efforts in the Sixth Committee and its Special Committee to arrive at an agreed formulation of the principles of international law governing friendly relations and cooperation in accordance with the Charter of the United Nations, illustrate.

[52] Op. cit., footnotes 31 and 32.

[53] See the statements of Mr. Yasseen and Mr. Barztoš, also shared by Mr. Waldock, on the effect of General Assembly resolution as expressing rules of *jus cogens* (op. cit., footnote 23).

[54] It is sometimes stated (e.g. Verdross, op cit., footnote 1), that treaties encroaching upon the rights of third States are contrary to *jus cogens*. It appears the better view, now recognized also by Verdross, that this falls properly under the *pacta tertiis nec nocent nec prosunt* rule. While these treaties are illegal if the third State does not give its consent, in the ordinary case it would not be contrary to *jus cogens*.

[55] Op cit., footnote (24).

State succession and its impact on the nationality of natural and legal persons and State succession in respect of membership of international organizations, by Mr. Vaclav Mikulka

Introduction: Historical review of the work of the Commission on the topic of State succession

1. At its first session in 1949, the Commission listed the topic "Succession of States and Governments" among the 14 topics selected for codification. The topic was later divided into three :

(*a*) Succession in respect of treaties;

(*b*) Succession in respect of rights and duties resulting from sources other than treaties; and

(*c*) Succession in respect of membership of international organizations.

2. Questions falling under the first heading, studied by the Commission from 1967 to 1974, were resolved by the adoption in 1978 of the Vienna Convention on Succession of States in respect of Treaties.

3. In view of its breadth and complexity, under the second heading the topic was narrowed down to the economic aspects of succession, namely to succession in

respect of State property, archives and debts. This was studied by the Commission from 1968 to 1981 and led to the adoption in 1983 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

4. A study of the third topic has never been undertaken by the Commission.

1. State succession and its impact on the nationality of natural and legal persons

5. The problem of the nationality of natural and legal persons was part of the second heading of the topic of State succession as originally proposed by the Commission. Some preliminary comments on it were made in the Commission during the debate on the first report by the Special Rapporteur at the twentieth session of the Commission.[1] Nevertheless, nationality was not included among the issues coming under the narrowed heading.

(a) *Nationality laws of successor States*

6. According to the prevailing opinion, State succession does not result in an automatic change of nationality. It is the prerogative of a successor State to make its own determination as to whom it claims as its nationals, and to indicate how nationality is acquired.

7. In this connection, reference is made to the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, article 1 of which provides that:

> It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

8. Also of relevance to this issue is the 1928 Code of Private International Law (Bustamante Code),[2] article 13 of which states:

> In collective naturalizations, in case of the independence of a State, the law of the acquiring or new State shall apply, if it has established in the territory an effective sovereignty which has been recognized by the State trying the issue, and in the absence thereof that the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference.

Article 20 states that:

> Change of nationality of corporations, foundations, associations and partnerships, except in cases of change of territorial sovereignty should be subject to the conditions required by their old law and the new.
>
> In case of change in the territorial sovereignty, owing to independence, the rule established in Article 13 for collective naturalizations shall apply.

In addition, there are a number of publications relevant to this issue.[3]

9. The legislative competence of the successor State must be exercised within the limitations imposed by general international law as well as international treaties. These limitations have different characteristics and are derived from:

(*a*) The principle of effective nationality, according to which, for nationality to be acknowledged by other States, there must be a real and effective link, a genuine connection, between the State and the individual concerned;[4] and

(*b*) The protection of human rights which makes questionable the techniques leading to the statelessness or any kind of discrimination. In this regard, mention should be made of article 15, paragraph 2, of the Universal Declaration of Human Rights, where it is stated that

> 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Mention should also be made of article 9 of the United Nations Convention on Reduction of Statelessness, prohibiting the deprivation of nationality on racial, ethnic, religious or political grounds.

(b) *International treaties concerning nationality in cases of State succession*

(i) Criteria for the *ipso facto* acquisition of nationality

10. There were many cases in which the problem of criteria and other conditions for the acquisition of nationality of a successor State was solved by an international treaty, mainly on the basis of the criterion of the domicile or habitual residence. Examples are to be found in articles 4 and 6 of the Versailles Treaty between the Allied and Associated Powers and Poland, and in some other treaties.[5]

(ii) The loss of the predecessor's nationality

11. The peace treaties following the First World War contained nationality provisions that were similar to the Versailles Treaty. At the same time, they provided for the recognition by the conquered States of a new nationality acquired *ipso facto* by their former nationals under the laws of the successor State and for the consequent loss of their allegiance to their country of origin.[6]

12. According to other instruments, the transfer of the territory does not necessarily result in the automatic acquisition of a new nationality and the loss of the original nationality. A case in point is article 4 of the Convention on Nationality. This position, defended by some authors, is rejected by others.[7]

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[1] See *Yearbook . . . 1968*, vol. II, pp. 114-115, document A/CN.4/204, and document A/7209/Rev. 1, pp. 220-221, paras. 73 and 78.

[2] League of Nations, *Treaty Series*, vol. LXXXVI, p. 111.

[3] See R. Graupner, *Nationality and State Succession, Transactions*, 1946; Hans Kelsen, "Théorie générale du droit international public", *Recueil des cours . . . 1932-IV*, vol. 42, pp. 314 and 325-327; Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed. (Germantown, Md., Sijthoff-Noordhoff, 1979), p. 242; and Lucius Caflisch, "La nationalité des societés commerciales en droit international privée", *Annuaire suisse de droit international*, vol. XXIV (1967), p. 155.

[4] See *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 22-23. See also the debates in the Commission on elimination and reduction of statelessness, *Yearbook . . . 1953*, vol. I, 212th, 213th, 217th and 220th meetings.

[5] "Laws concerning nationality", United Nations, *Legislative Series* (ST/LEG/SER.B/4), pp. 590 et seq.

[6] Ibid., pp. 586-589.

[7] See Eric Castren, "Aspects récents de la succession d'États", *Recueil des cours . . . 1951-I*, vol. 78, p. 380 *et seq.*, especially p. 487.

(iii) The right of option

13. The right of option was provided for in an important number of international treaties, including several of those mentioned above or in instruments related thereto. In exceptional cases, this right was granted for a considerable period of time during which the affected individuals enjoyed a kind of dual nationality. In this regard, see the Evian Declaration (Algeria-France) of 19 March 1962.

14. For the majority of authors the right of option can be deduced only from a treaty. Nevertheless, some authors tend to assert the existence of an independent right of option as an attribute of the principle of self-determination.[8]

(c) *Problems arising in the recent State practice*

15. After the Second World War, the practice of States which became independent while remaining within the British Commonwealth, was to base the automatic acquisition of nationality on the technique of combining the *jus soli* and *jus sanguinis* criteria, supplemented in a few instances by the residence criterion. For those affected by the automatic acquisition of nationality, no option was provided. This practice had the advantage of avoiding disputes over nationality by reducing the possibilities of dual nationality and, at the same time, minimizing the possibility of statelessness.

16. The French system of acquisition of nationality did not have the same effect. The new States drew largely on the techniques of the French 1945 *Code de la nationalité*, which did not always fit the situation of a newly independent State. Moreover, as each State chose to test for "genuine links" according to its own particular inclinations, various nationality laws overlapped or left lacunae, thus favouring dual nationality or statelessness.[9]

17. Dismemberment of the Soviet Union gives rise to a number of problems as far as the nationality laws of different new States are concerned. The refusal of certain republics which re-established their independence after 1990 to grant nationality to the ethnic Russian population settled there during several decades of large-scale population migration between different republics of the former Union has created uncertainty in the legal status of hundreds of thousands of individuals.[10]

18. The situation could be even worse in some new States born on former Yugoslav territory where the population is ethnically mixed, and the armed conflict is accompanied by "ethnic cleansing".

19. In Czechoslovakia, which is going through the process of dissolution, the problem could be easier due to the existence of separate Czech and Slovak citizenships since 1969, linking each Czechoslovak national to one of the two constituent republics, and thanks to a quite liberal policy allowing for change of citizenship together with change of the habitual residence.

20. The transition of Hong Kong from British to Chinese rule as of 1 July 1997 represents another problem concerning the status of the inhabitants.[11]

21. The recent tendency to accentuate ethnic origin when determining the criterion for granting the new State's nationality to its inhabitants, and to ignore the importance of the domicile criterion, is an alarming sign. This approach not only favours statelessness, but in many respects is questionable on grounds of fundamental human rights standards.

(d) *The principle of continuous nationality*

22. The rule of the continuity of nationality is a part of the regime of diplomatic protection. According to this rule, it is necessary that from the time of the occurrence of the injury until the making of the award, the person on whose behalf the claim is made must uninterruptedly hold the nationality of the State bringing the claim forward. The essence of the rule is to prevent individuals from choosing a powerful protecting State by changing nationality.

23. No clear answer is provided either by practice or scholarship to the question of whether the rule has a place in cases of involuntary changes brought about by State succession. There are good reasons to believe that in the case of State succession the rule may be modified.

24. In this connection, reference is made to the *Barcelona Traction, Light and Power Company, Limited* case,[12] and to the *Panevezys-Saldutiskis Railway* case.[13] Reference is also made to the *Pablo Najera* case, where it is stated:

Dans le cas de changements collectifs de nationalité en vertu d'un titre de succession d'États, la situation juridique doit être appréciée d'une manière beaucoup moins rigide que ne le fait généralement la pratique arbitrale dans les hypothèses normales de changement individuel de nationalité par le fait volontaire de l'intéressé.[14]

(e) *The possible outcome of the work*

25. The comprehensive examination of State practice should reveal whether a set of principles concerning

[8] See Joseph L. Kunz, "L'option de nationalité", *Recueil des cours ..., 1930-I*, vol. 31, pp. 109 et seq. and "Nationality and option clauses in the Italian peace treaty of 1947", Editorial Comment, AJIL, vol. 41, No. 3, 1947, pp. 622 *et seq.*

[9] See Karl Zemanek, "State Succession after decolonization", *Recueil des cours ..., 1965-III*, vol. 116, pp. 181 et seq., especially pp. 272-277.

[10] See George Ginsburgs, "From the 1990 law on the citizenship of the USSR to the citizenship laws of the successor republics (part 1)", *Review of Central and East European Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, vol. 18, No. 1 (1992), p. 1.

[11] See Roda Mushkat, "The transition from British to Chinese rule in Hong Kong: a discussion of the salient international legal issues", *Denver Journal of International Law and Policy*, vol. 14, No. 2 and 3 (1986), p. 171 and Christine Chua, "The Sino-British agreement and nationality: Hong Kong's future in the hands of the People's Republic of China", *UCLA Pacific Basin Law Journal*, vol. 8, No. 1 (1990), p. 163.

[12] *I.C.J. Reports 1970*, p. 3.

[13] *P.C.I.J., Series A/B, No. 76*, p. 4. See also *Annuaire de l'Institut de droit international, 1931*, vol. 36, No. II, pp. 201-212, ibid., vol. 37, pp. 479-529 and ibid., vol. 51, No. II, p. 261; and Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international* (Paris, Presses universitaires de France, 1990), pp. 19-30 and 111-118.

[14] United Nations, *Reports of International Arbitral Awards*, vol. V (Sales No. 1952.V.3), p. 488.

nationality in cases of State succession could be identified.

26. The clear statement of minimum standard criteria for *ex lege* acquisition of nationality could provide useful guidelines to legislators of new States that are in the process of drafting laws in the matter.

27. It could also facilitate the role of third States as far as the application of international treaties between them and a successor State is concerned. By virtue of the customary rules of international law, a large number of treaty rights and obligations are automatically binding on the successor State. The application of many such treaties directly concerns individuals, or more precisely nationals of the States parties. Sometimes there is a need for the application of these treaties even before the nationality law is adopted by the successor State. Thus a "preliminary" determination of the nationality of individuals or moral persons residing in the territory where the change of sovereignty occurred becomes the precondition for the continued application of the treaties in question.

28. The possible outcome of the work of the Commission on this subject could be a study in the form of a report or a draft declaration to be adopted by the General Assembly. The drafting of a convention, on the other hand, might face the risk of the same kind of problems the Commission faced during the work on the previous State succession topics (such as lengthy codification work, the problem of applying the convention to new States which are not parties to it, and the like).

2. State succession in respect of membership of international organizations

29. The last of the three headings on the topic of State succession entitled "Succession in respect of membership of international organizations" has never been studied by the Commission. However, the secretariat did prepare a memorandum on the problem of succession of States in relation to membership in the United Nations and submitted it to the Commission in 1962.[15] There were only a few significant cases at that time and the memorandum focused on the admission of Pakistan to the United Nations in 1947, the formation of the United Arab Republic in 1958, Syria's leaving that union in 1961 and the admission of Mali and Senegal in 1960.

30. The legal rules applicable to States coming into existence through division of a State Member of the United Nations were formulated by the Sixth Committee, during the second session of the General Assembly.[16]

31. Recently, there were several new cases of State succession in which the problem of membership in international organizations, or rather problems derived from the predecessor State's membership emerged. While in the case of the unification of Tanzania and Zanzibar, of Yemen or Germany, these problems went virtually unnoticed by the international community, they were discussed in connection with the dismemberment of the Soviet Union and Yugoslavia. They are acute again as a result of the dissolution of Czechoslovakia.

32. The problem of the relationship between the States concerned and the international organizations in the case of State succession has several aspects:

(*a*) The membership of a successor State in an international organization;

(*b*) The impact of the territorial changes on the membership of a predecessor State in an international organization in cases where the predecessor continues to exist after the change;

(*c*) The division between successors, or the predecessor and successor(s), of the rights or obligations resulting from the predecessor State's membership in the organization;

(*d*) The status of the military and other observers, as well as national units of a predecessor State taking part in peacekeeping operations, etc.; and

(*e*) The validity of certificates, licences, etc., issued to the nationals of a predecessor State on the basis of its membership in the organization.

(a) *The membership of a successor State in an international organization*

33. The prevailing opinion is that membership of international organizations is a "personal" right to which, in principle, succession is not possible. According to this view, new States which emerge from territorial changes must acquire membership on their own behalf, if they so desire.

34. Nevertheless, there were considerable differences in the practice depending on the character of the territorial change. For example, unions formed from former member States automatically became members of those international organizations in which their component parts were members before the merger. The number of these cases, nonetheless, does not affirmatively establish whether the membership of all component parts or just one of them is required.

35. International organizations with less rigid membership requirements, like the Universal Postal Union in Bern, the Paris Union or the Hague Conference on Private International Law, do permit succession even in cases where States are born from the dissolution of a former member State or through secession. For pragmatic reasons, succession in respect of membership in the United Nations was permitted after the dissolution of the United Arab Republic.[17]

[15] *Yearbook ... 1962*, vol. II, p. 101, document A/CN.4/149 and Add. 1.

[16] Ibid., see also *Official Records of the General Assembly, Second Session, First Committee*, document A/C.1/212, annex 14 (*g*), pp. 582-583.

[17] See *Yearbook ... 1962* (see footnote 15 above); Zemanek, loc. cit., pp. 244-252; and the note by the Permanent Bureau of the Hague Conference on Private International Law, doc. L.C.A. No. 38 (92) of 23 September 1992, which states, *inter alia*:

"... the Republic of Slovenia having participated in prior sessions both within the framework of the Serbo-Croat-Slovene State (Fifth and Sixth sessions) and as part of the Socialist Federal Republic of Yugoslavia, a country which was itself admitted as a successor

(*Continued on next page*)

36. Some international organizations provided for the membership or associate membership of former dependencies possessing international personality. As the personality of the new State was identical with that of the former dependency, the former membership or associate membership remained unaffected. Although there was no automatic upgrading to full membership, the organizations concerned nevertheless worked out pragmatic solutions for a smooth transition in order to avoid an automatic lapse of associate membership upon accession to independence.[18]

(b) *The impact of the territorial changes on the membership of a predecessor State*

37. The member State from which the new State has seceded or the member State which is joined by another State or territory retains its membership by virtue of the identity of its legal personality, although the rights and obligations deriving from its membership may change.

38. Several questions connected with it, however, remain unanswered. They concern:

(*a*) The criteria for determining the identity of the legal personality of the member State, i.e. the status of the predecessor State;

(*b*) The possibility for the organization to deny, under certain conditions, the predecessor State's right automatically to continue its membership in the organization itself or in its subsidiary bodies with full representation;

(*c*) The legal effects of an agreement between the predecessor State and successor State or States concerning the continuation of membership in international organizations;

(*d*) The obligation of the predecessor State to issue new credentials to its representatives in the organization (see, for example, the case of India's membership in the United Nations after the secession of Pakistan); and

(*e*) The right of the predecessor State to maintain a special status within the organization (see, for example, the seat for the Russian Federation in the Security Council), etc.

39. In this connection, reference is made to a number of United Nations documents.[19]

(c) *The division between successors or the predecessor and successor States of the rights and obligations resulting from the predecessor's membership in the organization*

40. The rights and obligations resulting from membership in the organization have, in principle, a "personal" character which lapses with the membership itself (or remains entirely with the predecessor State which continues to be a member State of the organization), as for example the right to participate in meetings, to vote, and so on. Nevertheless, some rights and obligations deriving from the predecessor State's membership are different in nature and, in principle, could be shared by the successor States or the predecessor and successor States. While this sharing of the rights and obligations can be envisaged in a situation where successor States join the organization as new members, it cannot be expected where the successor States decide not to join.

41. The following are examples of such rights or obligations :

(*a*) The arrears of the predecessor's contributions to the organization's budget or to other funds;

(*b*) The contributions by the predecessor to the funds of the organization in the form of credits or advances (e.g. United Nations Working Capital Fund) or non-reversible deposits (e.g. the entry fee under art. XXVIII of the Convention establishing an International Organization of Legal Metrology (1955));

(*c*) Shares in the property of the organization; and

(*d*) Projects in progress where the predecessor State is a beneficiary of or contributor to the project.

(d) *The status of military units and military or other observers taking part in peacekeeping operations, etc.*

42. The interaction between international organizations and their member States is becoming more all-embracing and includes various types of involvement by the member States in activities undertaken by the organization. An unexpected termination of the membership status resulting from State succession on the part of a State providing personnel for an observer or other mission or a unit for a peacekeeping operation may give rise to problems concerning:

(*a*) The admissibility of the continued participation of the personnel (unit) in the mission (operation); and

(*b*) The responsibility for the command and financing of the unit.

(*Footnote 17 continued*)

member of the Conference to the Serbo-Croat-Slovene State ... falls within the coverage of the first paragraph of Article 2 of the Statute ... Nonetheless, it is possible that some States Members of the Conference do not automatically share this point of view and think that Slovenia falls within the framework of Article 2, paragraph 2, and thus ought to be subject to the procedure for admission ..."

[18] See resolution WHA14.45, World Health Organization, Fourteenth World Health Assembly, *Official Records*, New Delhi, 7-24 February 1961, No. 110, Part I, p. 19 and Food and Agriculture (FAO) Report of the 10th Session of the Conference, 31 October-20 November 1959 (FAO C59/Report), pp. 266-268.

[19] See General Assembly resolution 47/1 concerning the membership of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations and its participation in the work of the General Assembly, and the letter of the Legal Counsel of the United Nations, dated 29 September 1992, concerning this issue (*Official Records of the General Assembly, Forty-seventh Session, Annexes*, agenda item 8, document A/47/485).

See also Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan of 6 August 1947, document A/C.6/161, *Official Records of the General Assembly, Second Session, Sixth Committee*, Annex 6c, pp. 308-310; or Alma Ata Declaration of 21 December 1991 between 11 republics of the former Soviet Union concerning the continuation of the membership of the Russian Federation in the international organizations in which the Soviet Union was previously a member (A/47/60-S/23329, annex II); and the United Nations Press Release PM/473, 12 August 1974, concerning the submission of new credentials of the representative of India in the Security Council and the Economic and Social Council: *Yearbook ... 1962*, p. 102 (see footnote 15 above).

(e) *The validity of certificates, licences, etc., issued or required by the international organizations*

43. There are different categories of certificates, licences and other documents issued or required by the specialized agencies or other international organizations in respect of nationals of their member States participating in specific activities, such as civil aviation, maritime navigation, and so forth. The validity of these documents vis-à-vis third States depends on the membership of the State in the international organization. There is a need to find pragmatic solutions which could reduce the negative impact of even a short interruption of the State's membership in the international organization on account of State succession.

3. POSSIBLE OUTCOME OF THE WORK

44. The analysis by the Commission of the practice of international organizations concerning the consequences of State succession on the relationship between those organizations and the States concerned could lead to the drafting of a report containing general outlines of solutions to various categories of problems which in many respects are common to a large number of organizations.

45. Such a report could per se have a unifying effect on the practice of international organizations. It could contain some recommendations which international organizations could take into account not only when drafting or amending their respective instruments or rules and regulations but also when seeking to solve any specific case.

46. This matter is not appropriate for codification in the form of a universal convention. Harmonization efforts are limited by the specific characteristics of each international organization as reflected in its constitution, other basic instrument or in its rules and regulations.

The law concerning international migrations, by Mr. Guillaume Pambou-Tchivounda

1. The subject of migration would at first glance seem to obey a logic that excludes law. Migration is inherent in the life of species (plant, animal, human); it is their "natural" means of survival, whatever the kingdom to which they belong.

2. Between migration and law, there is as it were a relationship of precedence, of chronology, which marks the assertion of the former as a specific phenomenon before the potential, and therefore subsequent, application of the latter to it becomes possible. The mutual exclusiveness of the two is thereby rendered less absolute. Migration, particularly human migration, whether it takes place within or beyond the natural confines of States, is a social phenomenon. It therefore falls within the operational scope of the law. The propensity of the legal phenomenon to subsume the migratory phenomenon thus appears as natural as the latter's vitality, which constantly impels it to free itself from the domain of law.

3. The pairing is as old as the hills. The oldest international treaty, concluded between the Pharaoh Ramses II and the King of the Hittites—the text of which is still graven on the walls of Karnak in Thebes—shows that 4,000 years ago, migratory movements were already governed by international agreements, that the conditions to which migrant workers were subject, in time of peace as in time of war, were the subject of regulation. The topic of population migration between sovereign, independent communities and its relationship with the law is a truly ancient one.

4. The contemporary age has in no way changed the structure of these relationships. Yesterday, international migration involved the political and legal orders of sovereign communities. Today it involves the order of the State and, as a corollary, that of those entities that owe their existence to the will of States.

5. The competence *ratione personae* of the State is exercised every time that, owing to a (chance) incident, the applicable rule has to be determined: that of the State of origin, of the State of transit, or of the receiving State. International migration law thus has its historical setting: it is first strongly national in content before assuming an international dimension, particularly through its application in litigation or concerted approaches to its formulation. The periods of freedom or restriction of international migration that have punctuated the development of law-making on the subject from the sixteenth century to our own time illustrate the important place occupied by States, in that those who choose, or are compelled, to "migrate" are, at the outset, nationals of a State. They will fall within the competence *ratione personae* of the receiving State, sometimes by passing in transit through the territory of a third State.

6. Only very recently has international law, particularly treaty law, come to include the regulatory framework for international migration.

7. There are many factors which have influenced this outcome. Everywhere, the State has progressively established itself as the exclusive framework for determining the identity of populations without, however, managing to keep them firmly settled. The technological revolution, through the development of means of mass transport (by air, land and sea), has brought men once separated from each other by great distances increasingly closer together. State poverty, the product of unequal development on the planetary scale, has compelled many individuals from the southern hemisphere to emigrate to the North in the hope of finding their happiness there. In terms of the initial motivation, there is no real difference between such South-North migration in search of a better life and the mass migrations from Europe to the New World and Australasia in the nineteenth century. State violence will impel sizeable population masses out through loopholes

the length of the boundary walls. The survival of the species points up the element of fiction in all State power: it explains the universal dimension the refugee phenomenon has acquired today. The advent of first-generation international organizations has contributed to the production of a body of norms, based on humanitarian concerns (for refugees from Europe) and social concerns (by laying the foundations for the legal status of migrant workers), which international resettlement organizations, wherever they may have been established (Europe, Africa, the Americas), will perfect and develop.

8. The legal framework for international migration therefore exists, but the geopolitics of migrations do not have the appearance of a completed construct.

9. The framework lacks conceptual homogeneity with regard to its subject matter. The term "migration" does not appear once in the Charter of the United Nations, though it was adopted well after international migrations had begun to occur and the practice of the law on the subject was sufficiently established. Before the nineteenth century, there was no universally recognized international definition of the term "migrant". After the First World War it was to national legislation that the International Labour Office had to turn to in order to extract a definition of immigration and emigration. The migratory phenomenon as a whole cannot be considered without reference to a recommendation of the 1922 International Labour Conference which covers the phenomena of emigration, immigration, repatriation, and the transit of emigrants upon leaving and returning.

10. However, international migration law does not offer a general concept of the phenomenon to which it applies. Its scope of application is fragmented. It involves spontaneous migration, legally organized or authorized migration, forced or imposed migration, political migration, economic migration, seasonal migration, annual or multi-annual migration, continental migration and transoceanic migration.

11. Moreover, the disputed issue of whether migration problems are a domestic or an international concern has not been resolved. Undeniably, some of them involve countries of emigration only (nationality, passport, health), while others involve countries of immigration only (entry, exit, naturalization of migrants): these are domestic concerns. There are, however, questions that are international in scope, such as transit and transmigration; applicability of national legislation in foreign territory; problems specific to citizens already living in foreign territory as refugees, or who have been expelled or are stateless; and aliens working outside their countries but usually intending to return.

12. This fragmentation of the issue of international migrations necessarily calls for an overhaul of the applicable regime from a unified, global perspective. From the standpoint of how it would be enacted, this regime needs to be harmonized. International coordination structures would guarantee its effective implementation.

13. Treaties, general principles, relevant national legislation or court decisions concerning international migration law have been compiled in two volumes by Richard Plender.[1] The second volume, which expands on the first, not only catalogues national and international jurisprudence, but also legislation of States, and treaties and other international instruments from 1793 to 1986. These two works form a basic reference to this topic.

14. Since the reprinting of these two volumes, a number of national or international texts have appeared:

(a) *Treaties*

Franco-Spanish agreement of 8 January 1988 concerning clandestine immigration;

Agreement between the Government of the Kingdom of Spain and the Government of the French Republic concerning admission of illegal aliens at border posts;

Convention on the determination of the State responsible for reviewing an application for exile presented in one of the States members of the European Community, signed in Dublin on 15 June 1990;

Convention implementing the Schengen Agreement of 4 June 1985 concerning the gradual elimination of common border controls, signed on 19 June 1990;

Treaty on European Union (Maastricht Treaty), signed on 7 February 1992.

(b) *National legislation*

United States Immigration Act of 6 November 1986 (entered into force on 5 May 1987);[2]

"Measures" aimed at limiting the number of asylum-seekers in the Federal Republic of Germany adopted by the (West German) Parliament on 13 November 1986;[3]

Italian law of 27 January 1987 fixing the "norms regarding placement and treatment of workers who are not from a member State of the Community and against clandestine immigration".

(c) *Court decisions*

Constitutional Council (France) decision of 25 June 1991 concerning the law authorizing the adoption of the convention implementing the Schengen Agreement;

Court of Justice of the European Communities, 9 July 1987 (joint cases 281/85, 283-285/85 and 287/85).

(d) *Miscellaneous*

Report of the Committee on Legal Affairs of the European Parliament, adopted on 23 February

[1] *Basic Documents on International Migration Law* and *International Migration Law, Second edition*, Richard Plender, ed., Dordrecht, Martinus Nijhoff Publishers, 1988.

[2] *United States Statutes at Large*, vol. 100, 1986, Part 4, Law No. 99-603, p. 3359.

[3] See *Verhandlungen des Deutschen Bundestages*, vol. 140, summary records of Bundestag meetings for the period from 12 November to 11 December 1986.

1987, on the limitations to be imposed on the exercise of the right of asylum.

15. A body of literature exists on this topic.[4]

16. Whether it culminates in a study, a report or a draft convention, the inclusion of the item "International migration law" in the Commission's programme of work should not meet with any major objection. The Commission's task of submitting specific studies or reports to the General Assembly is, however, not as well known to the public—even the specialized public— as its task of drafting conventions.

17. There is nevertheless one misunderstanding that needs to be cleared up. Regardless of any formal particularities it may have, the work of the Commission is always the end-product of lengthy studies. The method of work is one thing; its principle is immutable. The nature of the final results, which is determined by the interest the subject matter generates at a given moment and therefore by a decision of the Commission itself, is another matter entirely.

18. Reports and draft articles are not two unrelated species. There are topics and subtopics on which the Commission has submitted final reports. Others, by contrast, have gone beyond that stage to attain the status of draft articles. Without necessarily pursuing the same objective (to inform and codify), a draft convention cannot be prepared within the framework of the Commission without a report, and, in that context, special rapporteurs work for an extended period, over the long term, unlike rapporteurs whose mandate is limited in time. From this standpoint, this "outline" or "summary" on the topic of international migration law belongs very much in the report genre, which clearly distinguishes it from that of the draft convention.

19. Lastly, regardless of their purpose (and because of it), the formal structure of these two genres is not the same. Any type of report may be written on international migration law, but not just any draft convention.

20. There might be hesitation in embarking on the preparation of draft articles on international migration law, considering that it is a topic governed by international law on which, therefore, specific regulations already exist: there would be no need for progressive development or codification.

21. Yet, there is no general legal concept of international migration. The development of the topic of international migration has taken place somewhere between international humanitarian law and international social law. The implementation of the rules defined by these two disciplines has remained narrowly subordinate to the authority of various national policies, unilaterally defined by States in the light of their own approach to the migration phenomenon, even when they claim to accept the primacy of international law because they belong to resettlement organizations. These are generally closed-door policies which affect the rights of other States and individuals; rights for general protection mechanisms need to be defined. A concept of international migration that would win the support of States and international organizations

[4] (a) *Books*: Pierre Georges, *Les migrations internationales* (Paris, Presses universitaires de France, 1976); Guy S. Goodwin-Gill, *International Law and the Movements of Persons between States* (Oxford, Clarendon Press, 1978); and Richard Plender (see footnote 1 above).

(b) *Studies*: Jorge Balán, *Las migraciones internacionales en el Cono Sur* (Geneva, CIM, 1985); Ramiro Cardona, *Migraciones internacionales de los paises del Pacto Andino* (Geneva, CIM, 1985); Suzy Castor, *Migracion y relaciones internacionales (El caso Haitiano-Dominicano)*, Santo Domingo, Universidad Autonoma de Santo Domingo, vol. DXXII, 1987; Nicole Catala, *Communauté economique européenne, jurisclasseur droit international* (1990), Fasc. 611, Nos. 9 to 12; Julien Condé, *Les migrations internationales Sud-Nord* (Paris, OECD, 1986), vols. 1 and 2, and *Les migrations africaines dans la Communauté européenne* (Paris, OECD, 1992); Raymond Sarraute, "Réfugié", *Répertoire de droit international: Encyclopédie Juridique*, Dalloz, vol. II, p. 728; Eberhard Jahn, "Intergovernmental Committee for Migration", *Encyclopedia of Public International Law*, vol. 5, 1983, p. 41; and "Migration Movements", ibid., vol. 8 (1985), p. 377.

(c) *Courses*: Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique, *Recueil des cours . . . 1927-III*, vol. 18, p. 442; Stélio Séfériadès, "L'échange des populations", *Recueil des cours . . . 1928-IV*, vol. 24, p. 307; and Louis Varlez, "Les migrations internationales et leur réglementation", *Recueil des cours . . . 1927-V*, vol. 20, p. 165.

(d) *Collections*: Migrazioni, *Affari sociali internationali*, Milan, 19th year, Nos. 1 and 4, 1991; "XII[e] congrès de l'Institut international de droit d'expression française sur les mouvements de population", *Revue juridique et politique, indépendance et coopération*, 34th year, No. 1, January-March 1980; "Movimenti migratori: un problema globale, *Plitica internazionale*, 19th year, No. 5, September-October 1991; "La Migration", *Revue internationale des sciences sociales*, UNESCO, vol. XXXVI, No. 3, 1985; "Les migrations internationales au Moyen-Orient", *Revue tiers-monde*, vol. XXVI, No. 104, October-December 1985; and "Les travailleurs étrangers et le droit international", *Société française pour le droit international*, Paris, Pedone, 1979.

(e) *Articles*: A. A. Afolayan, "Immigration and Expulsion of ECOWAS Aliens in Nigeria", *International Migration Review* (New York), vol. 22, No. 1, 1988, p. 4; Reginald Appleyard, "Migration and Development: Myths and Reality", ibid., vol. 23, No. 3, 1989, p. 486; Hans Arnold, "The 'century of refugees'—A European century?", *Aussenpolitik* (Hamburg), vol. 42, No. 3 (1991), p. 271; Maurice Bertrand, "Menaces: entre l'imaginaire et le réel", *Le trimestre du monde* (Paris), No. 1 (1991), p. 93; V. Dovonon, "L'OIT, l'ONU et les migrations: Coopération ou conflit de compétence?", *Revue de droit international et de droit comparé*, Brussels, vol. 66, No. 1 (1989), p. 24; Dennis Gallagher, "The evolution of the international refugee system", *International Migration Review*, vol. 23, No. 3, p. 579; Jean-Pierre Gomane, "La pallette des périls", *Défense nationale* (Paris), vol. 43 (1987), p. 77; Jean-Pierre Hocké, "Réfugiés et migration: de la dérive européenne à l'urgence d'une action en accord avec les valeurs proclamées", *Cadmos* (Paris), 13th year, No. 50, 1990, p. 88; Rainer Hofmann, "Refugee law in Africa", *Law and State* (Tubingen), vol. 39 (1989), p. 79; Charles Leben, "La circulation internationale des personnes et le droit international", *Annales de la faculté de droit et de sciences politique de Clermont-Ferrand* (Paris), vol. 15, No. 1, 1978, p. 629; Donatella Luca, "La notion de 'solution' au problème des réfugiés", *Revue de droit international, de sciences diplomatiques et politiques* (Geneva), vol. 65, No. 1, 1987, p. 1; David A. Martin, "Effects of International Law on Migration Policy and Practice: The Uses of Hyprocrisy", *International Migration Review*, vol. 23, No. 3, 1989, p. 547; Richard Perruchoud, "L'Organisation internationale pour les migrations", *Annuaire française de droit international*, vol. XXXIII (1987), p. 513; Gérard Prunier, "La communauté indienne d'Ouganda, des origines à l'expulsion", *Le mois en Afrique* (Paris), 16th year, 1981, p. 61; Larbi Talha, "La migration des travailleurs entre le Maghreb et l'Europe", *Revue française d'études méditerranéennes*, 1975, p. 65; and Lovemore M. Zinyama, "International migrations to and from Zimbabwe and the influence of political changes on population movements, 1965-1987", *International Migration Review*, vol. 24, No. 4, 1990, p. 748.

(f) *Reports*: "Trends and Characteristics of International Migration since 1950", *Demographic Studies No. 64* (United Nations publication, Sales No. E.78.XIII.5) (ST/ESA/SER.A/64); and United Nations, "Conclusions on the International Protection of Refugees", Geneva, 1991.

seems to be a prerequisite for designing such mechanisms and ensuring their effectiveness.

22. The formulation of a general concept implies the drafting of a general convention on the principles and rules applicable to international population movements. The result would be to lessen the monopoly of the High Commissioner for Refugees in this area. The association of non-governmental organizations such as the ICRC and the IOM with this undertaking would not only enhance their role as the principal interlocutors of States, but would also give added impetus to their institutionalization. The effect of the legal and institutional fragmentation of international migration law would thereby be diminished, as the objective of the convention would be to replace that law by a regime with a more unifying effect established in the light of current trends in international migratory movements. The need to adapt the traditional rules to new kinds of problems should therefore determine the overall thrust of United Nations policy designed to win States' acceptance of a common regime of rules applicable to population movements.

23. The replacement of the concept of "migration" by that of population movements arises from a concern to grasp the reality of the phenomenon in all its diversity. The phenomenon has changed. How can the laws applicable to it be allowed to lag behind the movement itself? A general draft convention on the law applicable to international population movements would therefore be in keeping with this need to update, which responds to three sets of interests: those of States, those of individuals and those of the international community.

24. The advent of a new world order of international migrations would find in the emerging new global order a reference point going well beyond traditional idealism or abstraction. Direct, but orderly, experimentation must accompany and sustain the worldwide conversion to democratic ideology, which delegitimizes what may appear to be the illegality of the right of intervention. It is this same spirit of solidarity, raised to the level of a principle, that, serving as justification for the intervention of one Government or State in the domestic affairs of another, would also justify the migration of a given segment of the population from one country to another without fear of not being admitted if only for a short time. The role of the law would then be to prevent arbitrary exclusions and provide legislative protection for transit corridors, residence and—why not?—arrival. It would be seen that prevention rhymes with protection, the protection advocated by the literature (Bertrand, Hocké, Perruchoud) for migratory movements, which is, after all, the whole objective.

25. But to be realistic, a legal policy for international migration must be effectively supervised; control mechanisms must therefore be established. This is a necessity that stems from (or is linked to) the need to define institutional channels for managing migratory movements, from channels of assistance or financing to channels for settlement, reintegration or return. Restructuring the role of States (rights and obligations), involving existing regional organizations (for advisory services and assistance), identifying the partners participating in the implementation of programmes to oversee migratory movements, particularly at the international level: a whole system of assigning and coordinating the missions and roles that would complement the preventive machinery, according to an integrated concept, in the same legal instrument.

The law and practice relating to reservations to treaties, by Mr. Alain Pellet

1. The proposal to include in the long-term programme of work of the Commission the topic "The legal effects to be given to reservations and objections to reservations to multilateral conventions" was made at the forty-sixth session of the General Assembly, during the consideration by the Sixth Committee of the report of the Commission.[1] It was taken up by the Working Group on the long-term programme of work established by the Planning Group, which placed the topic "The law and practice relating to reservations to treaties" on the short list of topics which could be appropriate for study by the Commission.[2]

2. The Working Group had indicated that this topic "could be appropriate for a speedy incorporation into the Commission's agenda and might form the subject of an instrument of codification". The Planning Group, "while not disagreeing with that conclusion, decided not to make any recommendation at [that] stage and to revert to the matter after the prospects offered by other topics [had] been assessed".[3]

1. Previous work by the Commission

3. On several occasions, the Commission was called upon to consider the question of reservations to treaties. It first did so during the preparation of the draft articles on the Law of Treaties, which would become the source for the Vienna Convention on the Law of Treaties, articles 19 to 23 of which are devoted to reservations.[4]

[1] See topical summary by the Secretariat of the debates in the Sixth Committee of the General Assembly at its forty-sixth session (A/CN.4/L.469), para. 422.

[2] Report of the Planning Group (A/CN.4/L.473/Rev. 1), para. 21.

[3] Ibid., para. 23.

[4] See, especially, *Yearbook ... 1951*, vol. II, pp. 1 to 17, document A/CN.4/41, report by Mr. James L. Brierly; *Yearbook ... 1953*, pp. 90 to 162, document A/CN.4/63, report by Mr. H. Lauterpacht; *Yearbook ... 1962*, vol. II, p. 31, document A/CN.4/144, first report by Sir Humphrey Waldock, especially pp. 59-69, articles 17-19 of the draft articles on the law of treaties and relevant commentary and pp. 73-80 and appendix ("Historical summary of the question of reservations to multilateral conventions"); *Yearbook ... 1965*, vol. II, p. 1, document A/CN.4/177 and Add. 1 and 2 (fourth report by Sir Humphrey Waldock), especially pp. 15-16 (para. 1 (*f*): "Reservations") and 45-56 (chap. III); ibid., pp. 79 to 114, document A/5687, report of the

4. After some hesitation, the text of these articles was reproduced, virtually word for word and with the same numbering, by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[5]

5. The question of reservations is also the subject of article 20 of the Vienna Convention on Succession of States in Respect of Treaties.[6]

2. THE MAIN PROBLEMS RAISED BY THE TOPIC THROUGH PRACTICE AND DOCTRINE

6. As Mr. Lauterpacht noted in his first report on the law of treaties:

> the subject of reservations to multilateral treaties is one of unusual—in fact baffling—complexity and it would serve no useful purpose to simplify artificially an inherently complex problem.[7]

7. Articles 19 to 23 of the Vienna Convention on the Law of Treaties, which

> are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the regime of multilateral conventions,

could rightly be commended.[8]

8. Nevertheless, as the Commission noted, following Reuter,

> [e]ven in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the [1969] Vienna Convention may not have eliminated all these difficulties.[9]

9. In general, authors share this view, and emphasize that the three relevant Vienna Conventions (see paragraphs 3 to 5 above) have allowed major uncertainties to persist with regard to the legal regime applicable to reservations. Moreover, such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations.

10. The very abundance of literature devoted to reservations to treaties testifies to the fact that doctrine is consistently confusing with regard to problems which are highly technical and extremely complex, but of exceptional practical importance. As José Maria Ruda emphasized:

> The question of reservations to multilateral treaties has been one of the most controversial subjects in contemporary international law.[10]

11. There is hardly any need to recall, in this connection, the abundance of articles devoted to reservations in works dealing with the law of treaties as a whole, and even in treaties and manuals on general international law.[11] To

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Secretary-General on depositary practice in relation to reservations; and *Yearbook... 1966*, vol. II, p. 183, document A/6309/Rev.1, report of the Commission on the work of the second part of the seventeenth session, especially p. 204, para. 11 of the commentary on article 2 (former article 1) and pp. 218-226 (section 2: Reservations to multilateral treaties).

For a fuller listing of relevant works, see "Guide to the draft articles on the law of Treaties adopted by the International Law Commission at its eighteenth session (1966)", (A/C.6/376), pp. 72-80; Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, pp. 489-492; and Shabtai Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention*, Leiden, A. W. Sijthoff, 1970, pp. 182-187.

[5] See especially, *Yearbook... 1975*, vol. II, Fourth Report by Mr. Paul Reuter, pp. 35-39; *Yearbook... 1977*, vol. II (Part Two), Report of the Commission to the General Assembly, pp. 105-116; Yearbook... 1981, vol. II (Part One), Tenth Report by Mr. Paul Reuter, pp. 55-64; ibid., vol. II (Part Two), Report of the Commisison to the General Assembly, pp. 135-140; and *Yearbook... 1982*, vol. II (Part Two), Report of the Commission to the General Assembly, pp. 32-37.

[6] See, especially, *Yearbook... 1970*, vol. II, p. 27, document A/CN.4/224 and Add. 1, the third report by Sir Humphrey Waldock, especially pp. 46-52; *Yearbook... 1972*, vol. II, Report of the Commission to the General Assembly, pp. 260-265; *Yearbook... 1974*, vol. II (Part One), first report of Sir Francis Vallat, especially pp. 50-55; and ibid., Report of the Commission to the General Assembly, pp. 222-227.

[7] *Yearbook... 1953*, vol. II, p. 90, A/CN.4/63, especially p. 124.

[8] Fourth Report by Mr. Paul Reuter on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook... 1975*, vol. II, p. 36.

[9] *Yearbook... 1982*, vol. II (Part Two), p. 32, para. (1) of the commentary on section 2.

[10] "Reservations to Treaties", *Recueil des cours... 1975-III*, vol. 146, p. 95.

[11] See, especially, and only as examples of some of the standard works on the law of treaties: Suzanne Bastid, *Les traités dans la vie internationale*, Paris, Economica, 1985, pp. 71-77; Taslim O. Elias, *The Modern Law of Treaties*, Leiden, A. W. Sijthoff, 1974, pp. 27-36; Lord McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp. 158-177; Paul Reuter, *Introduction to the Law of Treaties*, London and New York, Pinter Publishers, 1989; and Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester, England, Manchester University Press, 1973, pp. 40-50 (second edition, 1984, cited above).

Since the adoption of the 1969 Vienna Convention on the Law of Treaties, new, well-researched and thorough works have been added to the classic monographs dealing with reservations. Among the studies published prior to 1969, see, especially: D. R. Anderson, "Reservations to Multilateral Conventions: A Re-examination", *The International and Comparative Law Quarterly* (London), vol. 13 (1964), p. 450; William W. Bishop, Jr., "Reservations to Treaties", *Recueil des cours...*, vol. 103 (1961-II), p. 245; Gerald Fitzmaurice, "Reservations to multilateral conventions", *The International and Comparative Law Quarterly*, vol. 2 (1953), p. 1; Kaye Holloway, *Les réserves dans les traités internationaux* (Paris, Librairie Générale de Droit et de Jurisprudence, 1958); Dietrich Kappeler, *Les réserves dans les traités internationaux*, Basel, Verlag für Recht und Gesellschaft, 1958; H. W. Malkin, "Reservations to multilateral conventions", BYBIL, vol. VII (1926), p. 141; Luis A. Podesta Costa, "Les réserves dans les traités internationaux", *Revue de droit international*, 1938, No. 1, pp. 1-52; Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties: Comments on articles 16 and 17 of the ILC's 1966 draft articles on the law of treaties", *Zeitschrift für ausländisches öffentliches Recht and Völkerrecht*, vol. 27 (1967), p. 463; and Edoardo Vitta, *Le riserve nei trattati* (Turin, G. Giappichelli, 957).

Among the monographs published following the adoption of the 1969 Vienna Convention, see especially: Derek W. Bowett, "Reservations to non-restricted multilateral treaties", BYBIL, vol. XLVIII (1976-1977), p. 67; Mohammed Ahsen Chaudri, "Reservations to Multilateral Treaties", *De Lege Pactorum: Essays in Honor of Robert Renbert Wilson*, Durham, North Carolina, Duke University Press, 1970, p. 40; Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, vol. 10, No. 2 (1989), p. 362; John K. Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", AJIL, vol. 74, No. 1, 1980, p. 372; V. F. Gubin, "Reservations in International Law" (in Russian), *Pravovedenie*, No. 5 (1972), p. 84; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Amsterdam, North-Holland Publishing Company, 1988); Imbert, op. cit. (see footnote 4 above); Jean K. Koh, "Reservations to multilateral treaties: How international legal doctrine reflects world vision", *Harvard International Law Journal*, vol. 23, No. 1, 1982, p. 71; Rolf Kühner, *Vorbehalte zu multilateralen Völkerrechtlichen Verträgen*, Berlin, Springer-Verlag, 1986; Rafael Nieto Navia, "Las reservas a los tratodos multilaterales en la Convención de Viena de 1969", *Rev. Universitas* (Bogotá), June 1974, pp. 283; Joseph Nisot, "Les réserves aux traités et la Convention de Vienne du 23 mai

(*Continued on next page*)

this already long, and yet quite incomplete list, should be added the large number of monographs devoted to the study of national practice in the area of reservatons, to reservations to a particular convention or a particular type of treaty, or to some specific issues. Some of these works will be mentioned below.

12. Within the necessarily limited framework of this submission, it would be impossible to provide an exhaustive overview of the issues raised by the legal regime applicable to reservations. Almost all that can be done is to make an incomplete list of them, starting necessarily, with the Vienna Conventions of 1978, 1986 and, especially, 1969.[12]

13. For purposes of convenience—but in a somewhat artificial manner—the issues relating to: (*a*) the very existence of these conventions; (*b*) their ambiguities; and (*c*) their lacunae will be dealt with successively.

(a) *Problems raised by the inclusion of provisions regarding reservations in the Vienna Conventions on the Law of Treaties*

14. With the passage of time, the issue of whether the rules regarding reservations laid down in the 1969 Convention are an aspect of codification or of progressive development has become largely obsolete. On the other hand, there is no question that articles 19 to 23 broke new ground—at times considerably in the view of some—particularly by instituting an actual "presumption in favour of reservations."[13] But, on the other hand, in so doing these provisions have consolidated or "crystallized" earlier trends that were well under way.[14]

> However, in the 20 years [and more] that have elapsed since the Vienna Convention was opened for signature, the rules regarding reservations stated in that Treaty have come to be seen as basically wise and to have introduced desirable certainty.[15]

Such consolidation—a partial one (see sections 16 and 17 above)—was prompted by several factors, especially:

(*a*) The rules reflected the conditions of international society at the time they were adopted;

(*b*) They were part of a general tendency to make multilateral conventions more flexible and more open;

(*c*) They were, moreover, adopted almost unanimously at the Vienna Conference;

(*d*) And included again in the 1986 Convention.

15. These considerations have led States to respect these provisions in the main, whether or not they ratified the Convention,[16] and even if, like France, they did not sign it, they have led international courts and arbitrators to perceive in the provisions the expression of customary rules. In this connection, reference is made to the decision of the Franco-British Court of Arbitration of 30 June 1977 in the case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (hereinafter referred to as the *Mer d'Iroise* case).[17]

16. This conclusion can, however, be maintained only with certain reservations:

(*a*) The formulations of the courts are not without some ambiguity:

(i) In the *Mer d'Iroise* case, the Court of Arbitration refers to the definition of a reservation in art. 2, paragraph 1 (*d*), of the 1969 Vienna Convention, pointing out that it is accepted by both parties (paragraph 55 of the decision), and seems rather to be making a correlation between the rules of general international law and those laid down in article 21, paragraph 3, of the Convention than to be taking a general position on the value of the Convention as codification (see paragraph 61 of the decision);

(ii) In the *Temeltasch* case, the European Commission of Human Rights considers that the Convention "primarily lays down rules that exist in customary law and is *essentially* in the nature of a codification."[18]

(*b*) Regardless of the fact that there are lacunae in the Convention on sometimes important points and that it could not foresee rules applicable to problems that did not arise at the time of its elaboration, it served as a point of departure for new practices that at the present time are not,

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(*Footnote 11 continued*)

1969", RGDIP, vol. 77, 1973, No. 1, p. 200; Ernesto J. Rey Caro, "Las reservas de la Convención de Viena de 1969 sobre el derecho de los tratados", *Revista de derecho internacional y ciencias diplomáticas* (Rosario) (1972), p. 168; Ruda, loc. cit. (footnote 10 above); and Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, vol. 2, 1970, p. 239.

[12] See Karl Zemanek, "Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties", *Études de droit international en l'honneur du Juge Manfred Lachs*, The Hague, Martinus Nijhoff Publishers, 1984, p. 323.

[13] Imbert, op. cit. (see footnote 4 above), p. 87; see especially article 20, para. 5, and art. 21, para. 3.

[14] See, for example, R. R. Baxter, "Treaties and custom", *Recueil des cours . . . 1970-I*, vol. 129, p. 48.

[15] Edwards, Jr., loc. cit. (see footnote 11 above), p. 365.

[16] See, in the case of the United Kingdom, the statements of Sir Ian Sinclair and, in the case of the United States of America, those of Robert E. Dalton in *American Society of International Law—Proceedings of the 78th Annual Meeting* (1984), pp. 273-274 and p. 278, respectively.

[17] United Nations, *Collection of Arbitral Judgements*, vol. XVIII (Sales No.: E/F.80.V.7), pp. 73 et seq., especially paras. 37, 38, 58-66 and *International Law Reports*, vol. 54 (1979), pp. 35-36 and 44-45. Cf. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume Uni de la Grande Bretagne et de l'Irlande du Nord", AFDI, vol. XXIV (1978), p. 29; A. E. Boyle, "The law of treaties and the Anglo-French continental shelf arbitration", *The International and Comparative Law Quarterly* (London), vol. 29 (1980), p. 498; and Giorgio Gaja, "Unruly Treaty Reservations" in *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago*, Milan, Drott. A. Giuffrè, 1987, vol. I, p. 307.

[18] Decision of 12 October 1981, European Commission of Human Rights, *Decisions and Reports*, vol. 26, No. 9116/80, p. 217, para. 68. Cf. Imbert, "Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (affaire Temeltasch)", RGDIP, vol. 87, No. 3, 1983, p. 580 and *The International and Comparative Law Quarterly*, 1984, vol. 33 (Part Three), p. 558.

or not fully, followed with any consistency.[19] As one author has written,

> [c]alm has been introduced by the Vienna Convention on the Law of Treaties . . . However, the Vienna Convention—perhaps the most successful international effort at codification ever undertaken—has not frozen the law. Rather, the rules in the Convention structure its future development.[20]

(*c*) Lastly and most importantly, State practice on certain points, or the practice of some States, contradicts the very terms of the Convention of 1969. In this regard, see, especially, Giorgio Gaja, "Unruly treaty reservations",[21] wherein the author examines successively, giving examples, the practices relating to:

(i) Reservations subsequent to ratification[22] (contrary to the provisions of article 2, paragraph 1 (*d*), and article 19 of the Convention);

(ii) The disregard that States have shown for the provisions of article 19 concerning inadmissible reservations,[23] although it is true that the wording of this provision is ambiguous;

(iii) The non-observance of the suspensive condition represented by the one-year time period before a State can become a party to the Convention as provided in article 20, paragraph 5;[24] and

(iv) The effect of objections to reservations[25] although, here again, the provisions of article 20, paragraph 4, seem particularly ambiguous.

17. The weight of these arguments varies. Nevertheless, they suggest a prudent approach and bar the conclusion that the rules applicable to reservations are absolutely clear-cut even on the points addressed by the Convention of 1969; the Convention of 1986, in connection with which the practice seems virtually non-existent.

(b) *The ambiguities of the provisions regarding reservations in the Vienna Conventions of 1969, 1978 and 1986*

Definition and scope of the reservations

18. Satisfactory in so far as it goes, the same definition of a reservation to be found in the Convention of 1969 (article 2, paragraph 1 (*d*)), the Convention of 1978 (article 2, paragraph 1 (j)) and the Convention of 1986 (article 2, paragraph 1 (*d*)), has omissions causing uncertainties that can often be very awkward. The first point left in the dark, while more irritating in theory than important in practice, concerns the possibility of formulating reservations to bilateral treaties. The problem arises nevertheless, given the amendment by the Vienna Conference of the title of Part II, section 2, of the 1969 Convention ("Reservations" in place of "Reservations to multilateral treaties"); the ambiguity of the *travaux préparatoires*;[26] and the view of some authors who accept the fact that "reservations may come into play in theory" for bilateral treaties.[27]

19. Of much greater practical concern is the distinction between reservations on the one hand and, on the other, the "interpretative declarations" that States seem to resort to with increasing frequency and on which the Conventions are silent.[28]

20. The conclusion to be drawn from recent judgements is that summaries must be set aside on this point and that an "interpretative declaration" must be taken to be a true reservation if it fulfils the definition given in the Conventions. In this connection, reference is made to the arbitral decision of 30 June 1977 in the *Mer d'Iroise* case[29] (para. 55 of the decision); the report of the European Commission of Human Rights on the *Temeltasch* case[30] (para. 73); and the judgement of the European Court of Human Rights in the *Belilos* case of 29 April 1988,[31] or the decision of 8 November 1989 of the United Nations Human Rights Committee in the case of *T. K. et M.K.* v. *France*.[32] But these decisions also testify to the fact that it is extremely difficult to make a distinction between "qualified interpretative declarations" and "mere interpretative declarations."[33] Furthermore, the legal effects of the latter remain unclear.

Determination of the validity of reservations

21. It is probably on this point that the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions is most obvious. This ambiguity stems from both the vague wording of article 19 and the lack of precision, to say the least, of the mechanism for assessing the validity of reservations provided for—or not provided for—by the Conventions.

22. As Reuter noted,

> . . . if the treaty is silent, the only prohibited reservations are those which would be incompatible with its 'object and purpose', a concept again used by the Vienna Convention, although its interpretation remains as uncertain as when it first appeared in the Court's Advisory Opinion of 1951.[34]

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[19] See the position of the Secretary-General of the United Nations concerning the period during which States have the possibility of lodging reservations:

> "The Secretary-General does not believe that he has any authority, in the absence of new instructions from the General Assembly, to adjust his practice to Vienna Convention rules which would be contrary to his present instructions."

United Nations, *Juridical Yearbook, 1975*, p. 204 and ibid., *1981*, p. 150.

[20] Edwards, Jr., loc. cit. (see footnote 17 above), p. 405.

[21] Loc. cit. (footnote 17 above), *passim*, pp. 307-330.

[22] Ibid., pp. 310-313.

[23] Ibid., pp. 313-320.

[24] Ibid., pp. 320-324.

[25] Ibid., pp. 324-329.

[26] See Edwards, Jr., loc. cit. (see footnote 11 above), pp. 402-405.

[27] See the fourth report of Mr. Paul Reuter (footnote 5 above), p. 36.

[28] See, especially, D. M. McRae, "The legal effect of interpretative declarations", BYBIL, vol. XLIX (1978), p. 155.

[29] See footnote 17 above.

[30] See footnote 18 above.

[31] *European Court of Human Rights, Judgements and Decisions*, Series A, vol. 132, paras. 40-49 (Cf. Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)", RGDIP, vol. 93, No. 2, 1989, p. 273).

[32] CCPR/C/37/D/220/1987, annex.

[33] McRae, loc. cit. (see footnote 28 above), p. 160.

[34] Op. cit. (see footnote 11 above), p. 63.

23. These uncertainties are not dispelled, on the contrary, they are intensified by article 20, paragraph 2, which reintroduces the criterion of the object and purpose of the treaty with respect to multilateral treaties and seems to imply *a contrario* that "a reservation running counter to the object and purpose of a treaty may be authorized if it is accepted by all the parties."[35] Moreover, the very definition of these multilateral treaties is still extremely ill-defined.[36]

24. These ambiguities would be a minor problem if, as the various Special Rapporteurs of the Commission had proposed, the Conventions had defined the manner in which the compatibility of a reservation with the rules to which it relates was to be judged. This was not the case.[37] The Conventions leave each individual State to assess, insofar as it is concerned, the validity of a reservation, whether it is the author of the reservation or whether the reservation is by another State party to the treaty. Furthermore, article 20, paragraph 4 (*b*) shows that, except in the very rare cases where a State has made an objection by stating that it did not intend to be found in respect of the reserving State, the treaty enters into force between the two States concerned. The fact that this provision introduced by the Vienna Conference of 25 April 1969 runs counter to the draft of the Commission and, consequently, to the rest of the text that resulted from the draft[38] cannot be denied.

25. Be that as it may, the criteria for the validity of reservations set out in article 19 seem, under these circumstances, to be "a mere doctrinal assertion.[39] Such criteria amount to more than a doctrinal assertion only if an international court is competent to assess the validity of the reservation. In this connection, reference is made to the judgements of the European Court of Human Rights in the Belilos case[40] (paras. 50-60), the *Weber* case of 22 May 1990[41] and the report of the European Commission of Human Rights of March 1991 on the *Chrysostomos et al.* case.[42]

Regime for objections to reservations

26. The underlying philosophy of the regime for objections to reservations adopted in 1969 and used again in 1986 is clear: it is to allow maximum flexibility; but, the regime is far from well defined and practice has brought its serious ambiguities to light.

27. The first of these ambiguities relates to the substantive scope of the objections. At the very least, an objection carries the consequence that "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."[43] However, it is not always easy to determine "the extent of the reservation" and difficult problems have arisen in this regard (particularly concerning objections to reservations made by a State to article 66 of the Vienna Convention and the effects of such reservations on the applicability of articles 53 and 64 between the States concerned.[44]

28. The interpretation of the 1969 and 1986 Conventions is just as difficult with regard to the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose. The solutions provided by practice are dubious, and doctrine provides diverse answers.[45]

29. As a rule, however, States base their objections on the inadmissible nature of the reservations that they challenge. Here again, however, practice is inconsistent and there are divergent opinions. Some hold that reservations prohibited by the treaty nullify ratification, the State is therefore not party to the treaty and the objection is of a purely declaratory nature.[46] The prevailing doctrine, however, runs counter to this view and considers that article 21, paragraph 3, of the Vienna Convention makes no distinction between admissible and non-admissible reservations so that, somewhat paradoxically, "a simple objection (. . .) carries a value which is comparable only to that of an interpretative declaration."[47] The Court of Arbitration seems to have reached a similar decision in the case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (*Mer d'Iroise* case,[48] para. 61 of the judgement).

(c) *Lacunae in the provisions regarding reservations in the Vienna Conventions of 1969, 1978 and 1986*

Effect of reservations on the entry into force of a treaty

30. This important and widely debated question has been the source of serious difficulties for the depositary and has not been answered in the relevant conventions. The practice followed in this area by the Secretary-General in his capacity as depositary, which was

[35] Ibid.

[36] See Imbert, op. cit. (see footnote 4 above), pp. 109-120 and, also, Jacques Dehaussy, "Le problème de la classification des traités et le projet de convention établi par la Commission du droit international des Nations Unies", *Recueil d'études de droit international en hommage à Paul Guggenheim*, Geneva, Institut universitaire des hautes études internationales, 1968, p. 305.

[37] See Imbert, op. cit. (see footnote 4 above), p. 93.

[38] See Zemanek, loc. cit. (see footnote 12 above), pp. 329-333.

[39] See especially Ruda, loc. cit., p. 390. See also Edwards, Jr., loc. cit. (see footnote 10 above). See also Gaja, loc. cit. (see footnote 17 above), pp. 313-320; Imbert, op. cit. (see footnote 4 above), pp. 134-137; Reuter, op. cit. (see footnote 11 above), p. 74.

[40] See footnote 31 above.

[41] *European Court of Human Rights, Judgements and Decisions*, Series A, vol. 177, paras. 36-38.

[42] European Commission of Human Rights, *Decisions and Reports*, (March 1991), *Revue universelle des droits de l'homme*, vol. 3, No. 3, 1991, p. 193.

[43] Article 21, para. 3, of the 1969 Vienna Convention.

[44] See Charles de Visscher, "Une réserve de la République arabe de Syrie à la Convention de Vienne (1969) sur les traités", *Revue belge de droit international*, vol. VIII (1972-2), p. 416. Also see Edwards, Jr., loc. cit. (see footnote 11 above), p. 325 and Imbert, op. cit. (see footnote 4 above), pp. 265-267.

[45] Compare, for example, Bowett, loc. cit. (see footnote 11 above), pp. 86-87 and Zemanek, loc. cit. (see footnote 12 above), pp. 333-336.

[46] See Bowett, loc. cit. (see footnote 11 above), pp. 83-84.

[47] Reuter, op. cit. (see footnote 11 above), p. 75. Similarly, see Gaja, loc. cit. (footnote 17 above), p. 327; Koh, loc. cit. (ibid.), pp. 102-103; Nisot, loc. cit. (ibid.), p. 203; Ruda, loc. cit. (footnote 10 above), pp. 199-200; Sinclair, op. cit. (footnote 11 above), pp. 76-77; and Zemanek, loc. cit. (footnote 12 above), pp. 76-77.

[48] See footnote 17 above.

amended in 1975,[49] has been the object of rather harsh doctrinal criticism.[50]

31. In addition, in an opinion given in 1982, the Inter-American Court of Human Rights expressed the view that a treaty came into force in respect of a State on the date of deposit of the instrument of ratification or accession, whether or not the State had formulated a reservation.[51] This position was accepted in some circles,[52] but other authors doubted whether it was compatible with article 20, paragraphs 4 and 5, of the Vienna Convention.[53] There are also grounds for asking whether the solution adopted by the Court reflects the specific nature of the Inter-American Convention rather than any general considerations (see paras. 58-63 below).

Problems connected with the specific object of certain treaties

32. Because of their general nature, the main codification conventions neglect, quite legitimately, the particular problems deriving from the specific object and nature of certain categories of treaty. Nevertheless, these problems occur very frequently in certain areas, particularly in connection with constituent instruments of international organizations on the one hand, and, on the other, treaties relating to human rights and, more generally, treaties which directly establish individual rights.

(i) Reservations to constituent instruments of international organizations

33. Although the conventions of 1969 and 1986 are not totally silent on this point, article 20, paragraph 3, is far from resolving all the problems which can and do arise:

(*a*) The concept of a constituent instrument is not an unequivocal one and it might be asked whether the rule set out in article 20, paragraph 3, applies to any normative provisions such instruments may include;

(*b*) Does this rule include interpretative declarations and, if so, who determines their exact nature (see paras. 18 to 20 above)?

(*c*) What body is competent to accept reservations of this kind?

(*d*) What is the exact scope of such acceptance? In particular, are the other Member States bound by it and thus prevented from objecting to the reservation?[54]

(ii) Reservations to human rights treaties

34. Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity,[55] a concept difficult to transpose to the field of human rights, or indeed to other fields.[56] As they are intended to apply without discimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-à-vis citizens of the reserving State.

35. More so than other treaties, human rights treaties comprise monitoring mechanisms and the question arises as to whether these bodies are competent to assess the validity of reservations. The European Commission of Human Rights and the European Court of Human Rights have recognized their own competence in this area, because of the "objective obligations" deriving from the Convention on the Protection of Human Rights and Fundamental Freedoms.[57]

36. This gives rise to a third problem, namely, what effect does a reservation which has been declared invalid have on the participation in a treaty by the reserving State? In the *Belilos* case, the European Court of Human Rights took the view that the reserving State remained, without question, a party to the Convention (para. 60).[58]

37. The specific nature of the problems raised by reservations to treaties concerning human rights and humanitarian questions is also clearly apparent in the provisions of the relevant treaties, which have often been subject to differing interpretations.

38. There is an abundance of literature on this subject.[59]

[49] Cf. *Repertory of Practice of United Nations Organs, Supplement No. 5*, vol. V, covering the period 1 January 1970 to 31 December 1978, article 102, p. 162.

[50] See Imbert, op. cit., pp. 277-282 and "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités—Réflexions sur la pratique suivie par le Secrétaire-général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *Annuaire français de droit international*, vol. XXVI (1980), p. 524. See also Henry H. Han, "The U. N. Secretary-General's treaty depositary function: Legal implications", *Brooklyn Journal of International Law*, vol. 14, No. 3. (1988), pp. 562-565.

[51] Advisory Opinion OC-2/82 of 24 September 1982, *Inter-American Court of Human Rights Judgments and Opinions*, Series A, No. 2; see also *International Law Reports*, vol. 67 (1984), p. 559; and ILM, vol. 22 (No. 1), p. 37.

[52] See Rosenne, *Developments in the Law of Treaties, 1945-1986*, Cambridge University Press, 1989, pp. 435-436.

[53] See, especially, Edwards, Jr., loc. cit. (see footnote 11 above), p. 401, or Gaja, loc. cit. (see footnote 17 above), pp. 321-322.

[54] On all these points, see especially: Imbert, op. cit. (see footnote 4 above), pp. 120-134 and Maurice H. Mendelson, "Reservations to the constitutions of international organizations", BYBIL, vol. XLV (1971), p. 137.

[55] Cf. *Certain Norwegian Loans, Judgment, I.C.J. Reports, 1957*, p. 24.

[56] See Imbert, op. cit. (see footnote 4 above), pp. 250-260.

[57] See the report of the European Commission on Human Rights in the *Temeltasch* case (note 18 above), paras. 63-65 and, less clearly, the above-mentioned judgments of the Court in the *Belilos* case (footnote 31 above), para. 50, and the *Weber* case (footnote 41 above), para. 37.

[58] See also the report of the European Commission on Human Rights in the *Chrysostomos* case (see footnote 42 above).

[59] See, especially: Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme*, Bari, Levante, 1974, p. 301; I. Cameron and F. Horn, "Reservations to the European Convention on Human Rights: The *Belilos* Case", *German Yearbook of International Law*, Berlin, vol. 33 (1990), p. 9; Antonio Cassese, "A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)", *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, Institut universitaire des hautes études internationales, 1968), p. 266 (see also Cassese, "Una nuova clausola sulle riserve", *Rivista di diritto internazionale*, vol. L, p. 584 and "Su alcune 'riserve' alla Convenzione sui diritti politici della donna", 1968, p. 294); Cohen-Jonathan, loc. cit. (see footnote 31 above); Alberto Colella, "Les

(*Continued on next page.*)

Reservations, codification treaties and customary rules

39. Curiously, the Conventions of 1969 and 1986 do not deal with the question of reservations to codification conventions or, to be more precise, clauses.

40. Opposing arguments can be put forward on this question. A reservation definitely cannot have any effect on States not parties to the codification treaty in respect of which the reserving State remains bound by the customary rule. This applies even more so to the signatory States to the treaty and this is generally the interpretation placed on the Judgment of ICJ of 20 February 1969 in the *North Sea Continental Shelf* cases.[60] However, it has been pointed out that this rule, which would be an additional criterion for non-validity of reservations under article 19, is debatable with regard to the intention of the parties to the Convention[61] and creates a regrettable confusion between *jus cogens* and *jus dispositivum*.[62]

Problems arising from certain specific treaty approaches

41. Because they were required to confine themselves to a very general level, the drafters of the Vienna Convention could not take account of certain specific treaty approaches, some of which developed rapidly from 1969 onwards. Two examples will suffice.

(i) Reservations and additional protocols

42. When an additional protocol supplements an existing convention, one of these instruments may contain a reservation clause and the other may not, or they may both contain such clauses, but the clauses may be incompatible. The situation is relatively rare, but does occur.[63] In addition, when ratifying a protocol (or accepting an optional clause), a State may be tempted to formulate a belated reservation to the basic treaty.[64]

(ii) Reservations and the bilateralization approach

43. This approach, frequently taken in conventions relating to private international law, enables States parties to choose their partners and even to establish exceptional arrangements with them. Although used somewhat warily in the past (see article XXXV, paragraph 1, General Agreement on Tariffs and Trade), the system spread rapidly in the 1970s in particular. Compare articles 21 and 23 of the Hague Convention on the Recognition and Execution of Foreign Judgements in Civil and Commercial Matters, of 1 February 1971, and article 34 of the Convention on the Limitation Period in the International Sale of Goods, of 14 June 1971. This flexible approach emerged as a "rival" to the reservations approach, but it also posed specific problems concerning the reservations *stricto sensu* which could be formulated concerning these conventions.[65]

Problems unresolved by the Convention of 1978 on Succession of States in respect of Treaties

44. Article 20 of the Convention of 23 August 1978 scarcely deals with, and even less resolves, potential problems concerning reservations in the case of succession of States.

45. First, it should be noted that the article is contained in Part III of the Convention, which deals with "newly independent States"; it therefore applies in the case of the decolonization or dissolution of States, whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely. It is true that, in the first instance, "treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates" (article 15 (*a*)). It is equally true that the extension of treaties of the successor State to the territory (article 15 (*b*)) appears to entail necessarily the automatic extension of reservations which the latter was able to formulate. Persisting problems with regard to "newly independent States formed from two or more territories" are no fewer; on this assumption, articles 16 to 29 (and hence article 20) undoubtedly apply in principle pursuant to article 30, paragraph 1; but, what if the new State fails to denounce any incompatible reservations at the time when the succession is notified? The same problem occurs in the case of the uniting of States, in respect of which the Convention contains no applicable provisions concerning reservations.

(*Footnote 59 continued*)

réserves à la Convention de Genève (28 juillet 1951) et au Protocole de New York (31 janvier 1967) sur le statut des réfugiés", AFDI, vol. XXXV (1989), p. 446; Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", *Virginia Journal of International Law*, vol. 30, No. 3 (1990), p. 643; J. A. Frowein, "Reservations to the European Convention on Human Rights", *Protection des droits de l'homme: La dimension européenne, Mélanges en l'honneur de Gérard Wiarda* (Carl Heyman, Cologne, 1988), p. 193; Imbert, "La question des réserves et les conventions en matière de droits de l'homme", *Actes du cinquième colloque international sur la Convention européenne des droits de l'homme* (Frankfurt, 9-12 April 1980), Paris, Pédone, 1982, p. 97, and "Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (*affaire Temeltasch*)", (see footnote 18 above); S. Marcus-Helmon, "L'article 64 de la Convention de Rome ou Les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, vol. XLV, p. 9; Claude Pilloud, "Les réserves aux Conventions de Genève de 1949", *Revue internationale de la Croix-rouge*, 1957, No. 464, p. 409; ibid., 1965, No. 559, p. 315, 1976, No. 685, p. 195 and No. 687, p. 131; and Isidoro Ruiz Moreno, "Reservations to treaties relating to human rights", ILA, *Report of the Fifty-fourth Congress*, The Hague, 23-29 August 1970), p. 642 (debate, pp. 596-625, resolution, p. XIV).

[60] *Judgment, I.C.J. Reports, 1969*, pp. 3 et seq., especially pp. 38-39, para. 63.

[61] Reuter, op. cit. (see footnote 11 above), p. 82.

[62] On this difficult problem, see especially Gérard Teboul, "Remarques sur les réserves aux conventions de codification", RGDIP, vol. 86, No. 4, 1982, p. 679.

[63] Cf. the Convention of 1951 relating to the Status of Refugees, article 42, para. 1 and the Protocol of 1967, article VII, as well as the 1961 Single Convention on Narcotic Drugs and the Protocol of 1972, raising extremely tricky problems (see Imbert, op. cit. (see footnote 4 above), pp. 213-214, or Colella, loc. cit. (footnote 59 above), pp. 451-452).

[64] Cf. Cohen-Jonathan, loc. cit. (see footnote 31 above), pp. 311-313; Cohen-Jonathan and Jean-Paul Jacque, "Activités de la Commission européenne des droits de l'homme", AFDI, vol. XXXVII (1991), p. 562; or Claudio Zanghi, "La déclaration de la Turquie relative à l'article 25 de la Convention européenne des droits de l'homme", *Revue générale de droit international public*, vol. 93, No. 1 (1989), p. 69.

[65] On this question, see Imbert, op. cit. (see footnote 4 above), pp. 199-201 and, particularly, Ferenc Majoros, "Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international*, vol. 101, No. 1 (1974), p. 73.

46. Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State, and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Nonetheless, this may seem logical if it is recognized that, in maintaining a former reservation, the new State is exercising an inherent right and is not acting as if it has the rights of the predecessor State.[66]

47. Lastly, and this constitutes a serious lacuna, article 20 makes no reference whatsoever to succession concerning objections to reservations, while the initial proposals of Sir Humphrey Waldock dealt with this point without the reasons for this omission being clear.[67]

3. Conclusions

48. The discussions of the Sixth Committee during the forty-sixth and forty-seventh sessions of the General Assembly bring to light the criteria which, in the view of Member States, should guide the Commission in drawing up its future work programme. Four criteria can be elicited, namely, the subject or subjects to be considered should:

(*a*) Meet a need of the international community;

(*b*) Have reasonable chances of being successfully completed;

(*c*) Be completed within a specific period of a few years; and

(*d*) Fall within the competence of the Commission and its members.[68]

(a) *Meet a need of the international community*

49. It would clearly be presumptuous for the Commission to affirm that the subject discussed in this submission meets a need of the international community without first obtaining the opinion of the Sixth Committee, particularly since it is a matter of irrelevance that the initiative to suggest it was taken, not by the Commission, but by representatives of Member States of the Sixth Committee (see paras. 1 and 2 above). However, cataloguing the ambiguities and omissions of the existing codification texts (see paras. 18 to 47 above) scarcely leaves any doubt as to the fact that the rules hitherto formulated are incomplete. Moreover, their adoption has given rise to new problems (see paras. 14 to 17 above).

50. Undoubtedly, as doctrine has underlined,[69] States have not abused their largely recognized right to make reservations, and the fairly numerous incidents arising in that connection have therefore only rarely degenerated into real disputes. It nonetheless remains that great uncertainty continues to surround the legal regime governing reservations, and there is reason to believe that difficulties may arise increasingly in the near future, particularly concerning the rules applicable in the case of succession of States, which are particularly incomplete (see footnotes 44 to 47 above).

(b) *Have reasonable chances of being successfully completed*

51. It would seem that a codification exercise of any kind (see paras. 67-69 below) would have a more than reasonable chance of being successfully concluded.

52. Certainly, as technical as a subject may seem, it is never politically neutral; and, there is no denying that the rules of partial codification so far adopted in these areas have been inspired by eminently political considerations.

53. Although the international political context has undergone quite profound changes since the 1960s, it is still probably neither useful nor desirable to call the principles laid down at that time into question (see paras. 58 to 63 below). However, it is reasonable to think that in the new international climate it will be possible to make them more meaningful and precise, in a calmer setting which is more conducive to work on codification and progressive development.

(c) *Be completed within a specific period of a few years*

54. For the same reasons, such work must be completed within a specific period of time.

55. It does not seem unrealistic to think that the Commission would be in a position to adopt an initial set of draft articles, or a first draft to serve as a "guide" (see paras. 67-69 below), within three or four years of the subject being included on its agenda and the appointment of a Special Rapporteur:

(*a*) During the first year, the Commission could prepare a preliminary report, listing outstanding problems more comprehensively than this submission and setting forth its general views on the question. At the same time, the Secretariat could be given the task of updating the information contained in the Commission's 1965 report on the work of the first part of its seventeenth session;[70]

(*b*) The second and third years could be devoted to the presentation by the Special Rapporteur of one or two draft texts on codification and progressive development and to their discussion by the Commission;

(*c*) If the Commission decided to refer them to the Drafting Committee, the latter could possibly review them as from the end of its session corresponding to the second year, and in any case during the third year, although it may mean that no final text is proposed until during the fourth year; and

[66] See Marco G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Fribourg, Editions universitaires, 1969, pp. 345-346.

[67] See Imbert, op. cit. (footnote 4 above), pp. 318-322.

[68] See topical summaries prepared by the Secretariat of the discussions held in the Sixth Committee on the consideration of the Commission's report during the forty-sixth and forty-seventh sessions of the General Assembly (A/CN.4/L.469, paras. 398-402, and A/CN.4/446, paras. 302-303).

[69] See specifically, Colella, loc. cit. (see footnote 59 above), p. 475 and Imbert, op. cit. (footnote 4 above), pp. 324-339.

[70] *Yearbook . . . 1965*, vol. II, pp. 155 et seq., document A/6009, especially chap. II.

(*d*) The Commission could discuss and adopt the draft on first reading during the fourth year and transmit it to the General Assembly.

(d) *Fall within the competence of the Commission and its members*

56. Lastly, there seems little doubt that the subject in question falls squarely within the competence of the Commission and its members.

57. Codification of treaty law is probably the area of the Commission's work in which the most progress has been made. Initial lacunae (treaties of international organizations, the most-favoured-nation clause and succession of States in respect of treaties) have largely been or are being filled in as a result of codification of the rules applying to State responsibility (see article 73 of the Convention of 1969 and article 39 of the Convention of 1978). By undertaking to complete the codification and progressive development of rules applying to reservations, the Commission would be completing a task of which it has acquitted itself well. (However, the question of the effects of the outbreak of hostilities between States (ibid.) would remain to be addressed.)

58. Codified rules on the subject of reservations, although fragmented and incomplete, nevertheless exist. If the Commission decides to consider the issue of reservations in depth, as would appear to be desirable, it must take account of this situation, which is not entirely new. Whether what is at issue is the succession of States in respect of matters other than treaties, international liability for injurious consequences arising out of acts not prohibited by international law, or treaties concluded between States and international organizations, the Commission has not opened up new ground with respect to codification.

59. However, the situation we are dealing with is somewhat exceptional because there are already some provisions on the very subject matter that is to be codified.

60. To the extent that the Commission's intention is first of all to eliminate lacunae, no substantive problems arise: it is a matter merely of adding to existing texts, not of modifying them. However, it is necessary to consider what form those additions should take: additional protocols to previously adopted conventions, or a consolidated text that incorporates relevant existing provisions and adds new rules.

61. Ambiguities in previously codified rules are numerous and represent a serious problem in some cases. They present more of a challenge than lacunae because it could prove difficult to clarify the provisions in question without changing their wording. Nevertheless, the suggested approach for eliminating lacunae could be taken to ambiguities.

62. The above also applies if the intention is to modify existing provisions. However, a decision cannot be made to modify an existing provision purely on technical grounds. It is true that when the rules adopted in 1969, 1973 and 1986 were implemented, some defects came to light, and it would probably be rash to maintain that they have all been so strengthened as to become indisputable rules of customary law. In another respect, however, their adoption does provide a balance between partially conflicting (political) positions. While one could argue that the world has changed since 1969 and therefore the problem of reservations is less of a "burning issue" than it once was, calling this compromise into question needlessly could stir up old quarrels. The author of the present submission would be very reluctant to adopt a strategy he regards as especially "gratuitous", since—whatever their (minor) defects—where they exist, the relevant codified rules are generally satisfactory and provide the necessary flexibility, thus meeting a goal that all States support, as far as can be judged.

63. Without prejudice to the response from the members of the Sixth Committee, it would seem desirable for the Commission, should it decide to include the question of reservations in its programme of work, to limit itself to the task of eliminating lacunae and removing ambiguities in existing rules without modifying the rules, or at least without calling into question the principles upon which they are based.

64. The Working Group and the Planning Group have selected "The law and practice relating to reservations to treaties" as the title for the topic to be considered. This title seems rather academic, and it prejudges the outcome of the Commission's work on this topic. Of necessity, the outcome will be either a "study" or a "report" because, while "the law" lends itself to codification, this is not so in the case of "practice", which might reveal customary rules or lead to the progressive development of the law, but which is not itself subject to codification.

65. For other reasons, the proposal made in the Sixth Committee to study "The legal effects to be given to reservations and objections to reservations to multilateral conventions" is not entirely satisfactory. While the effects of reservations and objections remain one of the great unknown quantities in the reservations regime, there are other lacunae and ambiguities in this area, and it would be unfortunate not to take this opportunity to attempt to correct that situation. In addition, the word "conventions" is not in keeping with the Commission's usage; and, there is a question, though secondary, as to whether reservations to bilateral treaties are to be contemplated or not.

66. Therefore, it seems sensible to choose as neutral and comprehensive a title as possible, at least provisionally, and then adjust it later on if it appears advisable to limit the scope of the study. A possible title would be: "Reservations to treaties".

67. As indicated above (see footnotes 58 to 63), this process could lead to the adoption either of draft protocols to existing conventions, or of consolidated draft articles, combining various provisions from the Conventions and of the new codified rules, intended to complete and clarify the provisions; it would then be for the General Assembly to decide what should become of the draft. There is a rather strong argument in favour of one or the other of these solutions: treaty rules do in fact exist, and it might seem valid to continue along the same lines and consolidate the treaty reservations regime.

68. However, whether one sees this exercise as codification or as the progressive development of international

law—in fact, both codification and progressive development are involved—there is no provision in the Statute[71] of the Commission placing it under the obligation to present the results of its work in the form of draft articles. They may also be presented in the form of a detailed study or even as a commentary on existing provisions and could be a sort of "guide to the practice of States and international organizations" which would have the authority of a document formally adopted by the Commission. This method, which would prevent "zigzagging" between existing provisions and make it possible to overcome smoothly the problems mentioned above (ibid.), would also present clear advantages.

69. Whatever the case may be, and contrary to what is sometimes required, it does not appear absolutely necessary to reach a final decision on this point at the current stage; it would be satisfactory if the Commission were to reach a decision on the basis of a more complete presentation of the issues which could be the subject of an initial report by the Special Rapporteur (see paras. 54 and 55 above) and a topic for discussion in the Sixth Committee.

[71] On this point as on many others, the Statute is fairly obscure and contradictory.

70. To recapitulate, the author believes that:

(*a*) The topic "Reservations to treaties" is particularly appropriate for a study by the Commission and fully meets the criteria which emerged during the discussions in the Sixth Commmittee with a view to identifying a topic for inclusion in the Commission's future programme of work;

(*b*) There is no need at this stage to decide what form such a study should take—draft protocols to existing conventions, a consolidated draft convention, or an analytical reference guide to law and practice relating to reservations for use by States and international organizations;

(*c*) Whatever form is chosen, the codified rules in the 1969, 1978 and 1986 Conventions should not be called into question or modified, but consolidated and made more specific.

71. A study, still very basic, of the question of reservations would fully embody the initial idea of the Working Group, which in its report to the Planning Group concluded that this topic "could be appropriate for a speedy incorporation into the Commission's agenda." However, I reserve my position on the Working Group's second proposal—that this topic might "form the subject of an instrument of codification"—if it is to be construed as referring to a set of draft articles designed from the outset to lead to another convention.

Extraterritorial application of national legislation, by Mr. Pemmaraju Sreenivasa Rao

1. National legislation is sought to be given extraterritorial jurisdiction in different contexts. For example:

(*a*) To exercise jurisdiction over nationals wherever they are;[1]

(*b*) To protect a State against treason, terrorism, drug trafficking and other offences affecting its power and security;[2]

(*c*) To protect and regulate activities affecting its wealth, resources and other economic interests;[3]

(*d*) To secure rights of human persons.[4]

2. Exercise of extraterritorial jurisdiction is considered to be inevitable and even desirable because of:

(*a*) Interdependence of the international community whih necessitates extension of State's legislative jurisdiction beyond its borders to regulate transnational activities

[1] Civil law countries exercise jurisdiction over their nationals for offences committed even while they were abroad. *Public Prosecutor* v. *Antoni*, *International Law Reports*, vol. 32 (1966), p. 140. For a mention of the statutory provisions of some countries like France and Germany, see Louis Henkin et al., *International Law: Cases and Materials* (St. Paul, Minnesota, West Publishing Co. 1980), p. 445.

Among the common law countries: (*a*) section 4 of the Indian Penal Code. See *Pheroze Jehangir* v. *Roshanlal*, *Bombay Law Reports* 225, vol. 66 (1964); *Central Bank of India Ltd.* v. *Ram Narain*, *International Law Reports*, 1954, p. 92; (*b*) U.K. law also allows such jurisdiction in select cases: treason, homicide, bigamy, perjury, breaches under Official Secrets Act, etc.

The United States of America exercises extraterritorial jurisdiction in a wide variety of cases: treason, tax, unauthorized attempts to influence a foreign government, violation of U.S. laws on restrictive trade practices, failure to answer subpoenas issued to attend a court as a witness (*Blackmer* v. *United States*, *United States Reports*, vol. 284, p. 421; for offences committed outside territorial sea on the high seas (*Skiriotes* v. *Florida*, ibid., vol. 313, p. 69; *U. S.* v. *Bowman*, ibid., vol. 260, p. 94; and *Steele* v. *Bulova Watch Co.*, ibid., vol. 343, p. 962 and other cases), see Henkin, Pugh, Schachter and Smit, op. cit., pp. 445-447. See also Georges René Delaume, "Jurisdiction over crimes committed abroad: French and American law", *George Washington Law Review*, vol. 21 (1952), p. 173.

[2] For a brief discussion of this aspect, see Geoff Gilbert, "Aspects of Extradition Law", *International Studies in Human Rights* (Dordrecht, The Netherlands, Martinus Nijhoff Publishers, 1991), pp. 43-45. See also *Joyce* v. *Director, The Law Reports, House of Lords, Judicial Committee of the Privy Council and Peerage Cases*, 1946, p. 347. Also see Lotika Sarkar, "The proper law of crime in international law", *The International and Comparative Law Quarterly*, vol. 11 (1962), p. 446.

[3] See D. W. Bowett, "Jurisdiction: Changing patterns of authority over activities and resources", BYBIL, vol. LIII (1982), p. 1.

[4] The passive personality principle allowed a State to assume jurisdiction for offences committed against its nationals. For example, see the *Lotus* case (decision of 7 September 1927, Judgment No. 9, *PCIJ, Series A*, in which Turkey assumed jurisdiction over a French captain; the *Cutting* case (1886) in which Mexico assumed jurisdiction over a U. S. national (J. Dumas, "La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers", *Recueil des Cours . . . 1931-II*, Paris, Sirey, 1932, vol. 36, pp. 189 and 190). Both France and the United States have their own versions of law and practice assuming similar jurisdiction now (for France, see Code de procédure penale, 1975, art. 689, sect. 1). For United States practice, see for discussion of the case of Fawaz Yunis, a Lebanese national, in Andreas F. Lowenfeld, "U.S. law enforcement abroad: The Constitution and international law", AJIL, vol. 83, No. 4 (1989), p. 880.

which have a profound effect on or of concern to the State;[5]

(*b*) The desirability to avoid safe havens for criminals;[6]

(*c*) The need to regulate and control activities of entities with agencies spread in different parts of the world, but connected or linked to a common source or headquarters or objectives criss-crossing several jurisdictions with no single jurisdiction being effective to control the enterprise;[7]

(*d*) The imperatives of international cooperation to give full effect to bilateral or multilateral obligations.[8]

3. Claims and counter-claims as to the acceptability or reasonableness of exercise of extraterritorial jurisdiction are centred around:

(*a*) The nature of jurisdiction: civil or criminal;[9]

(*b*) The type of jurisdiction: legislative, adjudicatory of enforcement.[10]

4. The issues or claims or counter-claims have arisen invoking:[11]

(*a*) Principles concerning jurisdiction;

(*b*) Sovereignty and non-interference;

(*c*) Genuine or substantial link between the State and the activity regulated;

(*d*) Public policy, national interest;

(*e*) Lack of agreed prohibitions restricting States right to extend its jurisdiction;

(*f*) Reciprocity; retaliation; and

(*g*) Promotion of respect for law.

5. On the policy level, several issues arise:

(*a*) How far and within what limits should a State exercise its jurisdiction over a foreigner for conduct outside its territory when the foreigner is subject to the jurisdiction of the State of nationality or some other State in respect of the same conduct?[12]

(*b*) Should a State have the same authority and control over activities of a foreigner in areas over the sea beyond its coastal zone—the territorial sea, contiguous zone, economic zone, continental shelf and high seas—as it has within its territory?[13]

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[5] Even in 1935, in "Jurisdiction with Respect to Crime", AJIL, vol. 29, *Supplement 3*, Part II (1935), p. 435, it was recognized that with the increasing facility of communication and transportation, the opportunities for committing crimes whose constituent elements take place in more than one State have grown apace; and to meet these conditions, it suggested that the territorial principle was expanded to include the subjective and objective territorial principles of jurisdiction.

[6] See the recent case of the United Kingdom Privy Council in *Liangsiriprasert* v. *United States, The Law Reports 1991, Appeal Cases*, p. 225.

[7] Literature on the problems posed by the multinational corporations or enterprises is vast. See *Transnational Corporations: A Select Bibliography* (ST/LIB/SER.B/17) (United Nations publication, Sales No. E/F.75.I.5); and the 1976 OECD declaration, *International Investment and Multinational Enterprises: The OECD Guidelines for Multinational Enterprises*, OECD, 1986. For draft guidelines on transnational corporations, see Cynthia Day Wallace, *Legal Control of the Multinational Enterprise: National Regulatory Techniques and the Prospects for International Controls* (The Hague, Martinus Nijhoff Publishers, 1982).

For a discussion of the various legal issues of relevance to extraterritoriality involving the parent corporation and its subsidiaries, see F. A. Mann, "The doctrine of international jurisdiction revisited after twenty years", *Recueil des cours . . . 1984-III*, vol. 186, pp. 9 et seq., especially pp. 56-66.

[8] Assumption of extraterritorial jurisdiction is an essential feature of modern-day bilateral and multilateral conventions on extradition, prevention of hijacking, civil aviation offences and protection of diplomatic persons. A State also is required to assume extraterritorial jurisdiction in pursuance of its obligation towards the international community as a whole, obligations known as obligations *erga omnes*. The exercise of such jurisdiction is valid and accepted, according to ICJ, in respect of offences involving acts of aggression, genocide, and principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination. The Court also held that some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of universal or quasi-universal character. See *The Barcelona Traction, Light and Power Company, Limited, second phase, Judgment* (*I.C.J. Reports 1970*, p. 32).

[9] Brownlie does not believe that there exists any real distinction between civil and criminal jurisdiction in this regard: see *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, chap. XIV, p. 299. However, see R. Y. Jennings, "Extraterritorial Jurisdiction and the United States antitrust laws", BYBIL, vol. XXXIII (1957) p. 146, where the author distinguishes the elementary cases of direct physical injury, such as homicide, from other cases where only an element of alleged remote consequential damage was involved (as for example in the antitrust cases) and argued that while, in the former case, extraterritorial exercise of criminal jurisdiction is permissible, in the latter case to apply the formula of "effects" would be, according to him, "to enter upon a slippery slope", virtually endorsing unlimited extraterritorial jurisdiction of a State. See also "Extraterritorial application of restrictive trade legislation: Jurisdiction and international law" in *Report of the Fifty-first Conference, Tokyo, 1964*, London, 1965, pp. 304 et seq.

[10] Many writers discuss problems on extraterritoriality treating the three different types of jurisdiction separately. See Mann, loc. cit. (see footnote 7 above). Brownlie also does not agree with this distinction (op. cit., footnote 9 above, p. 310).

[11] M. Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction*, The Hague, Martinus Nijhoff Publishers, 1946; Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des cours . . . 1964-I*, vol. III, p. 1; M. Akehurst, "Jurisdiction in international law", BYBIL, 1972-1973, vol. XLVI, p. 145; A. F. Lowenfeld, "Public law in the international arena: Conflict of laws, international law, and some suggestions for their interaction", *Recueil des cours . . . 1979-II*, p. 311; M. S. McDougal, "Jurisdiction", in R. B. Lillich and J. N. Moore, eds., *Readings in International Law from the Naval War College Review 1947-1977, U.S. Naval War College International Law Studies*, Newport, R.I., vol. 62 (1980), p. 634; A. V. Lowe, "The problems of extraterritorial jurisdiction: Economic sovereignty and the search for a solution", *The International and Comparative Law Quarterly*, vol. 34 (Part 4), (1985), p. 724 and Douglas E. Rosenthal, "Jurisdictional conflicts between sovereign nations", *The International Lawyer*, vol. 19, No. 2, 1985, p. 487.

[12] For a discussion of issues in this regard, see P. M. Roth, "Reasonable extraterritoriality: Correcting the 'balance of interest' ", *The International and Comparative Law Quarterly*, vol. 41 (Part 2), (1992), p. 245.

[13] See L. Oppenheim, *International Law: A Treatise*, 8th edition, London, Longmans, Green, vol. I, sects. 141, 202, 203, 205, and 287-298. See, for a discussion of policy issues concerning jurisdiction over the maritime areas, McDougal and Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, London, Yale University Press, 1986 and P. Sreenivasa Rao, *The Public Order of Ocean Resources: A Critique of the Contemporary Law of the Sea*, Cambridge, Mass., The MIT Press, 1975.

(*c*) Should the nature of jurisdiction a State exercises over maritime areas be strictly limited to the type of authority it enjoys over such areas or zones under international law or could its jurisdictional exercise be regarded as reasonable and hence permissible, in the absence of any outweighing competing claim?[14]

(*d*) Could a State exercise its authority and power over rivers, canals and other resources within its territorial jurisdiction on the basis of sovereignty it enjoys over them without regard for the adverse effects for other States, particularly in the case of rivers and canals flowing through more than one State?[15]

(*e*) Conversely, could a State so affected or likely to be affected prescribe through its national legislation certain standards of behaviour for other States and their nationals and seek to enforce the same through its judicial and executive organs?[16]

(*f*) What should be the limits for exercise of jurisdiction on the basis of the principles of "effects", "passive personality", or "active personality"?[17]

(*g*) What factors should govern to resolve conflicts in jurisdiction, for example: when conduct prescribed by one State is prohibited by another?[18]

(*h*) Can uniform policies be prescribed to control extraterritorial effects of national legislation?[19]

(*i*) What should be the proper role of international law in dealing with conflicts in jurisdiction involving essentially the private or personal rights of individuals as opposed to public interests of a State? In other words, what is the proper relationship between principles of public and private international law on the one hand and international and municipal (or national) law on the other?[20]

(*j*) Can "self-help" by a State, or its officials, or its agents, be justified in enforcing national law and policies in the fact of opposition, lack of cooperation, or lack of an expeditious response from foreign States, or to overcome inevitable or inherent delays in processing requests through diplomatic, administrative and judicial organs of such States?[21]

(*k*) What kind of remedies are or should be available in case of abuse of exercise of jurisdiction by a State?[22]

6. These issues or policy considerations are the subject matter of national legislation of several States—the United States of America, European States, criminal laws of States and the European Community; some multilateral conventions and declarations of the United Nations; and case law of the international courts and national tribunals.[23]

7. The doctrine concerning extraterritorial application of national legislation is not well settled. There are no uniform or universally settled principles in this regard. Interpretation and application of the same is essentially left to the courts in individual cases and they vary depending upon the field or issue at hand.

8. The basic principle, however, is that all national legislations are, prima facie, territorial in character.[24] While the Permanent Court in the *Lotus* case recognized this principle, it also held that several States did approve extraterritorial effect being given to their national laws, and that such a policy and practice were not prohibited by international law.[25] This view of the Permanent Court appears to have provided the basis for Justice Learned Hand in the *Alcoa* case wherein the Court held valid extension of the U.S. Sherman Act over activities by foreigners outside the U.S., but having effects or consequences within the United States.[26]

9. The test of effect also provided the basis for the United States and other countries to extend the reach of their laws over activities affecting their interests (including the interests of their nationals). This position is sup-

[14] See, for example, N. M. Hunning, "Pirate broadcasting in European waters", *The International and Comparative Law Quarterly*, vol. 14, 1965, p. 410; and P. Sreenivasa Rao, "The Seabed Arms Control Treaty: A study in the contemporary law of the military uses of the seas", *Journal of Maritime Law and Commerce*, vol. 4, No. 1, 1972, p. 67.

[15] See the work of the Commission on regulation of law concerning non-navigable uses of international watercourses.

[16] See J. L. Brierly, *The Law of Nations*, 6th ed., C. H. Waldock, ed., Oxford, Clarendon Press, 1963.

[17] "Extraterritorial effects of administrative, judicial and legislative acts", *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1987, vol. 10 (1987), pp. 155 et seq., especially pp. 158-161.

[18] For an interesting exchange of views between Judge Wilkey, who decided the case *Laker Airways Limited* v. *Sabena, Belgian World Airlines, Federal Reporter, Second Series, vol. 731, United States Court of Appeals, District of Columbia Circuit*, p. 909, and Messrs. Lowenfeld and Henkins, all connected with drafting section 403 of the *Restatement of the Law (Second): The Foreign Relations Law of the United States*, which provides for balancing of national interests and reasonableness as a test for assuming jurisdiction by U.S. courts when another State also has jurisdiction over the subject matter resulting in concurrent and/or conflicting jurisdiction, see H. G. Maier, "Resolving extraterritorial conflicts or 'There and back again'", *Virginia Journal of International Law*, vol. 25, No. 1 (1984), p. 7.

[19] Mann, see loc. cit. (see footnote 7 above), pp. 26-31.

[20] See O. Schachter, *International Law in Theory and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 256-257; Brownlie (see footnote 9 above), pp. 306-307. Mann, "The doctrine of jurisdiction in international law" (see footnote 11 above), pp. 17-22 and "The doctrine of international jurisdiction revisited after twenty years" (footnote 7 above), pp. 31-32. H. G. Maier, "Extraterritorial jurisdiction at a crossroads: Intersection between public and private international law", AJIL, vol. 76, No. 2, 1982, p. 280.

[21] See the U. S. Congressional discussion on this point, in Andreas F. Lowenfeld, "U. S. law enforcement abroad: The Constitution and international law, continued", AJIL, vol. 84, No. 2 (1990), pp. 484-488.

[22] See the work of the Commission on State Responsibility.

[23] For a collection of legal materials in this regard, see Alan V. Lowe, *Extraterritorial Jurisdiction*, Cambridge, Grotius Publications Limited, 1983.

[24] *American Banana Company* v. *United Fruit Company, United States Reports*, vol. 213, *Cases adjudged in the Supreme Court*, 1909, p. 347.

[25] See footnote 4 above.

[26] See *United States of America* v. *Aluminium Company of America et al.* (*Federal Reporter, Second Series*, vol. 148, 1945, p. 416) where Justice Learned Hand observed that: "it is settled law . . . that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends."

See also *Continental Ore Co. et al.* v. *Union Carbide and Carbon Corp. et al.* (*United States Reports*, 1962, vol. 370, p. 690) and *United States* v. *Watchmakers of Switzerland Information Centre* (*Federal Supplement 1955*, vol. 133, United States District Court of New York, p. 40).

ported on the basis of the principle of the objective territoriality which is viewed as an extension of the territoriality principle.

10. Even though the application of the principle of objective territoriality is seen as generally acceptable,[27] particularly in the case where physical injury is involved,[28] there is disagreement as to the conditions under which the application of the test of effects could be held as reasonable. Indeed, in several fields—bankruptcy,[29] antitrust,[30] shipping,[31] taxation,[32] nationality,[33] discovery,[34] recognition of foreign acts[35]—application of the text of effect or assertion of jurisdiction by a State on the basis of national interest provoked controversy. The United States, Germany and the European Economic Community, among others, support assumption of jurisdiction on the basis of the principle of effects in the antitrust field.[36] This was opposed by the United Kingdom and several other countries.[37] Japan opposed the United States attempts to extend its laws to regulate shipping conferences taking place essentially outside the United States.[38] The United Kingdom and several other countries have also passed blocking national legislation, denying recognition to United States law.[39] They also adopted the "clawback remedy" under which a certain class of defendants in the foreign proceedings are given the right to reclaim in the United Kingdom courts that part of the foreign judgement awarding triple or multiple damages which exceeds the normal compensation.[40]

11. Given this set of conflicts, attempts were made to define reasonable exercise of extraterritorial jurisdiction by States. It was suggested that, for assertion of extraterritorial jurisdiction, the effect within the territory should be substantial and the direct and foreseeable result of activity abroad.[41] In another case, it was suggested that there should be a substantial and genuine or bona fide link for such jurisdiction to be reasonable.[42] Courts also attempted balancing of national interest as a guide to justify jurisdiction in this regard.[43] The American Law Institute's *Restatement* indicated a set of factors to judge reasonableness of exercise of extraterritorial jurisdiction in case of counter-claims for jurisdiction on the basis of the principle of territoriality or nationality.[44] Several other factors like vital national interests, considerations of

[27] See Mahomed K. Nawaz, "Criminal Jurisdiction and International Law", *The Indian Year Book of International Affairs* (Madras), 1952, p. 210, where the author discussed extraterritorial application of the Indian Penal Code of 1860 which largely remains the law even today, and analyses the other principles, including the objective territoriality principle with reference to Indian cases (*Emperor* v. *Chotalal* and *Wheeler* v. *Emperor* (ibid., p. 214)). See also *Mobarik Ali Ahmed* v. *State of Bombay*, *All India Reporter*, 1957; *R.* v. *Baxter*, *The All England Law Reports, 1971*, vol. 2, p. 359; *Secretary of State for Trade* vs. *Markus*, ibid., 1975, vol. 1, p. 958. See also C. Blakesley, "United States jurisdiction over extraterritorial crime", *Journal of Criminal Law and Criminology*, vol. 73, 4th part (1982), p. 1109 and K. Dam, "Extraterritoriality, conflicts of jurisdiction", American Society of International Law, *Proceedings of the 77th Annual Meeting*, Washington, D.C., 14-16 April 1983, p. 370.

[28] Jennings, loc. cit. (see footnote 9 above).

[29] See *The Barcelona Traction, Light and Power Company, Limited* case (see footnote 8 above).

[30] K. M. Messen, "Antitrust jurisdiction under customary international law", AJIL, vol. 78, No. 4 (1984), p. 783.

[31] Mann, "The doctrine of international jurisdiction revisited after twenty years" (see footnote 7 above), pp. 21-94; *Mogul Steamship Company, Limited* v. *McGregor Gow & Company*, *The Law Report House of Lords, Judicial Committee of the Privy Council and Peerage Cases*, 1892, p. 25, dealing with United Kingdom law on shipping conferences. However, this position is not agreed to by the United States in certain cases resulting in 1981 in a number of shipping lines, including a German and English one being heavily fined. See BYBIL, vol. L (1979), p. 352 and ibid., vol. LII (1981), p. 459. Also see, in this connection, the note addressed by a group of 13 States to the United States rejecting its right to impose its laws on events and activities taking place, wholly or largely, within the territories of other States (ibid., vol. XLIX, 1978, p. 386). According to Mann, shipping conferences are a pre-eminent example of the working of "effect doctrine" (p. 92).

[32] See section 7 of the German law; section 482 of the U.S. Internal Revenue Code; section 80 of the English Finance Act, 1984, which permit, subject to various conditions, the apportionment of subsidi aries' profits among its shareholders and the imposition of tax upon them. See also section 38 of United Kingdom Finance Act, 1973, in conjunction with section 12 of the Capital Gains Tax Act, 1979, under which gains of oil companies outside the United Kingdom are treated as gains carried on in the United Kingdom through a branch or agency. See also Friedrich K. Juenger, "Conflict of Laws: A Critique of Interest Analysis", *American Journal of Comparative Law*, vol. 32, No. 1 (1984).

[33] See *The Antelope* case (*Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, vol. X, 1825, p. 66), in which Chief Justice Marshall held that a U.S. Court lacked jurisdiction over a foreign vessel accused of engaging in the prohibited slave trade, "however abhorrent this traffic may be", thus rejecting extraterritorial application of U.S. laws over a foreign ship, hence nationalities. However, see *U.S.* v. *La Jeune Eugénie* (*Federal Cases, Circuit Court, District of Massachusetts*, 1822, vol. 26, p. 832), where Justice Story held that the slave trade violated the Law of Nations and, therefore, fell within the jurisdiction of an American court. See also *Foley Bros. Inc.* v. *Filardo* (*United States Reports*, vol. 336, 1949, p. 281) where the Court held that the eight-hour workday law did not apply to an American citizen working abroad on a contract between the U.S. Government and a private contractor. See for a discussion of these cases and other aspects, Note: "Constructing the State extraterritorially: Jurisdictional discourse, the national interest, and transnational norms", *Harvard Law Review*, vol. 103, No. 6, 1990, pp. 1273 et seq., especially pp. 1288-1289.

[34] Roth, loc. cit. (see footnote 12 above), pp. 249-250. See also "Australia: Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976", in Lowe, op. cit. (footnote 23 above), p. 79.

[35] Oppenheim, op. cit. (see footnote 13 above), chap. IV, p. 371. See also *Banco Nacional de Cuba* v. *Sabbatino*, *Receiver (United States Reports*, vol. 376, 1964, p. 398).

[36] Roth, loc. cit. (see footnote 12 above), pp. 245-249, 260-265.

[37] Brownlie, op. cit. (see footnote 9 above), pp. 311-314.

[38] See Lowe, op. cit. (see footnote 23 above), p. 121.

[39] See documents reproduced in Lowe, Part 2, pp. 79 et seq., op. cit. and Bowett, loc. cit. (footnote 3 above), pp. 22-24.

[40] Roth, loc. cit. (footnote 12 above), p. 252. See also *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.* (*The All England Law Reports*, vol. 2, 1952, p. 780), where a United Kingdom court prevented Imperial Chemical Industries from parting with any of the patents which it had contracted to license to British Nylon Spinners as a retaliation to the decree issued by a U.S. court in *United States* v. *ICI*. In the *Westinghouse Electric Corporation Uranium Contract Litigation* (ILM, vol. 17, No. 1, 1978, p. 38) (2 December 1977), the House of Lords refused compliance with letters rogatory issued out of a U.S. decree court on the ground that English courts should not cooperate in investigations based on the extraterritorial obligation of United States antitrust laws.

[41] *Restatement of the Law (Second): The Foreign Relations Law of the United States*, The American Law Institute, St. Paul, Minn., 1987.

[42] Brownlie, op. cit. (footnote 9 above), p. 310.

[43] For a critical analysis, see K. Brewster, *Antitrust and American Business Abroad*, New York, McGraw-Hill, 1958 (suggesting the concept of "jurisdictional rule of reason") and Bowett, loc. cit. (see footnote 3 above), pp. 18-22.

[44] *Restatement of the Law (Third): The Foreign Relations Law of the United States*, vol. 2, The American Law Institute, St. Paul, Minn., 1987.

foreign policy or relations, international law or comity, limits of judicial power, reciprocity, hardship to the individual involved, control exercised by parent body over subsidiaries were also taken as relevant for judging reasonableness of the exercise of extraterritorial jurisdiction.[45]

12. States have also entered into formal or informal agreements to coordinate their policies, promote their cooperation and institutionalize responses governing exercise of extraterritorial jurisdiction. But most of these efforts had limited focus and others remained largely persuasive.[46]

13. Courts expressed their inability in some cases to deal with, evaluate and reconcile conflicting national interests.[47] States warned that such matters could not be left to domestic forums which, in the final analysis, could only be guided by their national laws and interests.[48] In view of this, it was felt that there is a strong case to codify and develop international law concerning the exercise of the extraterritorial jurisdiction by a State.[49]

14. Urgency concerning the matter of extraterritorial jurisdiction is highlighted by certain recent events involving abduction of persons from foreign jurisdiction to put them on trial before U.S. courts for offences connected with terrorism and drug-trafficking.[50] Such forcible and illegal abductions were condemned by several States as violation of their sovereignty and national laws and human rights. A proposal is now made by several countries requesting the United Nations General Assembly to consider submission of the legal cases involved for an advisory opinion of ICJ.[51]

15. Issues concerning the extraterritorial jurisdiction have also acquired prominence and require a comprehensive and conceptual response given to (*a*) the activities of States in outer space and over celestial bodies, maritime zones, Antarctica; (*b*) their concern to control terrorism, drug-trafficking, transnational movement of persons and operation of multinational enterprises; (*c*) demands for development involving claims for transfer or sale of technology without restricting the rights of the recipient States to trade freely in products or services, thus acquired with third parties;[52] and (*d*) the need for States to seek security, independence and enjoy their sovereignty. Problems concerning extraterritorial jurisdiction may also have to be considered in the context of global interdependence, transnational and environmental injuries, management of international rivers, preservation of the environment and biodiversity, checking population growth and eradication of poverty. The various principles of jurisdiction—the principle of universality, the principles of active and passive nationality and the principle of effect—have elements of extraterritorial application of national laws. These need to be analysed and consolidated as an exception to the basic principle of jurisdiction, the principle of territoriality.

16. In view of the above, it appears quite clear that a study by the Commission of the subject of the extraterri-

[45] *Mannington Mills Inc.* v. *Congoleum Corporation, Federal Reporter, Second Series*, vol. 595, 1979, p. 1287; see *Timberlane Lumber Co.* v. *Bank of America*, ibid., vol. 597, 1977, p. 549. However, in the case concerning the Westinghouse uranium contract (see footnote 40 above), the U.S. court moved away from consideration of Comity, the weighing of the interest of the foreign State, and narrowing the enquiry to three factors: the complexity of the action, the seriousness of the charges and the recalcitrance of the foreign defendant. For the European Economic Community strictures against the U.S. Government for breaching of international law and failure to apply the balancing of interest test in connection with the supply of materials for the Soviet pipeline, see ILM, vol. 21, No. 4, 1982, p. 891.

Under United States practice, in addition to the right given to foreign States to intervene in cases involving conflict of national interest through the *amicus curiae* briefs, they have also the right to sue under U.S. antitrust laws. See *Pfizer Inc. et al.* v. *Government of India et al.*, ILM, vol. 17, No. 1, 1978, p. 93.

See also section 418 (2) of the *Restatement of the Law (Second)*, establishing U.S. jurisdiction over corporations organized under the laws of the foreign State that are substantially owned and controlled by nationals of the U.S. See Mann (footnote 7 above), chap. III.

[46] See Mann, ibid., vol. 186 and Lowe, op. cit. (footnote 23 above). Mention may also be made of various international conventions or treaties relating to terrorism and extradition, drug-trafficking and avoidance of double taxation,

[47] *Laker Airways Limited* v. *Sabena, Belgian World Airlines* (see footnote 18 above). See also *Argentine Republic* v. *Amerada Hess Shipping Corp. and Others (International Law Reports*, vol. 81, 1990, p. 658): faced with Congressional silence regarding extraterritorial application of laws, courts invoke the presumption against extraterritoriality. See *Harvard Law Review* (footnote 33 above), pp. 1279 and 1280, footnote 43.

[48] For the views of the United Kingdom, see the note of 23 June 1982, BYBIL, vol. LIII (1982), p. 433. See also *Satya* v. *Teja Singh* (*All Indian Reports*, 1975), where the Supreme Court of India said that every case which comes before an Indian Court must be decided in accordance with Indian law. Any recognition given to a foreign law because of certain foreign elements being present in the case is conditional according to the court on its conformity with Indian public policy. Referring to the U.S. State Department's position urging judicial restraint by the U.S. courts in the assertion of extraterritorial jurisdiction (see American Society of International Law, *Proceedings of the 71st Annual Meeting*, San Francisco, Calif., 21-23 April 1977, pp. 214 et seq.). Bowett argues that such an approach would not yield satisfactory results and will not be sufficient. See, for the various reasons given, Bowett, loc. cit. (footnote 3 above), pp. 21-22.

[49] See Mann, loc. cit. (footnote 7 above) and Roth, loc. cit. (footnote 12 above).

[50] For documents and judicial resolutions on the *Alvarez Machain* case involving the United States of America and Mexico (*International Legal Materials*, Washington, D.C., vol. 31, No. 4, July 1992, pp. 900 et seq.), see *Limits to National Jurisdiction* (1992); on illegality of abductions, see Lowenfeld, loc. cit. (footnote 21 above).

[51] See the request in a letter dated 13 November 1992 from representatives of several Latin American countries, Portugal and Spain addressed to the Secretary-General of the United Nations, in document A/47/249, Add. 1 and Corr. 1.

[52] See the problems created in connection with the United States embargo on sending goods or technology to the Soviet Union to be used in building a natural gas pipeline between the Soviet Union and Europe. H. E. Moyer and L. A. Mabry, "Export controls as instruments of foreign policy" in *Law and Policy in International Business*, vol. 15 (1983), p. 1; see also Mann, loc. cit. (see footnote 7 above), pp. 60-63.

There is no consistency in the U.S. position, even on embargoes and boycotts. See *USA* v. *Betchel Corporation* (District Court of the Northern District of California, Stipulation and Final Judgement, in ILM, vol. 16, No. 1, 1977, p. 95), restraining parties from applying the Arab boycott against Israel within the United States of America. Contrast this with the U.S. enforcement of trade embargoes against China, Cuba and the Soviet bloc asserting extraterritorial reach for its Foreign Assets Control Regulations and its Export Control Act of 1949. See P. H. Silverstone, "Export Control Act of 1949: Extraterritorial enforcement", *University of Pennsylvania Law Review*, vol. 107 (1959), p. 331 and "International Boycotts and Embargoes", American Society of International Law (see footnote 48 above), pp. 170-182.

On the inequity of universalizing the sanctions contained in the United States Super 301 Law and the system of cross-retaliation being proposed in the context of the Uruguay Round of negotiations, see B. S. Chimni, "Political economy of the Uruguay Round of negotiations: A perspective", *International Studies*, vol. 29, No. 2 (1992) pp. 156-158.

torial application of national laws would be important and timely. There is an ample body of State practice, case law, national statutes and international treaties and a variety of critical scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions. To commence with, the Commission need not commit itself for the development of a Convention on the subject. Even a model law or a compilation of guiding principles could contribute towards codification and progressive development of law in this important area of international law. Such a study, further, could complement the efforts of the Commission in the codification and progressive development of law in other areas such as the responsibility of States, liability for transnational injury, a draft code of crimes and establishment of an international criminal jurisdiction.

17. Finally, a study on the subject of extraterritorial jurisdiction could provide an opportunity to examine the relationship and the limits of public and private international law on the one hand and international law and municipal law on the other.[53]

[53] See Sir Anthony Mason, "The relationship between international law and national law, and its application in national courts", *Commonwealth Law Bulletin*, London, vol. 18, No. 2 (1992), p. 750.

The law of (confined) international groundwaters, by Mr. Alberto Szekely

1. Of the earth's fixed and invariable volume of water, which amounts to about 1.4 billion cubic kilometres, approximately 97.3 per cent is ocean salt water. Only the remaining 2.7 per cent is fresh water. Of all fresh water available on the planet, 77.2 per cent is found in the polar ice caps and glaciers. The rest of the world's fresh water reserve is divided between groundwater (22.4 per cent), lakes and rivers (0.36 per cent) and water in the gaseous state, present mainly in the atmosphere (0.04 per cent). Many of the underground aquifers of the world are located in a transboundary fashion.

2. If nearly 47 per cent of the world's land area (excluding Antarctica) falls within approximately 165 transboundary river and lake basins, the figure for transboundary underground aquifers is even higher, reaching nearly 60 per cent in Africa and in Latin America.

3. Large transboundary aquifers in the different continents, such as the North-eastern African aquifer underlying the Libyan Arab Jamahiriya, Egypt, Chad and Sudan, the European aquifer underlying the many territories of the riparian States of the Rhine, and those in the Arabian peninsula across the boundaries of Saudi Arabia, Bahrain, Qatar, the United Arab Emirates and Jordan, amply show that groundwater, like surface water, often ignores political boundaries and lie in geological structures that straddle by themselves international borders or feed, or are fed by, international rivers and lakes.

4. Alarming demands on groundwater resources in the world are steadily increasing, not in small measure as a result of the exploding rates of population growth, industrial and agricultural development, and especially in border areas where, due to increased international trade and economic exchanges, proliferating human settlements and demographic concentrations are also on the rise.[1] In many locations, shortages or the quality of surface waters have caused users to expand the utilization of groundwater, the frequent result being the overpumping of aquifers, with the consequent deterioration of water quality, even the drying up of wells, thus creating all the necessary ingredients for potential conflict. As in the case of the Middle East, where almost all of the water in its river systems are already being used (including the Nile, Jordan and Tigris-Euphrates Rivers), in many other border areas of the world severe shortages will occur, combined with a deterioration of water quality, all of it leading to increased pressures on those rivers' interconnected aquifers, and on transfrontier aquifers not significantly related to surface supplies. Such a situation may only be exacerbated by the impact of global warming.

5. Even independently from all that has been said to this point, the exploitation of groundwater and the preservation of its quality have already become the single most pressing concern of border communities. This is particularly true in the vast arid regions of the world, where abuses or contamination of transboundary aquifers are reaching crisis proportions. Many transboundary deposits are being rapidly and uncontrollably depleted because withdrawals exceed recharge, and many are being rendered useless as a result of contamination. To all of the above concerns, add the often irreversible destruction and the threat of severe diminution of aquifer recharge from improper land-use activities, or of long-lasting pollution from direct or indirect discharges into groundwaters of highly toxic wastes and substances, and the impact of droughts and floods, which traditionally lead to disasters affecting or caused by surface waters, an impact which is often mitigated by resort to vulnerable underground supplies, themselves threatened by infiltration of contaminated flood waters.

6. Water being the most critical and vital natural resource for human survival, potential or actual conflict over access to it or to secure the preservation of its quality cannot be conducive to harmonious international development or to the maintenance of international peace and security; thus the need for an international legal regime in this matter.

7. Various important actors in the international community, both governmental and non-governmental, and most particularly within the United Nations system, increasingly aware of and concerned with the potential dangers to international peace and to the well-being of humankind deriving from rising threats to the world's underground water supplies, have already pronounced themselves on the matter and sounded the voice of alarm. That has been

[1] See the 1968 analysis of world demographic trends in *World Population Prospects 1965-2000, As assessed in 1968* (ST/SOA/Series A/53) (United Nations publication, Sales No. 72.XIII.4).

the case with the 1965 Inter-American Specialized Conference on Renewable Natural Resources, held in Mar del Plata, the 1977 Mar del Plata United Nations Water Conference,[2] the United Nations Interregional Meeting of International River Organizations, held in Dakar in 1981,[3] and the Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, organized by the United Nations Economic Commission for Africa and held in Addis Ababa in October of 1988,[4] which recommended that Governments recognize the interdependence and diversity of the components of the hydrological cycle, including, *inter alia,* underground water and the water-atmosphere interface.

8. The International Conference on Water and the Environment, held in Dublin in January of 1992,[5] stressed the grave threats and potential for conflict stemming from the shortage and abuse of fresh water and, recognizing the great importance of these natural resources for the future of mankind, called for the negotiation of agreements and principles regarding the use, preservation and protection of transboundary groundwater basins.[6]

9. The Governing Council of the United Nations Environment Programme has also recognized the need for special attention to be given to activities relating to the management of these transboundary resources.[7]

10. The water chapter of Agenda 21 contains an impressive emphasis and concern on the importance of groundwater, including transboundary aquifers, and calls on all countries to establish principles and institutional arrangements for their adequate use and protection.[8]

11. In international law, there are only general rules that apply, *inter alia*, but not specifically, to transboundary aquifers. That is why the United Nations Water Conference recommended that

> [i]n the absence of bilateral or multilateral agreements, Member States continue to apply generally accepted principles of international law in the use, development and management of shared [*sic*] water resources.[9]

12. As international law has evolved on matters regarding the use and conservation of national, international or transboundary natural resources in general, and even of water resources in particular, the respective principles and rules apply generally to transboundary aquifers simply because they constitute natural water resources divided by national boundaries.

13. Thus, specific multilateral international legal instruments may already contain some general references, provisions and even principles, as part of their rules, applicable to groundwaters (albeit not necessarily and specifically *transboundary* groundwaters), such as the European Water Charter,[10] or the African Convention on the Conservation of Nature and Natural Resources, or the 1984 Declaration of Principles on the Rational Use of Water adopted by the Economic Commission for Europe (Decision C XXXIX),[11] some directives of the Council of the European Communities, or of the Economic Commission for Europe's Declaration of Policy on the Prevention and Control of Water Pollution of 1980. An ECE Committee approved in 1985 a set of principles more directly to the point, including seawater invasion of coastal aquifers, artificial recharge, heat storage in water tables, disposal of wastewater, pollution due to mining and farming and radioactive pollution.[12] The ECE adopted in 1987 Principles Regarding Cooperation in the Field of Transboundary Waters, expressing its awareness that prevention and control of transboundary pollution in groundwater aquifers, as well as the prevention of floods, are important and urgent tasks whose effective accomplishment can only be ensured by enhanced cooperation among the countries concerned.[13] The Principles delve in some detail into recommended terms of agreements, water quality objectives and criteria, institutional arrangements, functions of institutional bodies, pollution, monitoring and data processing, warning and alarm systems and other matters.

14. Obviously, the most advanced official legislative project which would apply more specifically to transboundary groundwaters, would be the Commission draft rules on the Non-Navigational Uses of International Watercourses,[14] which excludes a very important part of the world's transboundary aquifers, namely, those labelled by the previous Special Rapporteur as "unrelated/confined" groundwater, that is, those aquifers not directly connected, or not "constituting by virtue of their relationship a unitary whole" with an international surface watercourse "flowing into a common terminus."[15]

15. There are basically no precedents in international jurisprudence in this field, even when some more or less related cases may be found, apart from the even further removed ones such as the *Lake Lanoux* case,[16] as the 1927

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[2] See E/CONF.70/CBP/1.

[3] See *Experiences in the Development and Management of International River and Lake Basins*, Proceedings of the Interregional Meeting of International River Organizations, Dakar, 5-14 May 1981, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.82.II.A.17).

[4] *River and Lake Basin Development*, Proceedings of the United Nations Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, Addis Ababa, 10-15 October 1988, Natural Resources/Water Series No. 20 (United Nations publication, Sales No. E.90.II.A.10)

[5] See Dublin Declaration on Water and Sustainable Development (*International Conference on Water and Development—Development for the 21st Century, Dublin, 26-31 January 1992* (A/CONF.151/PC/112, annex I), as well as the seventh item in its Programme of Action (ibid., annex II, pp. 47 et seq.).

[6] See paras. 4.12 and 4.13, and 7.6 of the Conference report (ibid., annex II).

[7] See the report of the Governing Council in *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 25* (A/44/25), particularly p. 101, decision 15/1.

[8] A/CONF.151/26/Rev.1 (Vol. 1) (United Nations publication, Sales No. E.93.I.8), pp. 6 et seq.; see, for instance, sections 18.25 (*d*), 18.37 and 18.39 (*a*), pp. 283, 287 and 288.

[9] *Report of the United Nations Conference on Water, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), Part One, chap. I, recommendation 93 (*b*).

[10] Adopted on 6 May 1968 by the Council of Europe.

[11] See *Annual Report of the Economic Commission for Europe, 24 April 1983-14 April 1984, Official Records of the Economic and Social Council, 1984, Supplement No. 13*, vol. I (E/1984/23-E/ECE/1083), chap. IV.

[12] WATER/GE.1/R.66, annex.

[13] See E/ECE/(42)/L.19, decision I (42) of 1987.

[14] For the text provisionally adopted by the Commission on first reading, see *Yearbook . . . 1991*, vol. II, Part 2, pp. 66-70.

[15] The quoted terms are taken directly from the draft articles.

[16] United Nations, *Collection of Arbitral Judgements*, vol. XII (Sales No.: 63.V.3), p. 281.

Award of the Reich State Tribunal in a case involving transboundary groundwaters seeping from the Danube (*Wurttemberg and Prussia* v. *Land in Baden*).[17]

16. That does not mean that there is no international practice on the matter in the record. Much to the contrary, a vast array of bilateral agreements can be identified that in one way or another deal with transboundary groundwaters (and sometimes even with concrete aquifers).[18]

17. The doctrine on the matter has basically inspired, aside from a respectable body of published specialized literature, two very advanced academic efforts to codify and progressively develop the international law of transboundary groundwaters.

18. On the one hand, the 1986 International Law Association Seoul Rules on International Groundwaters[19] (which followed the Association's 1966 Helsinki Rules on the Uses of the Waters of International Rivers[20]), and the much more advanced and complete 1987 Bellagio Draft Treaty on Transboundary Groundwaters,[21] elaborated by a team of international water and environmental law experts in the International Transboundary Resources Center of the University of New Mexico Law School. The Draft evolved as a revision of a previous "Ixtapa Draft" published in 1985.[22]

19. The Ixtapa Draft and its revision in the Bellagio Draft, have already been thoroughly reviewed, widely quoted and increasingly invoked in the specialized literature and in several international bodies, events and reports, including in several sessions of the International Law Association, in a special Panel Session of the Sixth Congress of the International Water Resources Association held in Ottawa in May 1988, in the Doman Colloqium on the Law of International Watercourses held at the University of Colorado School of Law at Boulder in October 1991, in the Tri-National Working Conference and the

[17] *Strietsache des Landes Wurttemberg und des Landes Preussen gegen das Land Baden, betreffend die Donauversinkung*, Staatsgerichtshof (Germany), 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen*, (Berlin), vol. 116, appendix, pp. 18 et seq.

[18] See, for example, the Definitive Boundary Treaty between France and Spain of 27 August 1785; the Treaty concerning the Frontiers between the Netherlands and Hanover of 2 July 1824; the Procès-verbal of demarcation between France and Neufchatel of 4 November 1824; the Convention between Italy and Switzerland for the Settlement of the Disputed Frontier between Lombardy and the Canton of Ticino of 5 October 1861; the Treaty between Austria and Bavaria concerning the regime of the frontier line and other territorial relations between Bohemia and Bavaria of 24 June 1862; the Spain-Portugal boundary treaty of 29 September 1864; the Agreement between the Governments of Great Britain and France with regard to the Somali Coast of 2 and 9 February 1888; the Treaty between Switzerland and Austro-Hungary for the regulation of the Rhine from the confluence of the Rhine, upstream, to the point downstream where the river flows into the Lake of Constance, of 30 December 1892; the Exchange of notes between France and the United Kingdom relating to the Gold Coast-French Soudan boundary of 8 April 1904; the Agreement relative to Frontier Delimitation between Persia and Turkey of 21 December 1913; the Provisions relating to the common frontier between Belgium and Germany of 6 November 1922; the Protocol between France and Great Britain defining the boundary between French Equatorial Africa and the Anglo-Egyptian Sudan; the Agreement between Egypt and Italy fixing the frontier between Cyrenaica and Egypt (on the Ramla Wells) of 6 December 1925; the Exchange of notes constituting an Agreement between the British and Italian Governments respecting the regulation of the utilization of the waters of the River Gash of 12 and 15 June 1925; the Treaty between France and Germany regarding the delimitation of the frontier of 14 August 1925; the Convention between the Governments of the Union of Soviet Socialist Republics and Persia regarding the mutual use of frontier rivers and waters of 20 February 1926; the Agreement between Belgium and Germany concerning the common frontier of 7 November 1929; the Treaty of peace, friendship and arbitration between the Dominican Republic and the Republic of Haiti of 20 February 1929; the Agreement between Persia and Turkey on the fixing of the frontier of 23 February 1932; the Agreement between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and Ruanda-Urundi of 22 November 1934; the Agreement between the Austrian Federal Government and the Bavarian State concerning the diversion of water in the Rissbach, Dürrach and Walchen districts of 16 October 1950; the State Treaty between the Grand Duchy of Luxembourg and the *Land* Rhineland-Palatinate in the Federal Republic of Germany concerning the construction of a hydroelectric power plant on the Sauer of 25 April 1950; the Protocol between Albania and Yugoslavia regulating the use of the waters at their common frontier of 1953; the Agreement between the Hashemite Kingdom of Jordan and the Republic of Syria concerning the utilization of the Yarmuk waters of 4 June 1953; the Agreement between the Federal People's Republic of Yugoslavia and the People's Republic of Albania concerning water-economy questions of 5 December 1956; the Convention between the Federal Republic of Germany and France on the regulation of the upper course of the Rhine between Basel and Strasbourg of 27 October 1956; the Agreement between the Government of the Federal People's Republic of Yugoslavia and the Government of the People's Republic of Hungary concerning water-economy questions of 8 August 1955; the Agreement between the Italian Republic and the Federal People's Republic of Yugoslavia concerning the supply of water to the Commune of Gorizia of 18 July 1957; the Minutes of the meetings of the delegations of the Government of the People's Republic of Yugoslavia and the Kingdom of Greece from 26 August to 1 September 1957 concerning hydroelectric studies of the drainage area of Lake Dojran of 1 September 1957; the Convention between the Grand Duchy of Luxembourg and the *Land* Rhineland-Palatinate in the Federal Republic of Germany, concerning the construction of hydro-electric power installations on the Our of 10 July 1958; the Agreement between the Government of the Federal People's Republic of Yugoslavia and the Government of the People's Republic of Bulgaria concerning water-economy questions of 4 April 1958; the Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters of 21 March 1958; the Convention between France and Switzerland on the protection of Lake Léman waters against pollution of 16 November 1962; the Agreement between Poland and the Union of Soviet Socialist Republics concerning the use of water resources in frontier waters of 17 July 1964; the Convention between the French Republic and Federal Republic of Germany concerning development of the Rhine between Strasbourg/Kehl and Lauterburg/Neuburgweier of 4 July 1969; the Agreement between Finland and Sweden concerning frontier rivers of 15 December 1971; the Agreement of 1973 (Minute 242) of the International Boundary and Waters Commission (Mexico-United States of America) concerning the salinity problems of the Colorado River; the Agreement between the German Democratic Republic and Czechoslovakia of 1974; the Agreement between France and Switzerland on intervention by the agencies responsible for combating accidental pollution of the waters by hydrocarbons or other substances capable of altering the waters, and recognized as such under the Franco-Swiss Convention of 16 November 1962 concerning the protection of the waters of Lake Léman against pollution; the 1978 Agreement between Canada and the United States of America on Great Lakes water quality of 22 November 1978; and the Agreement between Austria and Czechoslovakia to settle certain issues of common interest concerning nuclear installations of 18 November 1982.

[19] ILA, *Report of the Sixty-second Conference, Seoul, 1986*, London, 1987, pp. 238 et seq.

[20] Helsinki Rules on the Uses of Waters of International Rivers, adopted by the International Law Association in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966*, London, 1967, pp. 484 et seq., reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405.

[21] R. D. Hayton and A. E. Utton, "Transboundary groundwaters: The Bellagio Draft Treaty," *Natural Resources Journal*, vol. 29, No. 3 (1989), p. 663.

[22] A. B. Rodgers and A. E. Atton, "The Ixtapa Draft Agreement relating to the use of transboundary groundwaters", *Natural Resources Journal*, Albuquerque, N. M., vol. 25, No. 3 (1985), p. 713.

International Workshop on the North American Experience in Managing International River Systems, held respectively in Gasparilla Island in April 1991 and also in Bellagio in December 1992.

20. The advantage of the degree of detail and precision of the Bellagio Draft is that it would save considerable time and research effort for the Commission, and help it on its way to a draft convention and to prepare its own draft rules, by taking advantage of this basic working document, one which enjoys already wide international prestige.

21. The greatest contribution which can be derived from the Bellagio Draft is that it already identifies the issues involved in the international law of transboundary groundwater resources, and proposes concrete and advanced provisions for each of the issues with authoritative support in the form of substantive comments. It includes a good number of important definitions, and it proposes provisions for the general purposes of the draft articles: for the creation of an institutional mechanism, its enforcement and oversight responsibilities, as well as for the establishment and maintenance of a database, water quality protection, the creation of transboundary groundwater conservation areas, principles and criteria for the adoption of comprehensive management plans, public health emergencies, planned depletion of an aquifer, transboundary transfers, planning for drought, inquiry in the public interest, the regime of existing rights and obligations, and for the accommodation of differences and for the resolution of disputes.

The global commons, by Mr. Christian Tomuschat

1. One of the themes considered for inclusion in the Commission's programme of work is the "global commons". The purpose of the present paper is to devote some reflections to the question of whether that theme is suitable as subject of a study and possibly further work of codification and/or progressive development of law.

1. The concept of the global commons

2. The global commons has become a widely used formula in recent years. Notwithstanding its frequent appearance even in legal documents, its scope and meaning leave much room for doubt. A binding legal definition does not exist. If our understanding is correct, two different categories of things are normally thought of when a person speaks of the global commons.

3. On the one hand, reference is made to areas or spaces not subject to national jurisdiction. In this sense, the glob al commons comprises the territories that do not belong to any State, in the first place, Antarctica and the high seas, as well as the spaces above and below the sea level beyond the areas of national jurisdiction, including the sea floor together with the subsoil thereof, and the celestial space including the Moon, the other planets and the stars, to the extent that they are in any way subject to human domination.

4. On the other hand, the global commons can also be understood as encompassing additionally those environmental resources that resist total domination by man, namely air and water, as well as the global weather and climate resulting from the interaction of air, water and topographical conditions with the sun. In an even wider sense, the global commons would include the wealth of the earth's fauna and flora, irrespective of their territorial location.

5. It would appear obvious at first glance that it is not easy to lump together all these disparate elements. On the other hand, it is a matter of common knowledge that some of these elements at least are already regulated by international instruments. Thus, as a first step, it should be examined if and to what extent the different elements of the global commons are subject to specific rules under treaties in force or about to come into force. We shall leave aside, for the time being, the general rules of customary law which have evolved over the last decades, since customary law always presents a certain degree of fluidity. The existence of customary law should, therefore, not impede a possible effort at innovation by codification and progressive development.

2. Treaties applicable to the global commons

(a) *Areas or spaces making up the global commons*

6. As far as the *world's oceans* are concerned, it is well known that their regime has been regulated in a comprehensive fashion by the United Nations Convention on the Law of the Sea. Going much beyond the rather rudimentary rules that are contained in the Geneva Convention on the High Seas, the United Nations Law of the Sea Convention devotes an entire chapter (Part XII) to the preservation and protection of the marine environment. Its basic proposition is enshrined in article 192, according to which "States have the obligation to protect and preserve the marine environment". The following provisions elaborate in greater detail on that rule.

7. As far as "the Area" is concerned, i.e. the sea bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (art. 1, para. 1), specific measures to be taken by the Seabed Authority are provided for (article 145). It would certainly be difficult to improve on this regime in a general instrument covering the global commons in their totality. In any event, any such attempt would mean amending the Convention at a stage when it has not yet entered into force.

8. The United Nations Convention is not the only instrument governing activities related to the world's oceans. Many treaties have been concluded under the auspices of the IMO. They cover such subjects as oil spills and dumping of waste, including nuclear waste. The Treaty Banning Nuclear Weapon Tests in the Atmos-

phere, in Outer Space and Under Water prohibits all nuclear tests under water. Although there may exist some lacunae here and there, the main environmental threats are thus subject to legal regulation.

9. It also should be mentioned that there exist many regional treaties whose main objective is to prevent pollution of the seas from land-based sources.

10. Concerning *Antarctica*, 1991 saw the conclusion of a Protocol on Environmental Protection to the Antarctic Treaty. It would make little sense to come up with proposals for the modification of the regime provided for in that Protocol.

11. *Outer Space* was subjected to legal regulation in 1967 through the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The Treaty does not directly deal with issues relating to the environment, although one may take the view that the prohibitions contained in article IV (1), which essentially aim at banning nuclear or other weapons of mass destruction, have at the same time beneficial effects for the global commons. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies goes one step further in providing in article 7 that "[i]n exploring and using the Moon, States Parties shall take measures to prevent the disruption of the balance of its environment". However, until now no practical problems have emerged which would require further protective steps.

(b) *Environmental resources*

12. It is a truism to state that air cannot be kept within national boundaries. According to patterns whose main elements are well known today, air floats around the globe. Thus, any interference with the original purity of air has repercussions somewhere else. However, international regulation cannot go so far as to endeavour to establish a legal regime for any human activity affecting the quality of air, since there is almost no such activity which does not, to a greater or lesser degree, have an impact on air conditions. Therefore, restrictive criteria have been observed in practice. First, international regulation has focused on air pollution of a clearly perceivable international character. Second, efforts to curb air pollution have quite naturally concentrated on factors exceeding a certain level of gravity. The most prominent example of a treaty aiming at combating air pollution is the Convention on Long-Range Transboundary Air Pollution. However, this instrument with its three additional protocols is confined to the European region. It emerged from preparatory work accomplished within the Economic Commission for Europe. To date, no other region of the globe has followed suit. Nor does there exist a binding international instrument at the worldwide level.

13. Water has qualities similar to those of air. It is in movement through evaporation and successive rainfall. Thus, water cannot be kept confined forever by one nation, except perhaps for certain stocks of groundwater which, if untapped, may remain unchanged for centuries. On the other hand, water is a largely more stable resource than air, since evaporation as well as the flow of rivers are rather slow processes which can to some extent be controlled by man. It is for these reasons that legal regulation has never targeted water as such, but has instead attempted to establish rules for its different forms of appearance in rivers, lakes, the seas and the oceans. As the debate in the Commission on the law of the non-navigational uses of international rivers has shown, States view the water of rivers running through their territories rather as a resource subject to national sovereignty, although recognizing that some international commitments must restrict its use. In any event, the notion of a shared resource—among the riparians of an international river system—was not even accepted by the Commission.

14. According to scientific research, the ozone layer has a particular importance inasmuch as it prevents life-threatening ultraviolet radiation from reaching the earth's surface. In that regard, the international community has taken action by adopting the Vienna Convention for the Protection of the Ozone Layer, which was subsequently supplemented by the Montreal Protocol on Substances that Deplete the Ozone Layer, which for its part was amended in 1990. Here, again, little remains to be done. In any event, one cannot hope to improve on that regime in a general instrument covering the global commons as a whole.

15. Lastly, mention should be made of the recent United Nations Framework Convention on Climate Change. As indicated by its title, the Convention deals in a specific manner with all of the issues related to the world climate. To be sure, no more than a general framework is set. However, it should be kept in mind that in any event an instrument purporting to regulate the global commons in their entirety would have to be confined to laying down fairly broad principles. By its very nature, it would not have the potential of going into details.

16. Summing up, one is entitled to state that at the present juncture an extended network of legal rules protecting the global commons already exists. It can hardly be maintained that these rules are fully satisfactory. Nor is it difficult to draw attention to gaps and lacunae here and there which also characterize the overall picture. On the other hand, the potential for innovative strides ahead is obviously rather limited. In the important fields, where major environmental threats can be perceived, the existing instruments go into much more detail than a set of principles or rules on the global commons could ever do.

17. An entirely new chapter would be opened if one took the view that the fauna and flora of the globe, whatever their territorial location, were also to be considered as part and parcel of the global commons. Obviously, such a conception would hurt many traditionally held views on national sovereignty. However, at a regional level many treaties exist which seek to protect wildlife as well as plants threatened with extinction. At the Rio Summit in June 1992, the Convention on Biological Diversity was also adopted. Here, again, the outer limits of what is internationally acceptable seem to have been reached for the time being.

3. Main difficulties of a project for the protection of the global commons

18. The preceding observations have already given some indication of the difficulties a project on the global commons would have to grapple with.

19. All the treaties in force are of a specific nature. They either establish a general regime for one separate element of the global commons (e.g. Antarctica, the high seas, outer space), or they attempt to counteract a specific environmental threat (e.g. air pollution). Thus, it was possible to adapt the regime concerned to the specificities of the subject matter at stake, drafting rules to be applied directly, not needing to be elaborated upon and concretized through different legislative stages. If the Commission attempted to draft rules for all of the global commons with their widely divergent features, the rules would have to be set at such a high level of abstractness that one could hardly hope to make any progress in comparison to the Stockholm Declaration on the Human Environment[1] or the recent Rio Declaration on Environment and Development.[2]

20. If the general orientation is to establish a legal regime for the global commons as a whole, this essentially comes down to enjoining States to take precautionary measures so that activities carried out in their territories do not harm resources that condition the existence of mankind. Such a regime, however, cannot be distinguished from a regime for the protection of the territorial integrity of other States. This is particularly obvious in the case of air pollution. Most of the pollution negatively affecting the oceans reaches them from the skies. In order to keep the marine environment intact, therefore, it is necessary to reduce sources of air pollution based on land, that is to say in territories under national jurisdiction. These same sources of pollution, however, also harm neighbouring States. What is needed, therefore, is one regime of air pollution whose parameters are determined by taking into account, at the same time, the harm potentially caused to the global commons as well as the injury which may be inflicted on other States. It would be extremely artificial, if not impossible, to draw up different rules on prevention according to the identity of the potential victim objects. Responsibility is a different matter altogether. In that regard, the classical rules provide no answers, presupposing, as they do, a bilateral relationship between an author State and a victim State.

21. A last difficulty stems from the fact that the Commission has the well-known topic "Injurious consequences arising out of acts not prohibited by international law" on its agenda. According to the decisions taken at the forty-fourth session,[3] the work on this topic is to be carried out first of all by studying the relevant aspects of prevention. As was pointed out above, prevention is a unitary concept, designed to avoid harmful effects from arising, wherever their location. By including in its programme the global commons as a new topic, the Commission would therefore necessarily duplicate the work already begun under "Injurious consequences..." It would seem infinitely preferable to bear in mind the need of the global commons for protection in establishing a code of duties of prevention. Any other decision would inevitably lead to interminable and sterile debates about the delimitation of the two topics.

4. Conclusions

22. It is not advisable to include a topic entitled "The global commons" in the long-term programme of work of the Commission.

23. The concerns underlying the suggestion for the inclusion of such a topic in the Commission's programme of work can, to a large extent, be taken care of in developing appropriate rules of prevention within the framework of the topic "Injurious consequences arising out of acts not prohibited by international law". It would certainly be wise to change the title of that topic in due course in order to make its new orientation plainly visible.

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

[2] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions Adopted by the Conference*, resolution 1, annex I.

[3] *Yearbook . . . 1992*, vol. 2 (Part Two), paras. 343-349.

Rights and duties of States for the protection of the human environment, by Mr. Chusei Yamada

1. General ideas

1. The conclusions of the Siena Forum on International Law of the Environment, which was held in April 1990 at Siena, Italy, properly pointed out that, since the Stockholm Declaration on the Human Environment,[1] international environmental law has seen many important developments. Its present situation is characterized by an abundance of conventions and other international instruments, which cover many fields and constitute an impressive network of rights and obligations of States. They should be considered a successful achievement of contemporary international law.

2. The existing network of obligations in international conventions leaves, however, certain gaps. Certain fields—in particular those related to global concerns—are

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

not yet fully covered. Implementation of conventions, both domestic and international, is not always satisfactory.

3. The "sector by sector" approach, adopted in the conclusion of conventions, often dictated by the need to respond to specific requirements, involves the risk of losing sight of the need for an integrated approach to the prevention of pollution and the continuing deterioration of the environment.

4. Customary law in the field of protection of the environment is at an early stage of development. The development of general principles in the form of a convention for filling the gaps of conventions and for insuring the protection of the commons, therefore, would be a challenging but important task for the Commission.

5. It may be recalled in this connection that the "Survey of international law",[2] prepared by the Secretariat for the Commission to select a list of topics to be included in its long-term programme of work, devoted a chapter for the law relating to the environment in order to draw attention of the Commission to the progressive development of international law in this area.

6. It is proposed that the title of the item would be "Rights and duties of States for the protection of environment" instead of "Human environment". When the title was proposed during the last session of the Commission, I had in mind the Stockholm Declaration on the Human Environment, but to restrict the scope of the item to the human environment would limit too much the effectiveness and usefulness of the outcome in the light of the recent conceptual developments in the field of environment.

2. Development of international environmental law

7. A brief overview of the historical development of international environmental law would give us a useful indication on what we should do in this field.

8. The characteristics of traditional environmental problems, which have been a subject of international law since the pre-war period, are that they normally arose between two neighbouring nations, in which the identification of the polluter(s) and the victim(s) was relatively easy, and that the dispute between the affected and the affecting State(s) in their bilateral relationships was the kind which could be resolved through the application of the principle of good neighbourliness. A typical example of this type of dispute was the *Trail Smelter* arbitration,[3] which was settled in 1941.

9. The rules of international law of this kind are based on the premise of sovereign equality of territorial States in which the State is expected to exercise due diligence over the economc activities within its territory so that they will not cause any harm to other States; *sic utere tuo ut alienum non laedas*.

10. The characteristic of this type of international environmental law is that it is primarily aimed at balanced coordination of exclusive territorial sovereignty of States and, therefore, is not necessarily aimed at the global environmental protection.

11. When environmental degradation, at a later stage, came to cover not only the injury to neighbouring States but also the widespread damage to wider areas, a certain tendency for modification of the applicable rules of international law was witnessed.

12. In the conventions dealing with damages caused by ocean pollution and ultra-hazardous activities such as nuclear or space activities, the principle of responsibility for risk (which is to impose absolute liability of a certain level to those who create risk to the society) has come to be introduced, apart from the traditional principle of responsibility based on negligence.

13. However, there is no general convention stipulating the rights and duties of States as regards ultra-hazardous activities except for those conventions on specific activities, and the contents of the rights and duties therein prescribed are not comprehensive.

14. With the drastic expansion of the economy and the explosive increase of population in recent years, global problems such as destruction of the ozone layer and climate change have come to be embraced as important topics of international law.

15. The characteristics of global environmental problems such as climate change, destruction of the ozone layer, biodiversity and tropical forests are that they cause gradual but widespread and long-lasting harm to the environment as a combined result of various activities in various countries.

16. These problems, as the common concerns of mankind, give rise to a totally new question as to the rights and duties of States, which goes far beyond the traditional relationship of reciprocal obligations of States, and which would take the form of "*erga omnes* obligations" or "general obligations" in its contents, nature and the method of implementation.

17. From this point of view, the principle of the general obligation of States for the protection of the environment itself created by a number of environmental conventions has great significance as a basic principle of international law (the principle, for example, is embodied in art. 2, para. 1, of the Convention for the Protection of the Ozone Layer).

3. The form of an instrument to be drafted

18. As a form of the instrument in the field of environment, it would be appropriate to consider the possibility of drafting an umbrella convention which prescribes general rights and duties of States, going beyond the individuality of specific areas and particular aspects of the environment. Development of rules of international law which are common to all current and future environmental problems might make it possible to fill gaps left by the existing individual conventions, and to keep under some degree of control of international law newly arising environmental

[2] See *Yearbook . . . 1971*, vol. II (Part Two), p. 1, document A/CN.4/245.

[3] United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.

problems. It would help avoid leaving any lacunae of applicable rules even in the absence of the relevant conventions. It would promote, at the same time, the early identification of potential environmental problems, and the establishment of more concrete provisions under specific conventions. Needless to say, the purpose of this umbrella convention is not to substitute for individual conventions, but to promote more effective protection of the environment. The convention under consideration would prescribe common rules which cut across the existing conventions; further details are expected to be complemented by individual conventions on specific subjects.

4. Possible structure of general rights and duties of States for the protection of environment

19. In view of the historical development of international law and the current situations facing the international community as stated in paras. 7 to 17 above, the following might be considered as a possible outline of the general rights and duties of States in this field.

I. General Principles
- A. Use of terms (definition of terms such as "environment", "pollution", "harm", injury", "damage" and "risk" to the environment, etc.)
- B. Legal implication of "general obligations" of States vis-à-vis international community
- C. The principle of responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment
- D. Relatively new principles
  1. The concept of "sustainable development"—inter-generational equity
  2. Common but differentiated responsibilities for the interests of all mankind—consideration of special situations of developing countries
  3. Harmonization of environmental and trade policies

II. Substantive and procedural rules
- A. Basic principles
  1. Responsibility in neighbourly relations
  2. Liability pertaining to high-risk activities
  3. Applicability of polluters-pay principle
  4. Protection of global environment as a whole
- B. International cooperation (exchange of information, consultations, environmental assessments, etc.)
- C. Principles on distribution of responsibility and liability
  1. Responsibility arising from negligence
  2. The principle of strict or absolute liability
  3. Liability to ensure remedies (e.g. liability of a parent company and/or a State of a parent company concerning activities of subsidiaries harmful to the environment)
- D. Procedure for the settlement of disputes
  1. International procedure for the settlement of disputes
     (*a*) Arbitration and/or ruling by competent international organizations
     (*b*) The question of jurisdiction of ICJ concerning environmental disputes
     (*c*) Admissibility of *actio popularis* in the field of global environmental disputes
  2. Domestic procedure for the settlement of disputes—equal access of non-residents to domestic courts

III. Measures for the implementation of obligations
- A. Classification of obligations by their nature and their relationships with the methods of implementation
- B. Direct implementation measures
  1. Implementation by international organizations, establishment of rules within the framework of international organizations, opt-out system, pledge and review system, etc.
  2. Implementation through domestic laws—including questions of the principles concerning jurisdiction of States, and the extraterritorial effect of the unilateral domestic measures of a State
  3. The question of linkage between framework conventions and the implementing protocols
- C. Indirect implementation measures
- D. Disincentive measures
  1. Observation of the fulfilment of obligations on the international level
  2. Measures taken by international society towards a State having committed certain acts harmful to the environment
     (*a*) Imposition of fines and taxes
     (*b*) Economic sanctions including trade restrictions and suspension of aid
     (*c*) Other measures
- E. Incentive measures
  1. Transfer of funds and technology, tax incentives

2. International mechanism for financial burden sharing

3. Establishment of liability insurance mechanisms.

5. Future perspectives on the work of the Commission under this item

20. The author is aware that the above list is quite an ambitious one. The Commission will decide in due course which sub-topics should be considered on a priority basis.

21. It is necessary to ensure that the convention in question be compatible and harmonized with other topics related to environmental problems (especially the draft articles on State responsibility and international liability for the consequences of activities not prohibited by international law, and the draft code of crimes against the peace and security of mankind), works which are currently being undertaken by the Commission.

22. Considering that the instrument under this item is proposed to be a comprehensive umbrella convention, some topics listed in point 4 above could be a duplication of the contents of ongoing work of the Commission, which naturally we should avoid.