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# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/9010/REV.1

### REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-FIFTH SESSION, 7 MAY-13 JULY 1973

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#### ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILO	International Labour Organisation
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNITAR	United Nations Institute for Training and Research

## Chapter I

## ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-fifth session at the United Nations Office at Geneva from 7 May to 13 July 1973. The work of the Commission during this session is described in the present report. Chapter II of the report, on State responsibility contains a description of the Commission's work on that topic, together with six draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter III, on succession of States in respect of matters other than treaties, contains a description of the Commission's work on that topic, together with eight draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter IV, on the most-favoured-nation clause, contains a description of the Commission's work on that topic together with seven draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter V is devoted to the question of treaties concluded between States and international organizations or between two or more international organizations. Chapter VI deals with the review of the Commission's long-term programme of work, including the question of the priority to be given to the topic of the law of the non-navigational uses of international watercourses. Chapter VII is concerned with the organization of the Commission's future work and a number of administrative and other questions.

## A. Membership and attendance

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy);  
 Mr. Milan BARTOŠ (Yugoslavia);  
 Mr. Mohammed BEDJAOUI (Algeria);  
 Mr. Suat BILGE (Turkey);  
 Mr. Juan José CALLE y CALLE (Peru);  
 Mr. Jorge CASTAÑEDA (Mexico);  
 Mr. Abdullah EL-ERIAN (Egypt);  
 Mr. Taslim O. ELIAS (Nigeria);  
 Mr. Edvard HAMBRO (Norway);  
 Mr. Richard D. KEARNEY (United States of America);  
 Mr. Alfredo MARTÍNEZ MORENO (El Salvador);  
 Mr. C. W. PINTO (Sri Lanka);  
 Mr. R. Q. QUENTIN-BAXTER (New Zealand);  
 Mr. Alfred RAMANGASOAVINA (Madagascar);  
 Mr. Paul REUTER (France);  
 Mr. Zenon ROSSIDES (Cyprus);  
 Mr. José SETTE CÂMARA (Brazil);  
 Mr. Abdul Hakim TABIBI (Afghanistan);  
 Mr. Arnold J. P. TAMMES (Netherlands);  
 Mr. Doudou THIAM (Senegal);  
 Mr. Senjin TSURUOKA (Japan);

Mr. N. A. USHAKOV (Union of Soviet Socialist Republics);  
 Mr. Endre USTOR (Hungary);  
 Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);  
 Mr. Mustafa Kamil YASSEEN (Iraq).

3. At its 1200th meeting, held on 7 May 1973, the Commission paid tribute to the memory of Mr. Gonzalo Alcívar, who had served as a member of the Commission since 1970.

4. On 15 May 1973, the Commission elected Mr. Juan José Calle y Calle (Peru), Mr. Alfredo Martínez Moreno (El Salvador), Mr C. W. Pinto (Sri Lanka) and Sir Francis Vallat (United Kingdom of Great Britain and Northern Ireland) to fill the vacancies caused by the death of Mr. Gonzalo Alcívar and by the resignations of Mr. Nagendra Singh, Mr. José María Ruda and Sir Humphrey Waldock on their election to the International Court of Justice.

5. With the exception of Mr. Rossides, all members attended meetings of the twenty-fifth session of the Commission.

## B. Officers

6. At its 1200th meeting, held on 7 May 1973, the Commission elected the following officers:

*Chairman:* Mr. Jorge Castañeda  
*First Vice-Chairman:* Mr. Mustafa Kamil Yasseen  
*Second Vice-Chairman:* Mr. Milan Bartoš  
*Rapporteur:* Mr. Arnold J. P. Tammes

The Bureau availed itself of the services of two informal working groups, one dealing with the comments on the report of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid* from the point of view of international criminal law, transmitted by the Economic and Social Council (see below, section F of the present chapter), and the other dealing with the commemoration of the twenty-fifth anniversary of the International Law Commission.

## C. Drafting Committee

7. At its 1207th and 1210th meetings held on 16 and 21 May 1973 respectively, the Commission appointed a Drafting Committee composed as follows:

*Chairman:* Mr. Mustafa Kamil Yasseen;  
*Members:* Mr. Roberto Ago, Mr. Taslim O. Elias, Mr. Richard D. Kearney, Mr. Alfredo Martínez Moreno, Mr. C. W. Pinto, Mr. Paul Reuter, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov, and Sir Francis Vallat.

Mr Mohammed Bedjaoui took part in the Committee's work on State succession in respect of matters other than treaties in his capacity as Special Rapporteur for that topic. Mr. Endre Ustor took part in the Committee's work on the most-favoured-nation clause in his capacity as Special Rapporteur for that topic. Mr. Arnold J. P. Tammes also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. Secretariat

8. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 1244th meeting, held on 9 July 1973, and represented the Secretary-General on that occasion. Mr. Yuri M. Rybakov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko and Mr. Santiago Torres-Bernárdez acted as Deputy Secretaries to the Commission and Mr. Eduardo Valencia-Ospina and Mr. Larry Johnson served as Assistant Secretaries.

#### E. Agenda

9. The Commission adopted an agenda for the twenty-fifth session, consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. (a) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245);<sup>1</sup>  
(b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolutions 2780 (XXVI) and 2926 (XXVII)).
6. Most-favoured-nation clause.
7. Organization of future work.
8. Co-operation with other bodies.
9. Date and place of the twenty-sixth session.
10. Other business.

10. In the course of the session, the Commission held 50 public meetings (1200th to 1249th meetings) and one private meeting (on 15 May 1973). In addition, the Drafting Committee held 10 meetings. The Commission considered all the items on its agenda.

#### F. Letter from the Chairman of the International Law Commission to the President of the Economic and Social Council

11. At its 1818th meeting, on 2 June 1972, the Economic and Social Council, having considered the report of the Commission on Human Rights, endorsed the request of

that Commission and decided *inter alia* to transmit to the International Law Commission for its comments the report of the *Ad Hoc* Working Group of Experts concerning the question of *apartheid* from the point of view of international penal law.<sup>2</sup> The Chairman of the International Law Commission replied to the foregoing request by a letter, dated 13 July 1973, addressed to the President of the Economic and Social Council. The text of the letter, approved by the Commission, was as follows:

At its present session, held at Geneva from 7 May to 13 July 1973, the International Law Commission was formally seized of the decision taken by the Economic and Social Council at its 1818th meeting on 2 June 1972 to transmit to the Commission, for its comments, the report of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid* from the point of view of international criminal law, submitted under resolution 8 (XXVI) of that Commission.

The International Law Commission shares the concern of the United Nations regarding the serious consequences of the policy of *apartheid*. Although this policy and its implementation are a matter falling primarily within the competence of other expert organs of the United Nations, the Commission has followed with great interest and continuous attention the various efforts being made in this sphere by such organs.

With reference, in particular, to the study of the *Ad Hoc* Working Group of Experts, the Commission will limit itself, as it has been requested to do and as is only appropriate in view of the work accomplished by so highly qualified a group of experts, to making some observations of a general character. Besides, the Commission wishes to indicate that it would not have enough time at its disposal to consider in depth such an elaborate study and, furthermore, that such a task would not easily fall within either the rules that determine its statutory competence or those which govern its methods of work.

In connexion with the conclusion of the *Ad Hoc* Working Group concerning the relationship between international criminal law and public international law in general, the Commission deems it appropriate to recall the fact that various meanings have been attributed to the expression "international criminal law" in practice and in doctrine. The Commission has in several instances of its past work concerned itself with questions such as the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, the elaboration of the draft code of offences against the peace and security of mankind, and the submission of conclusions regarding the desirability and possibility of establishing an international criminal jurisdiction.

The Commission remains aware of the possible relevance that the work of the *Ad Hoc* Working Group concerning the policy of *apartheid* may have to the development of rules of international law in the context of State responsibility, a topic the study of which is being carried out at present by the Commission.

The Commission notes with deep interest the recommendation of the *Ad Hoc* Working Group to the effect that inhuman acts resulting from *apartheid* should be made subject to sanctions by means of an international convention.

The Commission warmly supports all efforts by organs of the United Nations to bring about wider participation in humanitarian conventions and a stricter observance of their provisions and of the rules of customary international law applicable in the matter.

(Signed) Jorge CASTAÑEDA  
Chairman of the  
International Law Commission

<sup>1</sup> Yearbook . . . 1971, vol. II (Part Two), p. 1.

<sup>2</sup> See *Official Records of the Economic and Social Council, Fifty-second Session, Supplement No. 1* (E/5183 and Corr.1), p. 23.

## Chapter II

## STATE RESPONSIBILITY

## A. Introduction

## 1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

12. At its first session, in 1949, the International Law Commission included the question of State responsibility in the list of fourteen topics of international law selected for codification. In 1955, following the adoption by the General Assembly of resolution 799 (VIII), dated 7 December 1953, the Commission appointed Mr. F. V. García Amador Special Rapporteur for the topic. Between 1956 and 1961, Mr. García Amador submitted to the Commission six successive reports on State responsibility. Being occupied throughout those years with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able to undertake the codification of the topic of State responsibility, although from time to time, particularly in 1956, 1957, 1959 and 1960, it held some general exchanges of views on the question.<sup>3</sup>

13. In 1960 the question of the codification of State responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. It was considered in 1961 and 1962 by the Sixth Committee and by the International Law Commission in the context of the programme of future work in the field of the codification and progressive development of international law. The discussion brought out differences of opinion regarding the approach to the subject, in particular as to whether the Commission should begin by codifying the rules governing State responsibility as a general and separate topic, or whether it should take up certain particular topics of the law of nations, such as the status of aliens, and at the same time, within this context, should set out to codify the rules whose violation entailed international responsibility, as well as the rules of responsibility in the proper sense of the term. Finally it was agreed, both in the General Assembly and in the International Law Commission, that it was a question not merely of continuing work already begun but of taking up the subject again *ex novo*, that State responsibility should be included among the priority topics, and that measures should be taken to speed up work on its codification. As Mr. García Amador was no longer a member, the Commission agreed in 1962 that it would be necessary to carry out some preparatory work before a special rapporteur was appointed, and it entrusted this task to a Sub-Committee on State Responsibility of ten members.<sup>4</sup>

<sup>3</sup> For a detailed history of the question up to 1969, see *Yearbook . . . 1969*, vol. II, p. 229-233, document A/7610/Rev.1, chap. IV.

<sup>4</sup> Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tunkin, Mr. Tsuruoka and Mr. Yasseen.

14. At its session in January 1963, the Sub-Committee on State Responsibility<sup>5</sup> decided unanimously to recommend that, with a view to the codification of the topic, the Commission should give priority to the definition of the general rules governing the international responsibility of the State. It was also agreed, first, that there would be no question of neglecting the experience and material gathered on certain particular aspects of the topic, especially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law might have had on State responsibility. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by its Chairman, Mr. Ago, and decided to give the Commission some indications as to the main points to be taken into consideration in connexion with the general aspects of the international responsibility of the State, so as to guide the work of the special rapporteur to be appointed by the Commission. The indications or recommendations of the Sub-Committee related particularly to the definition, origin and forms of the international responsibility of the State.

15. The work of the Sub-Committee on State Responsibility was reviewed by the Commission at its 686th meeting, during its fifteenth session (1963), on the basis of the report submitted by the Chairman of the Sub-Committee, Mr. Roberto Ago.<sup>6</sup> All the members of the Commission who took part in the discussion agreed with the general conclusions formulated by the Sub-Committee. The members of the Commission also approved the programme of work proposed by the Sub-Committee, without prejudice to their position on the substance of the question listed in the programme. In this connexion, it was pointed out that the list of questions was intended merely to assist the Special Rapporteur in his substantive study of the various aspects of the formulation of the general rules governing the international responsibility of States.

16. After having unanimously approved the report of the Sub-Committee, the Commission at the same session appointed Mr. Roberto Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that

<sup>5</sup> The Sub-Committee had before it memoranda prepared by Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1), by Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/SC.1/WP.7), by Mr. Gros (A/CN.4/SC.1/WP.3), by Mr. Tsuruoka (A/CN.4/SC.1/WP.4), by Mr. Yasseen (A/CN.4/SC.1/WP.5) and by Mr. Ago (A/CN.4/SC.1/WP.6).

<sup>6</sup> The report was reproduced as an annex to the report of the Commission on the work of its fifteenth session *Yearbook . . . 1963*, vol. II, pp. 227-228, document A/5509, annex I). The summary records of the second to the fifth meetings of the Sub-Committee and the memoranda submitted by its members were reproduced in the *Yearbook . . . 1963*, vol. II, pp. 228-259, as appendices I and II to annex I mentioned above.

the Secretariat should prepare a number of working papers on the topic.<sup>7</sup>

17. In 1964 the Secretariat prepared and circulated, in accordance with the Commission's request, a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions,<sup>8</sup> and a digest of the decisions of international tribunals relating to State responsibility.<sup>9</sup> A supplement to each of these two documents, bringing them up to date, was published by the Secretariat in 1969.<sup>10</sup>

18. Owing to the fact that the term of office of the members of the Commission was to expire at the end of 1966, and that it was desirable to complete, by that date, the study of the topics which were already at an advanced stage, the Commission decided to devote its sixteenth, seventeenth and eighteenth sessions to the completion of its work on the law of treaties and special missions, and not to begin its consideration of the substance of the question of State responsibility until it had completed its study of those other topics.<sup>11</sup>

19. In 1967, at its nineteenth session, the Commission had before it a note on State responsibility submitted by Mr. Roberto Ago, Special Rapporteur. Since the membership of the Commission had been altered as a result of the election in the General Assembly in 1966, the Special Rapporteur expressed the wish that the Commission, as newly constituted, would confirm the instructions given to him in 1963. The Commission confirmed these instructions and noted with satisfaction that Mr. Ago was to submit a substantive report on the topic at its twenty-first session.<sup>12</sup>

20. In 1969, at the twenty-first session of the Commission, Mr. Roberto Ago, Special Rapporteur, submitted his first report on the international responsibility of States.<sup>13</sup> The report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of earlier codification work, both individual and collective, official and unofficial.<sup>14</sup>

21. As the Special Rapporteur explained when presenting it at the 1011th meeting of the Commission,<sup>15</sup> his report

<sup>7</sup> *Yearbook . . . 1963*, vol. II, pp. 223-224, document A/5509, chap. IV, sect. A.

<sup>8</sup> *Yearbook . . . 1964*, vol. II, pp. 125-132, document A/CN.4/165.

<sup>9</sup> *Ibid.*, pp. 132-171, document A/CN.4/169.

<sup>10</sup> *Yearbook . . . 1969*, vol. II, pp. 114-124, document A/CN.4/209 and *ibid.*, pp. 101-113, document A/CN.4/208.

<sup>11</sup> *Yearbook . . . 1964*, vol. II, p. 226, document A/5809, para. 36.

<sup>12</sup> *Yearbook . . . 1967*, vol. II, p. 368, document A/6709/Rev.1 and Rev.1/Corr.1, para. 42.

<sup>13</sup> *Yearbook . . . 1969*, vol. II, pp. 125-156, document A/CN.4/217 and Add.1.

<sup>14</sup> These texts were as follows: (1) Project on "diplomatic protection", prepared by the American Institute of International Law in 1925 (*Yearbook . . . 1956*, vol. II, p. 227, document A/CN.4/96, annex 7); (2) Draft code of international law, adopted by the Japanese branch of the International Law Association and the Kokusaiho Gakkwai (International Law Association of Japan) in 1926 (*Yearbook . . . 1969*, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II); (3) Draft on "international responsibility of States for injuries on their territory to the person or property of foreigners", prepared by the Institute of International Law (1927) (*Yearbook . . . 1956*, vol. II, pp. 227-229, document A/CN.4/96, annex 8); (4) resolution on the rule of the exhaustion of local

was intended to provide the Commission with a conspectus of what had been done so far, by studying which it could derive the maximum benefit for its future work, and at the same time avoid committing the errors which in the past had stood in the way of codification of this important branch of international law.

22. In this context the Special Rapporteur was particularly concerned to illustrate some of the serious difficulties encountered when approaching the topic of international

remedies", adopted by the Institute of International Law in 1956 (*Yearbook . . . 1969*, vol. II, p. 142, document A/CN.4/217 and Add.1, annex IV); (5) Resolution on "the national character of an international claim presented by a State for injury suffered by an individual", adopted by the Institute of International Law in 1965 (*Ibid.*, p. 142, document A/CN.4/217 and Add.1, annex V); (6) Draft convention on "responsibility of States for damage done in their territory to the person or property of foreigners", prepared by the Harvard Law School (1929) (*Yearbook . . . 1956*, vol. II, pp. 229-230, document A/CN.4/96, annex 9); (7) Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961 (*Yearbook . . . 1969*, vol. II, pp. 142-149, document A/CN.4/217 and Add.1, annex VII); (8) Draft convention on the responsibility of States for injuries caused in their territories to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930 (*ibid.*, pp. 149-151, document A/CN.4/217 and Add.1, annex VIII); (9) Draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Professor Strupp in 1927 (*ibid.*, pp. 151-152, document A/CN.4/217 and Add.1, annex IX); (10) Draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932 (*ibid.*, p. 152, document A/CN.4/217 and Add.1, annex X); (11) Recommendation concerning "claims and diplomatic intervention", adopted at the First International American Conference (Washington, 1889-1890) (*Yearbook . . . 1956*, vol. II, p. 226, document A/CN.4/96, annex 4); (12) Convention relative to the rights of aliens, signed at the Second International Conference of American States (Mexico City, 1902) (*ibid.*, annex 5); (13) Resolution on "International responsibility of the State", adopted at the Seventh International Conference of American States (Montevideo, 1933) (*ibid.*, annex 6); (14) Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared by the Inter-American Juridical Committee in 1962 (*Yearbook . . . 1969*, vol. II, p. 153, document A/CN.4/217 and Add.1, annex XIV); (15) Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared by the Inter-American Juridical Committee in 1965 (*ibid.*, pp. 153-154, annex XV); (16) Conclusions of the report of the Sub-Committee on State Responsibility, annexed to Questionnaire No. 4 adopted by the League of Nation Committee of Experts for the Progressive Codification of International Law (Geneva, 1926) (*Yearbook . . . 1956*, vol. II, pp. 222-223, document A/CN.4/96, annex 1); (17) Bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) arranged in the order that the Committee considered would be most convenient for discussion at the Conference (*ibid.*, pp. 223-225, document A/CN.4/96, annex 2); (18) Text of articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930) (*ibid.*, annex 3); (19) Bases of discussion drawn up in 1956 by Mr. F. V. Garcia Amador, Special Rapporteur of the International Law Commission on State responsibility (*ibid.*, pp. 219-221, document A/CN.4/96, para. 241); (20) Drafts on international responsibility of the State for injuries caused in its territory to the person or property of aliens, prepared in 1957 (*Yearbook . . . 1957*, vol. II, pp. 128-129, document A/CN.4/106, annex), in 1958 (*Yearbook . . . 1958*, vol. II, pp. 71-73, document A/CN.4/111, annex) and in 1961 (*Yearbook . . . 1961*, pp. 46-49, document A/CN.4/134 and Add.1.) by Mr. Garcia Amador, Special Rapporteur of the International Law Commission on State responsibility; (21) part IV of Restatement of the law, by the American Law Institute (1965) (*Yearbook . . . 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2).

<sup>15</sup> *Yearbook . . . 1969*, vol. I, pp. 104-106, paras. 2-19.

responsibility, and to bring out the reasons for those difficulties as they emerge from an examination of the various earlier attempts at codification under the auspices of official bodies, including the League of Nations and the United Nations itself. In concluding his analysis, the Special Rapporteur reviewed the ideas which had guided the International Law Commission since the time when, having been forced to recognize that its previous efforts had led nowhere, it decided to take up the study of the topic of responsibility again, but from a fresh viewpoint; in particular, he summarized the plan adopted by the Sub-Committee on State Responsibility set up in 1962, and confirmed by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the strength of which the Commission had decided to try to give a fresh impetus to the work of codification and reach some positive results, in pursuance of the recommendations of the General Assembly in resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

23. The Commission discussed the Special Rapporteur's first report in detail at its 1011th to 1013th and 1036th meetings.<sup>16</sup> The debate revealed a considerable identity of views in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposed to undertake. The Commission's conclusions in that regard were subsequently set out in its report on the work of its twenty-first session.<sup>17</sup>

24. The conclusions reached by the Commission at its twenty-first session were favourably received at the twenty-fourth session of the General Assembly.<sup>18</sup> The over-all plan for the study of the topic, the successive stage for the execution of the plan and the criteria for the different parts of the draft, as laid down by the Commission, met with the general approval of the Sixth Committee. In the light of the Committee's report, the General Assembly, in resolution 2501 (XXIV) of 12 November 1969, in which it referred to its resolution 2400 (XXIII), recommended that the Commission should continue its work on State responsibility.

25. On the basis of the directives laid down by the International Law Commission and the recommendations of the General Assembly, the Special Rapporteur began to consider, in succession, the many and diverse questions raised by the topic as a whole. He submitted to the Commission, at its twenty-second session, in 1970, a second report on State responsibility, entitled "The origin of international responsibility".<sup>19</sup> The introduction to the report contained a detailed plan of work for the first phase of the study of the topic, in which attention is to be focused on the subjective and objective conditions

for the existence of an internationally wrongful act. The introduction was followed by a first chapter dealing with a number of general fundamental principles governing the topic as a whole. The Special Rapporteur presented his second report at the 1074th and 1075th meetings of the Commission.<sup>20</sup> At the same time, he submitted a questionnaire listing a number of points on which he wished to know the views of members of the Commission for the purposes of the continuation of his work.<sup>21</sup>

26. Because of the limited time at its disposal, the Commission was unable at its twenty-second session to do more than discuss the Special Rapporteur's report in a general manner by way of a first broad review, and postponed more detailed consideration of specific points till a later session. The discussion took place at the 1075th, 1076th, 1079th, and 1080th meetings. At the 1081st meeting, the Special Rapporteur replied to the questions raised during the discussion and summarized the main conclusions to be drawn from the Commission's broad review.<sup>22</sup> The Commission's conclusions, which concerned questions of method as well as points of substance and problems of terminology, are summarized, in its report on the work of its twenty-second session.<sup>23</sup>

27. At the close of its discussion on the second report, the Commission invited the Special Rapporteur to continue his study of the topic and the preparation of draft articles. It was agreed that his third report should deal primarily with the part that had been examined provisionally at the twenty-second session, revised in the light of the discussion, and the broad conclusions to which it had led. That third report and those to follow it would contain a detailed analysis of the various conditions which must be met for a State to be regarded as having committed an internationally wrongful act and as having thereby incurred international responsibility.

28. At the twenty-fifth session of the General Assembly, the Sixth Committee found that the conclusions reached by the Commission at its 1970 session were generally acceptable.<sup>24</sup> In resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the views and considerations referred to in its resolutions 1765 (XVII), 1902 (XVIII) and 2400 (XXIII).

29. At the twenty-third session of the Commission, in 1971, the Special Rapporteur submitted his third report, entitled "The internationally wrongful act of the State, source of international responsibility".<sup>25</sup> This report began with an introduction setting out the various conclusions reached by the Commission following its

<sup>16</sup> *Ibid.*, pp. 104-117 and 239-242.

<sup>17</sup> *Yearbook . . . 1969*, vol. II, p. 233, document A/7610/Rev.1, chap. IV, paras. 80-84).

<sup>18</sup> *Official Records of the General Assembly, Twenty-first Session, Sixth Committee*, 1103rd-1111th and 1119th meetings; and *ibid.*, *Annexes*, agenda items 86 and 94 (b), document A/7746, paras. 86-89,

<sup>19</sup> *Yearbook . . . 1970*, vol. II, p. 177, document A/CN.4/233.

<sup>20</sup> *Ibid.*, vol. I, pp. 175-178 and 181-187.

<sup>21</sup> *Ibid.*, pp. 175-176.

<sup>22</sup> *Ibid.*, pp. 181-192 and 209-222.

<sup>23</sup> *Yearbook . . . 1970*, vol. II, pp. 307-309, document A/8010/Rev.1, paras. 70-83.

<sup>24</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 98-107.

<sup>25</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3.

consideration of the second report. The introduction was followed by a first chapter ("General principles"), divided into four sections (articles 1-4). In this chapter the Special Rapporteur reproduced the material included in chapter I of his second report, revised and supplemented in the light of the discussion in the Commission at its twenty-second session, namely: the principle that any internationally wrongful act of the State involves the State's international responsibility; the conditions for the existence of an internationally wrongful act; the subjects which might commit internationally wrongful acts; and the irrelevance of municipal law to the characterization of an act as internationally wrongful. The report ended with sections 1 to 6 (articles 5 to 9) of chapter II of the draft ("The 'act of the State' according to international law"); in all, this chapter is to include ten sections dealing with the conditions for the attribution to the State, as a subject of international law, of an act which might constitute a source of international responsibility. Sections 1 to 6, included in the third report, present some considerations on the subject matter of the chapter and on questions concerning the attribution to the State of the acts of its organs; the irrelevance of the position of an organ in the distribution of powers and in the internal hierarchy of the State; the attribution to the State of acts of organs of public institutions separate from the State; the attribution to the State of acts of private persons in fact performing public functions or in fact acting on behalf of the State; and the attribution to the State of the acts of organs placed at its disposal by another State or by an international organization.

30. Consideration of the conditions for attributing to the State, as a subject of international law, an act which might constitute a source of international responsibility was continued and completed in the fourth report<sup>28</sup> by the Special Rapporteur, which was submitted in 1972 at the Commission's twenty-fourth session. This report contains sections 7 to 10 (articles 10 to 13) of chapter II of the draft ("The 'act of the State' according to international law"). These sections deal with problems relating to the attribution to the State of acts or omissions of organs acting outside their competence or in contravention of the rules of municipal law concerning their activity; and with problems which arise in the same context with regard to the conduct of private individuals acting in that capacity, the conduct of organs of another subject of international law, and the conduct of organs of an insurrectional movement whose structures have subsequently become, in whole or in part, the structures of a State.

31. Being occupied with the preparation of draft articles on the representation of States in their relations with international organizations, on the succession of States in respect of treaties and on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was unable, for lack of time, to consider the topic of State responsibility either at its twenty-third session (1971) or at its twenty-fourth session (1972). The Commission

included in its reports on those sessions, however, a brief statement of the position with regard to the work on State responsibility, in order to inform the General Assembly of the progress made in the study of the topic as a result of the third and fourth reports submitted by the Special Rapporteur.<sup>27</sup>

32. At the General Assembly's twenty-sixth session (1971), it was considered in the Sixth Committee that the Special Rapporteur's third report to the International Law Commission was a valuable contribution likely to facilitate the latter's work and speed up the preparation of draft articles on the subject.<sup>28</sup> In its resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the view and considerations referred to in its resolutions 1765 (XVII), 1902 (XVIII) and 2400 (XXIII), with a view to making in 1972 substantial progress in the preparation of draft articles on the topic.

33. At the General Assembly's twenty-seventh session, in 1972, a number of representatives in the Sixth Committee said that the International Law Commission should give the highest priority to the study of State responsibility.<sup>29</sup> In its resolution 2926 (XXVII) of 28 November 1972, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the resolutions mentioned in its resolution 2780 (XXVI), with a view to the preparation of a first set of draft articles on the topic.

34. At its twenty-fifth session, the Commission continued its study of State responsibility and began the preparation of a set of draft articles on the subject, in accordance with the General Assembly's recommendations. At its 1202nd to 1213th and 1215th meetings it considered chapter I, and also chapter II, sections 1 to 3 of the third report by the Special Rapporteur, and referred to the Drafting Committee the articles contained in these sections. At its 1225th and 1226th meetings it considered the report of the Drafting Committee with the draft articles proposed by that Committee and adopted articles 1 to 6 of the draft on first reading.

35. These articles and the commentaries thereto, as adopted by the Commission, are reproduced in the present chapter<sup>30</sup> for the information of the General Assembly. The Commission wishes to draw attention to the fact that these articles are only the first provisions of the draft on State responsibility which it is preparing, the basic structure of which is outlined below.<sup>31</sup> With the adoption of articles 1 to 4, the first reading of chapter I ("General principles") of the draft is now completed. With regard to chapter II ("The act of the State according to international law"), articles 5 and 6, which are included

<sup>27</sup> (*Yearbook . . . 1971*, vol. II (Part One), pp. 344-346, document A/8410/Rev.1, chap. III, sect. C); *Yearbook . . . 1972*, vol. II, p. 323, document A/8710/Rev.1, chap. IV, sect. B.

<sup>28</sup> *Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, paras. 137 and 138.

<sup>29</sup> *Ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 195.

<sup>30</sup> See section B below.

<sup>31</sup> See paras. 43-51.

<sup>28</sup> *Yearbook . . . 1972*, vol. II, document A/CN.4/264 and Add.1.

in the present report, will be followed by others completing the provisions concerning the conditions for the attribution to the State, as a subject of international law, of an act which may constitute a source of international responsibility. Since in his third and fourth reports, the Special Rapporteur has covered the whole of chapter II,<sup>32</sup> the Commission now has all the elements necessary to complete the study of this chapter.

## 2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES<sup>33</sup>

### (a) *Form of the draft*

36. The final form to be given to the codification of State responsibility is obviously a question which will have to be settled later, when the Commission has completed the draft. The Commission, in accordance with the provisions of its statute, will then formulate the recommendation it considers appropriate. Without prejudging this recommendation, the Commission has decided to give to its study on State responsibility the form of a *set of draft articles*, as expressly recommended by the General Assembly in resolutions 2780 (XXVI) and 2926 (XXVII). The Commission, too, feels that the preparation of a set of draft articles is the most effective method of discerning and developing rules of international law concerning State responsibility. The articles now being prepared are drafted in a form which will permit their being used as a basis for concluding a convention, if that is eventually decided.

### (b) *Scope of the draft*

37. As with other topics it has undertaken to codify in the past, the Commission intends to limit its study of international responsibility, for the time being, to *State responsibility*. It does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States. The overriding need for clarity in the examination of the topic and the organic nature of the draft, however, clearly make it necessary to defer consideration of these other questions.

38. The draft articles under consideration relate to the responsibility of States for *internationally wrongful acts*. The Commission fully recognizes the importance, not only of questions relating to responsibility for internationally wrongful acts, but also of those concerning liability for possible injurious consequences arising out of the performance of certain lawful activities; especially those which because of their nature give rise to certain risks. The Commission takes the view, however, that questions in this latter category should not be dealt with jointly with those in the former category. Owing

<sup>32</sup> See paras. 29-30 above.

<sup>33</sup> The general considerations which follow are based largely on the conclusions reached and decisions taken by the Commission in 1963, during its consideration of the report of the Sub-Committee on State Responsibility, and in 1969 and 1970, during its consideration of the first and second reports by Mr. Ago, Special Rapporteur. They constitute the framework for the present work on the preparation of a set of draft articles on State responsibility.

to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. Being obliged to accept the possible risks arising from the exercise of an activity which is itself lawful, and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation, are two different matters. It is only because of the relative poverty of legal language that the same term is habitually used to designate both. In the light of these considerations and in order to avoid any misunderstanding, the Commission wishes to emphasize that the expression “State responsibility” which appears in the title of the draft articles is to be understood as meaning solely “responsibility of States for internationally wrongful acts”.

39. The limitation of the present draft articles to the responsibility of States for internationally wrongful acts should not, of course, prevent the Commission from undertaking, at the appropriate time, a study of that other form of responsibility, which is the protection against the hazards associated with certain activities that are not prohibited by international law. What the Commission should not do is to deal in one and the same draft with two matters which, though possessing certain common features and characteristics, are quite distinct. If it is thought desirable—and views to this effect have already been expressed in the past both in the International Law Commission and in the Sixth Committee of the General Assembly—the International Law Commission can undertake the study of the so-called responsibility for risk after its study on responsibility for wrongful acts has been completed, or it can do so simultaneously but separately. It is for reasons of this kind that the Commission considered that it was particularly necessary to adopt, for the definition of the principle stated in article 1 of the present draft, a formulation which, while indicating that the internationally wrongful act is a source of international responsibility, does not lend itself to an interpretation which might automatically exclude the existence of another possible source of “responsibility”.

40. International responsibility bears some very different aspects from the other topics of which the Commission has hitherto undertaken the codification. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one or another sector of inter-State relations, impose specific obligations on States, and may, in a certain sense, be termed “primary”. In dealing with the topic of responsibility, on the other hand, the Commission is undertaking to define other rules, which, in contradistinction to those mentioned above, may be described as “secondary” inasmuch as they are concerned with determining the legal consequences of failure to fulfil obligations established by the “primary” rules. In preparing the present draft, therefore, the Commission intends to concentrate on determining the *rules which govern responsibility*, maintaining a strict distinction between this task and that of defining the rules which impose on States obligations the violation of which may be a source of responsibility. This strict distinction seemed to the Commission

to be essential if the topic of international responsibility was to be placed in its proper perspective and viewed as a whole.

41. In order to be able to assess the gravity of an internationally wrongful act and determine the consequences attributable to that act, it is doubtless necessary to consider the different categories of obligations of States under international law and to establish a distinction between those obligations according to their importance to the international community (particularly in regard to the maintenance of peace). This is a matter which will be referred to at the appropriate time. But it must not be allowed to obscure the essential fact that it is one thing to define a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what should be the consequences of the breach. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate any hope of successful codification. That is clear from past experience.

42. In the present draft articles, the Commission is proposing to codify the rules governing the responsibility of States for internationally wrongful acts *in general*, and not only in regard to certain particular sectors such as responsibility for acts causing injury to the person or property of aliens. The international responsibility of the State is a situation which results not just from the breach of certain specific international obligations, but from the breach of *any* international obligation, whether established by the rules governing one particular matter or by those governing another matter. The draft articles accordingly deal with the *general rules* of the international responsibility of the State for internationally wrongful acts, that is to say, the rules which govern all the new legal relationships which may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong.

(c) *Structure of the draft*

43. In broad outline, and subject to any decisions which the Commission may take later, the structure of the proposed draft articles corresponds to the plan for studying the international responsibility of States adopted by the Commission at earlier sessions on the basis of the proposals of the Special Rapporteur. The preparation of the draft will therefore comprise two distinct main phases. Speaking generally, the first will deal with the origin of international responsibility, and the second with the content of the responsibility. More precisely, the first will determine on the basis of what facts and in what circumstances there exists on the part of a State an internationally wrongful act which, as such, is the source of international responsibility. The second will determine the consequences attached by international law to an internationally wrongful act in the various cases, in order to derive therefrom a definition of the content, form and degree of the international responsibility. Once these two essential tasks have been accomplished, the Commission may possibly decide whether a third should be added, namely, to consider certain

problems concerning what has been termed the "implementation" ("*mise en œuvre*") of the international responsibility of the State, and questions concerning the settlement of disputes arising out of the application of the rules relating to responsibility.

44. Within this general framework, the first task before preparing a set of draft articles to cover the question of the responsibility of the State for internationally wrongful acts—a task with an apparently limited objective but singularly delicate because of the many possible implications—is to formulate the basic general principles. Once these principles have been established, the next step will be to deal with all the questions relating to the subjective element of the internationally wrongful act, that is to say, questions concerning the possibility of attributing particular conduct (act or omission) to the State as subject of international law, and hence of considering this conduct as an act of the State in international law. It will then be necessary to solve the problems which arise in regard to the objective element of the internationally wrongful act, in other words, to establish in what circumstances the conduct attributed to the State must be considered as constituting a breach of an international legal obligation. In this way it will be possible to bring together the conditions for an act of the State to be characterized as an internationally wrongful act giving rise, as such, to State responsibility at the inter-State level. This will be followed by a consideration of the questions which arise in regard to the various circumstances whose existence may possibly exclude any wrongfulness of the conduct attributed to the State. It will then be possible to pass on to the second phase of the work, that relating to the content, forms and degrees of international responsibility.

45. In the light of the foregoing considerations, *chapter I* of the draft articles is devoted to "general principles". It contains, first, a definition of the fundamental principle attaching responsibility to every internationally wrongful act of the State (*article 1*). Next, it states the principle, closely linked to the first, that every State is capable of being considered, according to international law, as having committed an internationally wrongful act involving its international responsibility (*article 2*). This is followed logically by the principle which states the two elements, subjective and objective, for the existence of a wrongful act of the State according to international law (*article 3*). The chapter ends with the definition of a fourth general principle—namely, the principle of the irrelevance of the municipal law of a State to the characterization of an act by that State as internationally wrongful (*article 4*). The text of these provisions was adopted provisionally during the present session. The Commission has thus completed, on first reading, the determination of the basic general principles of the draft and their formulation (for the text of the articles and the commentaries thereto, see section B of the present chapter).

46. *Chapter II* of the draft ("The 'act of the State' according to international law") is devoted to the subjective element of the internationally wrongful act and, therefore, to the determination of the conditions in which a particular act must be considered as an "act of the State" according to international law. After an *intro-*

*ductory commentary* containing preliminary considerations designed to take into account certain theoretical difficulties and to assert in any case the autonomy of international law in this matter, the chapter will contain a series of rules in the form of *articles*. These rules will deal, first, with the question of establishing what persons may be the authors of conduct which may be considered as an act of the State according to international law. First will come the principal category, State organs—those so characterized according to the internal law of the State. The Commission will then examine whether other conduct whose authors come within certain specific categories but do not, strictly speaking, belong to a State organ, may also be considered as an act of the State according to international law. Secondly, it will be necessary to decide within this general context whether conduct falling under all these different categories, in certain particular conditions should or should not be attributed to the State according to international law. Thirdly, the analysis will conclude on a negative note by stating the rules which indicate the categories of conduct for which attribution to the State is excluded, while examining what may be the international situation of the State in relation to such conduct.

47. During the present session, the Commission considered the *introduction* to chapter II and the first two articles of the chapter, which thus relate only to a part (acts of organs of the State) of the first group of questions mentioned. The first article of the chapter (*article 5*) defines the rule which, in this sphere, constitutes the starting point—the rule that an act or omission may be taken into consideration for the purposes of attribution to the State as an internationally wrongful act if it has been committed by an organ of the State, that is to say, by an organ possessing that status according to the internal legal order of the State and acting in that capacity in the case in question. As a corollary to this rule, the second article of the chapter (*article 6*) states that for purposes of attribution, it is immaterial whether the organ in question is part of any of the main branches of the State structure, whether its functions concern international relations or are of a purely internal character, or whether it holds a superior or subordinate position in the organization of the State (for the text of these two articles and the commentaries thereto, as also for the introductory commentary, see section B of this chapter).

48. The Commission will continue its study of those questions which come within the framework of chapter II of the draft on the basis of the relevant sections, which it has not yet considered, of the Special Rapporteur's third and fourth reports, and will resume from the point where it left off at the present session, which means that it will begin by examining first chapter II, section 4, which appears in the Special Rapporteur's third report. This section deals with the question whether or not it is possible to take into account, for the purposes of attribution to the State as a subject of international law, the conduct of organs not of the State itself but of separate public institutions—autonomous national public institutions or local public authorities (States members of a federal State, cantons, regions, departments, municipal-

ities, autonomous administrations of certain territories or of dependent territories, and so on). Section 5 deals with the possibility of considering as attributable to the State—again with a view to establishing its international responsibility—the acts of individuals or groups which, although not formally having the status of organs, have in fact acted in that capacity (*de facto* organs, State auxiliaries, private individuals who occasionally perform public functions, and so on). Lastly, section 6 discusses the question of the possibility of attributing to a State the act or omission of an organ placed at the disposal of that State by another State or by an international organization.

49. In chapter II, section 7, contained in his fourth report, the Special Rapporteur passes on to the second group of questions which arise in the context of chapter II of the draft. This section deal essentially with the highly controversial question of the attribution to the State of the conduct of an organ which has exceeded its authority or acted contrary either to specific instructions or to the general requirements of the exercise of its activity. An effort is also made to clarify the situation which may arise when a person has continued to act as an organ when, in fact, even if not formally, he has lost that status.

50. The third group of questions in chapter II of the draft is also dealt with by the Special Rapporteur in his fourth report. In principle, for the purposes of State responsibility, section 8 excludes the possibility of attributing to the State, under international law, the conduct of private individuals who have acted as such, and it then examines the circumstances in which the existence of an internationally wrongful act by the State can nevertheless be contemplated in connexion with certain conduct of private individuals. Section 9 considers whether it is possible to attribute to the State acts or omissions of subjects of international law (States, international organizations, insurrectional movements possessing international personality) acting in its territory, or whether these acts or omissions should be attributed only to the other subject of international law in question. In the same context, the Special Rapporteur deals in section 10 (*article 13*) with the specific question of the retroactive attribution to a State of the acts of organs of a successful insurrectional movement.

51. At this point, the examination of the requirements for the characterization of specific conduct as an "act of the State" may be considered completed. It will then be necessary to consider, in another chapter of the draft devoted to "breach of obligation" in international law, the various aspects of what has been called the objective element of the internationally wrongful act, the breach of an international obligation. These questions will be the subject of further reports by the Special Rapporteur. It will first be necessary to examine whether the source of the international legal obligation (customary, treaty or other) has any implication when it comes to determining whether the breach is an internationally wrongful act. Next will be considered the problems relating to the determination of distinct categories of breaches of international obligations. An essential question which will arise at this point is whether in these days it is necessary

to recognize the existence of a distinction based on the importance to the international community of the obligation involved, and accordingly whether contemporary international law should acknowledge a distinct and more serious category of internationally wrongful acts, which might perhaps be described as international crimes. Another question which will arise in this same context will be that of the distinction to be made between the breach of an obligation requiring specific conduct on the part of the State, and the breach of an obligation requiring only that it ensure that a particular event does not occur (wrongful acts of conduct and wrongful acts of event). An effort will be made later to deal with the different characteristics of the breach of obligation according as the obligation involved is one of those which specifically require a certain act or omission or is one of those which require generally that a certain result shall be ensured, without specifying the means by which the result is to be obtained. Another matter which will be examined in this context is the force of the rule that local remedies must be exhausted before the breach of certain obligations relating to the treatment of aliens can be established. Next will be examined the different questions relating to the determination of *tempus commissi delicti*, both in relation to the requirement that the obligation whose breach is complained of shall have been in force at the time the conduct resulting in the breach took place, and in relation to cases where the act of the States takes the form of a continuing situation or the sum of a series of distinct and successive acts of conduct. Once these points have been settled (and the above list is not intended to be either exhaustive or indicative of a final order of priority), there will still remain some special problems to consider: for example, the possibility of attributing an internationally wrongful act simultaneously to more than one State in respect of one and the same situation, and the possibility of making a State responsible, in certain circumstances, for an act committed by another State. After that, detailed consideration of various circumstances excluding wrongfulness—*force majeure* or act of God, consent of the injured State, legitimate application of a sanction, self-defence, state of emergency, and so on, as well as possible mitigating circumstances, will bring to an end the first phase of the study of State responsibility for internationally wrongful acts. The next step will be to move on to the second phase, concerning the content, form and degree of international responsibility.

(d) *Method followed in the preparation of the draft*

52. The members of the Commission signified their agreement with the method followed by the Special Rapporteur in the preparation of his reports, and a number of representatives in the Sixth Committee of the General Assembly also signified it expressly. The Special Rapporteur therefore proposes to continue to follow the same method. This method consists in prefacing each draft article by a full explanation of the reasoning behind a particular formulation, and the practical and theoretical data on which the supporting arguments are based. The Special Rapporteur will continue to indicate the various questions which arise in connexion with each of the points

successively considered, and will note the differences of opinion which have appeared regarding them and the ways in which they have in practice been settled in international life.

53. The Commission and the Special Rapporteur thus display their preference for an essentially *inductive* method, rather than for deduction from theoretical premises, at least whenever considerations of State practice and judicial decisions make it possible to follow such a method for determining the content of the rules relating to State responsibility. It must, however, be pointed out once more that the precedents offered by practice and by judicial decisions are not equally distributed over the different questions, being abundant on some and relatively scarce on others. It is also necessary to take due account of a very large number of opinions of writers. The topic of international responsibility, particularly in some of its aspects, is one of those on which a great deal has been written, and these opinions of writers have inevitably had their effect on judicial decisions, so that a knowledge of them can be an essential tool for the interpretation of specific decisions. Moreover, in order to be able to define in clear and simple terms the problems to be solved, it is sometimes essential to clear the ground of certain controversies and artificially introduced complications which have become embedded in doctrinal polemics. At the same time, it is important to take full account of the various trends, especially the most modern, in order to be able to identify and harmonize the approaches adopted in the different legal systems, and to pick out from these trends those which enjoy the support of the majority of writers as compared with those which merely represent individual views.

54. In order to simplify matters for the General Assembly and in view of the method followed by the Special Rapporteur, the Commission proposes to refer in the commentaries to the articles not only to diplomatic practice and international judicial precedents but also to the opinions of writers. So as not to overburden its reports to the General Assembly, however, it intends as far as possible to confine these references to the most important cases and statements of position relating specifically to the points in question.

55. The Commission agreed that the topic of international responsibility was one of those where the progressive development of international law could be particularly important, especially—as the Special Rapporteur has shown—with regard both to the distinction between different categories of breaches of international obligations and to the content and degree of responsibility. The Commission wishes expressly to state, however, that in its view the relative importance of progressive development and of the codification of accepted principles cannot result from a pre-established plan. It must emerge in concrete terms from the pragmatic solutions adopted on the various points.

56. The Commission felt that it would be better to postpone until later any decision concerning the desirability of prefacing the draft with a definitions article or with an article indicating what matters would be excluded from its scope. When solutions to the different

problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general economy of the draft. It is essential to avoid definitions or initial formulations which might prejudge solutions to be adopted later. The first part of the draft will be based on a general notion of responsibility, that term being taken to mean the set of new legal relationships to which an internationally wrongful act by a State may give rise in the various cases. Later it will be for the Commission to say whether, for example, such relationships may arise only between the State concerned and the State whose own rights have suffered injury, or also between the State concerned and other subjects of international law, or possibly even with the international community as a whole. For the time being the Commission will confine itself to explaining, in the commentaries to the articles, the meaning of expressions used, whenever that is necessary for an understanding of the provision in question. That has been done, for instance, in the commentary to article 1 with regard to the expression "internationally wrongful act", and in the commentary to article 3 with regard to the use of the verb "to attribute".

57. Lastly, the Commission wishes to point out that, while the determination of so-called "primary" rules of international law often involves drafting a great many very long articles, responsibility on the other hand involves relatively few rules which can often be formulated very concisely. But it does not follow from concise formulation that the subject-matter is simple. On the contrary, every point raises a host of complex questions, all of which must be considered, since they affect the formulation to be adopted. It should come as no surprise, therefore, to find articles relatively few in number and sometimes consisting of only a few lines, followed by extensive commentaries.

## B. Draft articles on State responsibility

58. Articles 1 to 6 and the commentaries thereto, as adopted by the Commission at the twenty-fifth session on the proposal on the Special Rapporteur, are reproduced below for the information of the General Assembly.

### CHAPTER I

## GENERAL PRINCIPLES

### Commentary

Chapter I of the draft, which comprises four articles (articles 1-4) is devoted to certain principles of law which apply to the draft as a whole and provides the basis on which subsequent chapters will be constructed. After considering several suggestions, the Commission decided to give this chapter the heading "General principles". The expression "general principles" is used in this context as meaning rules of the most general character applying to the draft articles as whole. Other expressions, such as "fundamental rules" or "basic principles" appear in other chapters of the draft articles as meaning rules of a less general character but still of fundamental importance. The Commission deemed it unnecessary to add the words "of State responsibility" after the expression

"general principles". The title of the draft articles shows that the reference can only be to State responsibility.

### Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

#### Commentary

(1) The principle that any conduct of a State which international law characterizes as a wrongful act entails the responsibility of that State in international law is one of the principles most strongly upheld by State practice and judicial decisions and most deeply rooted in the doctrine of international law.

(2) The Permanent Court of International Justice applied this principle on 17 August 1923 in its judgment, No. 1, in the *S.S. "Wimbledon"* case,<sup>84</sup> and in its judgments in the *Case concerning the factory at Chorzów*.<sup>85</sup> In 1938, in its judgment in the *Phosphates in Morocco* case, the Permanent Court held that when a State was guilty of an internationally wrongful act against another State international responsibility was established "immediately as between the two States".<sup>86</sup> The International Court of Justice, too, applied the principle in its judgment in the *Corfu Channel* case,<sup>87</sup> in its Advisory Opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*<sup>88</sup> and in its Advisory Opinion of 18 July 1950 on the *Interpretation of peace treaties with Bulgaria, Hungary and Romania (Second Phase)*, in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".<sup>89</sup> Arbitral awards have repeatedly affirmed the principle set forth in the present article. We need only recall the awards rendered in 1901 concerning *Claims of Italian subjects resident in Peru* (*Réclamations des sujets italiens résidant au Pérou*)<sup>40</sup> in 1931 in the *Dickson Car Wheel Company* case<sup>41</sup> by the Mexico-United States General Claims Commission set up under the Convention of 8 September 1923, and in the *International Fisheries Company* case;<sup>42</sup> in 1925 by Max Huber in the *British*

<sup>84</sup> Case of the *S.S. Wimbledon*, P.C.I.J., Series A, No. 1, p. 15.

<sup>85</sup> *Case concerning the factory at Chorzów* (Jurisdiction), Judgment No. 8 of 26 July 1927, P.C.I.J., Series A, No. 9, p. 21 and *idem* (Merits), Judgment No. 13 of 13 September 1927, P.C.I.J., Series A, No. 17, p. 29.

<sup>86</sup> *Phosphates in Morocco* case (Preliminary Objections) 14 June 1938, P.C.I.J., Series A/B, No. 74, p. 28.

<sup>87</sup> *Corfu Channel* case (Merits), Judgment of 9 April 1949, *I.C.J. Reports, 1949*, p. 23.

<sup>88</sup> *I.C.J. Reports 1949*, p. 184.

<sup>89</sup> *I.C.J. Reports 1950*, p. 228.

<sup>40</sup> Seven of these awards reiterate that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents..." (United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), pp. 399, 401, 404, 407, 408, 409 and 411). (Translation by the United Nations Secretariat.)

<sup>41</sup> *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 678.

<sup>42</sup> *Ibid.*, p. 701.

claims in the Spanish zone of Morocco case (Réclamations britanniques dans la zone espagnole du Maroc);<sup>43</sup> and in 1953 in the *Armstrong Cork Company* case<sup>44</sup> by the Italian-United States Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947.

(3) With regard to State practice, the opinion of States is most significantly expressed by the positions adopted by Governments in connexion with the attempt by the League of Nations during the period 1924-1930 to codify the topic of State responsibility, limited to the case of damage to the person or property of aliens. Belief in the existence of the general rule that responsibility attaches to any internationally wrongful act by a State was clearly expressed in Point II of the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference for the Codification of International Law.<sup>45</sup> The same opinion is discernible both from the replies of Governments<sup>46</sup> and from the positions taken by representatives at the Conference.<sup>47</sup> At the end of the discussion, the Third Committee of the Conference unanimously approved article 1, which laid down that

International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.<sup>48</sup>

(4) Despite the diversity of the arguments they put forward to justify this fundamental principle,<sup>49</sup> all the

<sup>43</sup> According to the arbitrator, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility..." (*ibid.*, vol. II, (United Nations publication, Sales No. 1949.V.1), p. 641). (Translation by the United Nations Secretariat.)

<sup>44</sup> According to the Conciliation Commission, no State "may escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law" (United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No. 65.V.4), p. 163).

<sup>45</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 20.

<sup>46</sup> *Ibid.*, p. 24; and *Supplement to Volume III* (document 75 (a). M.69 (a). 1929.V), pp. 2 and 6.

<sup>47</sup> League of Nations, *Acts of the Conference for the Codification of International Law*, vol. IV, *Minutes of the Third Committee* (document C.351 (c). M.145 (c). 1930.V), pp. 18 *et seq.*

<sup>48</sup> *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>49</sup> Some writers claim to have found this justification in the actual existence of an international legal order and in the legal nature of the obligations it imposes on its subjects (see D. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. 1, pp. 25 and 62; P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, 1917), Supplement 2 to vol. X, p. 16; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, Kohlhammer, 1920), vol. III, part one, pp. 4 *et seq.*). Others prefer to think that, in the international order, State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States (see for example, Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, p. 90; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 5-6.

writers recognize that any internationally wrongful act of a State entails the international responsibility of that State, in other words, that it gives rise, as far as that State is concerned, to new international legal relations characterized by subjective legal situations distinct from those which existed before the act took place. The fact that the legal relations between States established as a result of an internationally wrongful act are new relations has been pointed out both by jurists whose writings are now legal classics,<sup>50</sup> and by authors of more recent works.<sup>51</sup>

(5) The Commission is fully aware that, notwithstanding the unanimous recognition of the general principle which, under the name of international responsibility, links the emergence of new legal relations with the commission by a State of an internationally wrongful act, there are serious differences of opinion over the definition of the legal relationships created by an internationally wrongful act and the legal situations resulting from these relationships. One approach which may be regarded as traditional in international law writings—it is supported by Anzilotti, Ch. de Visscher, Eagleton, and Strupp, among others—describes the legal relations deriving from an internationally wrongful act in one single form: that of a binding bilateral relationship established between the offending State and the injured State, in which the obligation of the former State to make reparation—in the broad sense of the term, of course—is set against the subjective right of the latter State to require the reparation. This view does not admit of the possibility of a sanction in the proper sense of the term—i.e. having a punitive purpose—which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Another view, whose most illustrious supporters are Kelsen and Guggenheim, leads to a position almost diametrically opposed to that just described. It, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees the authorization accorded to the injured State to apply coercion to the offending State by way of sanction precisely as the sole legal consequence flowing directly from the wrongful act. Accordingly, general international law would not regard the wrongful act as creating any binding relationship between the offending State and the injured State. The obligation to make reparation would be nothing more than a subsidiary duty which in municipal law the law itself, and in international law an agreement, interposes between the wrongful act and

<sup>50</sup> D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), vol. I, p. 385.

<sup>51</sup> W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow, Mezhdunarodnie otoshenia, 1970), p. 470; E. Jiménez de Aréchaga, "International Responsibility", *Manual of Public International Law*, Sørensen ed. (London, Macmillan, 1968), p. 533; see also Institute of the State and of Law of the USSR Academy of Sciences, *Kurs mezhdunarodnogo prava*, F. I. Kozhevnikov *et al.*, eds. (Moscow, Nauka, 1969), vol. V, *Osnovnye instituty y otrasli sovremennogo mezhdunarodnogo prava*, p. 426.

the application of coercion. Lastly, there is a third view, upheld by, among others, Lauterpacht, Eustathiades, Verdross, Ago, and the Soviet authors of the *Kurs mezhdunarodnogo prava*, according to which the consequences of an internationally wrongful act cannot be limited simply either to "reparation" or to a "sanction". In international law, as in any system of law, the wrongful act may, according to that view, give rise, not to just one type of legal relationship, but to two types of relationship, each characterized by a different legal situation of the subject involved. These legal consequences amount, according to the case, either to giving the subject of international law whose rights have been infringed by the wrongful act the right to claim reparation—again in the broad sense of the term—from the author of the act, or to giving that same subject, or possibly a third subject, the faculty to impose a sanction on the subject which has engaged in wrongful conduct. The term "sanction" is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation.

(6) The Commission noted that the opinions of writers also differ on another point with regard to the definition of the new legal relations which arise from an internationally wrongful act of a State; this is the question what subjects are involved in these relations. According to one view, which may be regarded as the traditional view, an internationally wrongful act committed by a State against another State gives rise to new legal relations between those two States *exclusively*. In other words, only the injured State may enforce the responsibility of the State which has committed the wrongful act. Some internationalists, on the other hand, hold today that in addition to these relations others may be created in certain cases either between the offending State and an international organization or between the offending State and other States.<sup>52</sup>

(7) Lastly, the Commission did not fail to note that the unanimity found in State practice, in judicial decisions and in the international legal literature as regards the existence of the principle that any internationally wrongful act of a State involves, in international law, the responsibility of that State, relates only to the normal situation produced as the result of a wrongful act. For the accepted view expressed in many scientific works, as well as in a number of international decisions and statements of position by Governments, is that there

are exceptional cases in which this responsibility devolves, not upon the State which committed the wrongful act, but on another State. These cases—in which the reference is usually to indirect responsibility or responsibility for the act of another—occur particularly when the State is placed in a position, in relation to another State, in which it controls the actions and limits the freedom of that State.

(8) The differences of opinion mentioned in paragraphs (5) to (7) of the commentary to this article, and the questions to which they relate, will certainly have to be considered and settled at the appropriate time. But, in the Commission's view, there is no need to take a position on them in defining the general basic rule of the draft. On the contrary, the Commission believes that the definition of that rule should be as comprehensive as possible; it should state a principle which is capable of attracting unanimous assent and is, above all, really a basic principle, that is to say, is capable of encompassing in itself all the various possible cases. In formulating this principle, therefore, it would be wrong to distinguish between various categories of wrongful acts and the effects of their different character on the new relationships which are established as a result of those acts; it would be equally wrong to list possible exceptions of which the principle might admit in marginal situations. Other articles of the draft will deal with these questions. They have been mentioned in this commentary only in order to assure the reader that the Commission had them quite clearly in mind when it chose the wording for article 1 of the draft. For what that article must carefully avoid is, precisely, prejudging in any way the solution to problems which will arise later.

(9) First, therefore the Commission took the view that the basic rule should not be encumbered with any theoretical "justification" of the existence of the fundamental principle. Its existence is fully proved by an examination of the facts of international life; there is no need to seek confirmation by deduction from other principles, such as the "legal" character of the international order or the sovereign equality of States.

(10) Secondly, the Commission rejected any idea of mentioning, in article 1, either the various forms which international State responsibility may take, or the subjects which may be involved in the attribution of responsibility. But it must be clear that, by using the term "international responsibility" in article 1, the Commission intended to cover every kind of new relations which may arise, in international law, from the internationally wrongful act of a state, whether such relations are limited to the offending State and the directly injured State or extend also to other subjects of international law, and whether they are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law. In other words, the formulation adopted for article 1 must be broad enough to cater for all the necessary

<sup>52</sup> In connexion with this last point, attention must be drawn to the growing tendency of a group of writers to single out, within the general category of internationally wrongful acts, certain kinds of acts which are so grave and so injurious, not only to one State but to all States, that a State committing them ought to be automatically held responsible to all States. It is tempting to relate this view to the recent affirmation of the International Court of Justice, in its Judgment of 5 February 1970 in the case concerning the *Barcelona Traction, Light and Power Company, Limited*, that there are certain international obligations of States which are obligations *erga omnes*, that is to say, obligations to the international community as a whole (*I.C.J. Reports 1970*, p. 32).

developments in the chapter which is to be devoted to the consent and forms of international responsibility.

(11) Thirdly, it is clear that the Commission refers in article 1 to the normal situation, which is that the offending State incurs international responsibility. Most members of the Commission recognized that there may be special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed. These cases, too, will be covered later in the draft. But in view of their exceptional character, the Commission did not consider that they should be taken into account in formulating the general rule on responsibility for wrongful acts, since that might detract from the basic force of the general principle stated at the outset.

(12) Fourthly, the Commission felt unable to accept the idea of some writers that the rule that any internationally wrongful act of a State involves the international responsibility of that State should allow of an exception in the case where the wrongful act was committed in any of the following circumstances: *force majeure* or act of God, consent of the injured State, legitimate exercise of a sanction, self-defence or emergency. If any of those circumstances were present in a particular case, that would preclude the international responsibility of the State which had committed the wrongful act. As stated in the introduction to this chapter of the report, the Commission intends to take these circumstances, and their consequences in different situations, specifically into consideration in the chapter to follow that dealing with breach of obligation.<sup>53</sup> For the time being, in the Commission's view, it is only necessary to say that the true effect of the presence of such circumstances is not, at least in the normal case, to preclude responsibility that would otherwise result from an act wrongful in itself, but rather to preclude the characterization of the conduct of the State in one of those circumstances as wrongful. There is therefore no reason to provide for an exception to the rule laid down in this article.

(13) Lastly, the Commission endeavoured to find a formula which would not prejudge the existence of liability for "lawful" acts. It is true that the Commission, as stated in the introduction to this chapter of the report, decided to confine the draft to responsibility arising from wrongful acts;<sup>54</sup> but it is no less true that it recognized that there are cases in which States may incur "internationally responsibility"—if that is the right term—for the harmful consequences of certain activities which are not, at least for the moment, prohibited by international law. The growing number of activities which create hazards lends special emphasis to the importance of this form of "responsibility". The Commission accordingly agreed that it was important not to reverse the order of the wording adopted for the article. Formulations such as "International responsibility results from any internationally wrongful act by a State" or "International responsibility exists whenever

there is an internationally wrongful act by the State" could, in fact, be interpreted to mean that international responsibility results *exclusively* from a wrongful act.

(14) As for the terminology used in article 1, first, the Commission considered the French term "*fait internationalement illicite*" to be preferable to "*délit*" or other similar expressions, which can sometimes take on a special meaning in certain systems of internal law. For the same reason, it decided not to use, in English, such words as "delict", "delinquency" and "tort"; or in Spanish the word "*delito*". Next, the French term "*fait internationalement illicite*" appeared more correct than "*acte internationalement illicite*", primarily for the reason that wrongfulness often results from inaction, and that is hardly indicated by the term "*acte*" which, etymologically, suggests the idea of action. In addition, particularly from the point of view of legal theory, "*fait*" would seem to be the obvious choice, because the term "*acte*" should technically be reserved in law to designate a manifestation of will intended to produce the legal consequences determined by that will, and that is certainly not the case with wrongful behaviour. For the same reason, the term "*hecho internacionalmente ilícito*" was adopted in the Spanish text. In the English text, however, it was decided to maintain the expression "internationally wrongful act", since the French word "*fait*" has no true equivalent in English legal terminology and the English term "act" does not have the same meaning as its counterpart in the legal terminology of Latin countries. Similarly, the adjective "wrongful" was considered preferable to the adjective "illicit". Finally, the term "internationally wrongful act" was preferred to "international wrongful act" from a formal point of view, even though the two expressions mean substantially the same thing. For the sake of uniformity, the terms "*fait illicite international*" and "*hecho ilícito internacional*" in the French and Spanish texts respectively were rejected in favour of "*fait internationalement illicite*" and "*hecho internacionalmente ilícito*".

**Article 2. Possibility that every State may be held to have committed an internationally wrongful act**

**Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.**

*Commentary*

(1) The purpose of article 1 of this draft is to establish that any State which commits an act characterized as internationally wrongful incurs international responsibility. The purpose of article 2 is to supplement the provision in the preceding article by stating further that any State whatever which engages in certain conduct will find that conduct characterized as an "internationally wrongful act" if it meets the conditions required for such characterization. In other words, this provision is intended to ensure that a State shall not escape its international responsibility by claiming that the rules according to which conduct must be considered inter-

<sup>53</sup> See para. 51 above.

<sup>54</sup> See para. 38 above.

nationally wrongful if committed by any State do not apply to it.

(2) The concept referred to in article 2 corresponds in a way that often termed in internal law "delictual capacity" or "capacity to commit wrongful acts". In many national legal systems, there are subjects which do not have this "capacity"—minors, for example. In other words, there are subjects which the legal order does not regard as having committed a "wrongful" act and which it therefore does not hold responsible, even when their conduct exhibits the features normally required for it to be characterized as wrongful, and thus even though the same conduct, if engaged in by another subject (an adult, for example), would have been regarded as an act entailing that subject's responsibility. There is no provision, however, for similar situations in international law. In particular, there is no possible parallel between the status of a newly constituted State in international law and that of a minor or in general of any person not possessing delictual capacity in internal law. States establish themselves as equal members of the international community as soon as they achieve an independent and sovereign existence. If it is the prerogative of sovereignty to be able to assert its rights, the counterpart of that prerogative is the duty to discharge its obligations. The principle that no State which by its conduct has committed a breach of an international obligation can escape the consequence, namely, to be regarded as having committed an internationally wrongful act which entails its responsibility, is the corollary of the principle of the sovereign equality of States.

(3) State practice and international judicial decisions leave no doubt about the existence of this principle, even though it has not generally been expressly stated in international awards or diplomatic correspondence. It can be said that writers on international law also are explicit or implicit in agreement on this point.<sup>55</sup>

(4) The principle having been established, the question arose whether there should or should not be any exceptions to it. While it was recognized that no State can claim that the rules under which its conduct could be characterized as internationally wrongful are in no case applicable to itself, it was suggested that there might nevertheless be special situations in which a State could in fact, as an exception, escape the application of those rules.

<sup>55</sup> The idea of "capacity to commit internationally wrongful acts" has been elaborated principally in German and Italian legal thinking (see, respectively, I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt am Main, Keppler, 1963), pp. 130-131; and R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-III* (Paris, Sirey, 1947), t. 68, pp. 453 et seq.). Among lawyers representing other legal systems, see L. Oppenheim, *International Law: A Treatise*, 8th ed. (H. Lauterpacht ed.) (London, Longmans Green, 1955), vol. I, pp. 339-340; A. Ross, *A Textbook of International Law* (London, Longmans Green, 1947), pp. 259-260; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 181-182. These writers are agreed in expressly stating that all States have "delictual capacity".

(5) The first special situation considered was that of States members of a federal union, where such States have retained, within limits, a measure of international personality.<sup>56</sup> It was with reference to such cases that the question was raised whether they should perhaps be recognized as constituting an exception to the principle formulated in article 2. It was argued that international practice seemed to indicate that even when it was the member State which, within the limits of its international personality, had assumed an obligation towards another State, it was still the federal State and not the member State which bore the responsibility for a breach of that obligation by the member State. Without wishing to take a position at the present stage on the validity of this argument, the Commission noted that, even if it proved to be well-founded, the breach of an international obligation committed by the member State possessing international personality would still constitute an internationally wrongful act by that member State. There would thus be no exception to the principle that every State is subject to the possibility of being held to have committed an internationally wrongful act.

(6) Another special situation considered was that where, on the territory of a given State, one or more other subjects of international law act in place of that State. The one or more other subjects of international law may sometimes, to a greater or lesser extent, entrust to elements of their own organization certain activities normally carried out by organs of the territorial State. The organs of the territorial State which normally fulfil certain international obligations of the State are no longer present or at all events are prevented from carrying out some of their duties.<sup>57</sup> In other words, the territorial State is shorn of a part of its organization, a part which had previously provided the physical means of fulfilling certain international obligations as well as of violating them. Here the Commission agreed that if in such circumstances the organs of the foreign State which had replaced those of the territorial State render themselves guilty of an act or omission in breach of an obligation of the territorial State, that act or omission could conceivably constitute an internationally wrongful act of the foreign State, but could not constitute a wrongful act of the territorial State. The Commission

<sup>56</sup> If the States members of a federal union have no international personality, the question considered here obviously cannot arise. Not being subjects of international law, these "States" manifestly cannot be regarded as the authors of internationally wrongful acts. The only problem to be resolved in this case is that of attributing to the federal State, as an act of that State, the conduct of organs of the member State; this problem will be dealt with in chapter II of the present draft.

<sup>57</sup> This situation may occur when there is a legal relationship of dependence, such as a protectorate; but it may also occur in other cases, particularly a military occupation. The situation that arises when the organization of the "suzerain" State or the occupying State replaces the organization of the dependent or occupied State in certain sectors should not be confused with that which may occur when the organs of the dependent State remain in existence and retain their functions, but act only under the control of the suzerain State. In such a case, as has been pointed out, the result may be that one State is responsible for the internationally wrongful act of another State.

pointed out that, even in this case, there was no real limitation of the principle stated in article 2. If there was no internationally wrongful act of the territorial State, it was because, under the rules for determining what is an act of the State, the conduct in question could not be attributed to the territorial State.

(7) The Commission also recognized that the existence of circumstances which might exclude wrongfulness, already mentioned in the commentary to article 1, did not affect the principle stated in article 2 and could not be deemed to constitute an exception to that principle. When a State engages in certain conduct in circumstances such as self-defence, *force majeure*, or the legitimate application of a sanction, its conduct does not constitute an internationally wrongful act because, in those circumstances, the State is not required to comply with the international obligation which it would normally have to respect, so that there cannot be a breach of that obligation. Consequently, one of the essential conditions for the existence of an internationally wrongful act is absent. This case certainly cannot be claimed as an exception to the rule that no State can escape the possibility of having its conduct characterized as internationally wrongful if—and this is the point—its conduct meets all the conditions. Still less could be possible existence of circumstances which would have the effect, not of precluding any wrongfulness of the act of the State but of diminishing the responsibility of the State,<sup>58</sup> be put forward as an exception to this rule. When, in any particular case, such circumstances arise, the existence of an internationally wrongful act by the State is not an issue. It is the consequences attaching to the act that may be affected by such circumstances, and that is why this question will be dealt with when the extent of responsibility comes to be considered.

(8) Consequently, the members of the Commission concluded not only that the principle laid down in article 2 is unchallenged, but that there is in reality no exception to it. Since the principle may be described as “obvious” and one that “goes without saying”, doubts were expressed as to the need to include in the convention a rule stating such a principle. It was suggested that it was sufficient that the principle should be explained in specialized works on international law. The opinion that prevailed, however, was that it was not sound practice in codification to refrain from stating a principle simply because it was “too obvious”. It is not uncommon for a State to deny the existence of an “obvious” rule, or while recognizing its existence, to affirm that this “obvious” rule admits of exceptions which make it inapplicable to that State. The Commission accordingly considered that it was better to include the rule in the draft, even if it did not seem absolutely indispensable, than to leave any possible doubt as to the applicability to all States without exception of rules whereby an act of a State is characterized as internation-

ally wrongful and as such entailing the international responsibility of that State.

(9) With regard to the choice of wording to express the principle in question, some members of the Commission argued that the purpose of the article was essentially to prevent a State, by invoking a particular subjective condition, from claiming to escape its international responsibility. They therefore considered it desirable to emphasize that, in international law, there is no subjective condition which could justify a claim of this kind, and also that in international law, all States are equal as regards the possibility of their international responsibility. They proposed a formula expressing the idea that every State is responsible for its internationally wrongful acts. Most members of the Commission, however, were of the opinion that such a formula would not provide an effective safeguard against the possibility of a State attempting to escape its international responsibility by invoking a particular subjective condition. A State could always contend that the existence of such a condition ruled out the possibility of characterizing its conduct as internationally wrongful, and consequently of holding it responsible under articles 1 and 2. Furthermore, the suggested formula would in reality merely repeat in another form the principle already laid down in article 1 that any internationally wrongful conduct of a State, whatever State it may be, entails the international responsibility of the State. What the principle to be laid down in article 2 must indicate is that whatever State it is which has acted in a particular way, the conduct of the State will be characterized as an internationally wrongful act if it meets the conditions laid down for such characterization in these articles. It is the combined effect of this principle and of the principle stated in article 1 that precludes the possibility of any State escaping its international responsibility by invoking an alleged special subjective condition. Thus, agreement was reached in the Commission on a formula which expresses the equality of States in respect both of the possibility of being considered as having committed an internationally wrongful act and of the possibility of being held responsible for it.

(10) Still on the subject of terminology, the Commission considered it preferable not to use the expression “capacity to commit wrongful acts”, although that is the expression generally used by writers to express the underlying notion in article 2. If the term “capacity” were used, there would be a temptation to draw an analogy between the principle that in international law every State has the capacity to commit wrongful acts and the rule in article 6 of the Vienna Convention on the Law of Treaties, which provides that “Every State possesses capacity to conclude treaties”.<sup>59</sup> But capacity to conclude treaties and capacity to commit internationally wrongful acts are two entirely separate notions. Capacity to conclude treaties, which is the

<sup>58</sup> Such circumstances might be present, for example, in the case of a State which has just become independent or which has been ravaged by war or civil war or has suffered grave natural disasters, etc.

<sup>59</sup> For all references to the Vienna Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 289 *et seq.*

international equivalent of capacity to contract, is the most prominent aspect of a subjective legal situation which, to continue using municipal law terminology, may be defined as the State's "capacity to act" in international law, i.e. the legal power possessed by the State to perform "legal acts" and to produce legal effects by manifesting its will. On the other hand, what is called the "capacity to commit wrongful acts" or "delictual capacity" obviously does not denote any legal power. It would be absurd that the legal order should endow its subjects with capacity to conduct themselves in a manner contrary to its own obligations. Hence "capacity to commit wrongful acts" or "delictual capacity" is not a sub-category of the "capacity to act". What is meant when this term is used is, that a subject of international law may well engage in conduct contrary to a legal obligation incumbent on it, and thereby fulfil the requisite conditions for being held to have committed a wrongful act. Furthermore, if article 2 were worded so as to specify that "every State possesses the capacity to commit internationally wrongful acts", it might be thought that international law authorizes its subjects to contravene the legal order established by it. For similar reasons it was also considered preferable not to say, in French, "*Tout Etat est susceptible de commettre un fait internationallement illicite*", in order to avoid the permissive colouring which the English translation would have if it stated that "Every State may commit internationally wrongful acts". The wording adopted seemed to the Commission to be the best way of avoiding any misinterpretation.

(11) In drafting article 2, the Commission was careful to adopt a formula which does not prejudge the possibility that subjects other than States may be held to have committed an internationally wrongful act. The present draft is concerned only with the international responsibility of States. In this context there is no need to determine whether an internationally wrongful act may be committed only by States or whether it may be committed by other subjects of international law also. To avoid any misunderstanding on this point, the Commission preferred not to use for article 2 a title such as "Subjects of international law capable of being held to have committed an internationally wrongful act". This might have given a false impression that the intention in article 2 was to affirm that States alone are liable to commit such acts.

### *Article 3. Elements of an internationally wrongful act of a State*

**There is an internationally wrongful act of a State when:**

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

**(b) That conduct constitutes a breach of an international obligation of the State.**

#### *Commentary*

(1) Article 1 states the basic general principle that every internationally wrongful act of a State entails its

international responsibility, while article 2 states the principle that every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its responsibility. Article 3 supplements these two principles by laying down the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of an internationally wrongful act. For that purpose, the following two elements, both of which must be present, are traditionally distinguished: (a) an element, generally called a *subjective element*, consisting of conduct that must be capable of being attributed not to the human being or group of human beings which actually engaged in it, but to the State as a subject of international law; and (b) an element, generally called an *objective element*, which indicates that the State to which the conduct in question is attributed has failed, by that conduct, to fulfil an international obligation of the State.

(2) Disregarding questions of terminology and more generally of the degree of precision of the expressions sometimes used, there is no doubt that the two elements mentioned above are clearly discernible in, for example, the passage in its judgement in the *Phosphates in Morocco* case in which the Permanent Court of International Justice explicitly links the creation of international responsibility with the existence of an "act being attributable to the State and described as *contrary to the treaty right[s] of another State*".<sup>60</sup> They are also to be found in the decision in the *Dickson Car Wheel Company* case, given in July 1931 by the Mexico-United States General Claims Commission established by the Convention of 8 September 1923, where the condition required for a State to incur international responsibility is stated to be the fact "... that an unlawful international act be imputed to it, that is, that there exist a *violation of a duty imposed by an international juridical standard*".<sup>61</sup> With regard to State practice, attention may be drawn to the terms in which the Austrian Government replied to Point II of the request for information addressed to Governments by the Preparatory Committee of the 1930 Conference: "There can be no question of a State's international responsibility unless it can be *proved* that the State *has violated one of the international obligations incumbent upon States* under international law."<sup>62</sup>

(3) In the literature of international law, the facts that certain conduct is attributable to a State as a subject of international law and that such conduct constitutes a breach of an international obligation of that State are together generally considered to be the essential elements for recognition of the existence of a wrongful act giving rise to international responsibility. Among the older formulations, that of Anzilotti remains a

<sup>60</sup> *Phosphates in Morocco case (Preliminary Objections)*, 14 June 1938 (P.C.I.J., Series A/B, No. 74, p. 28). (Italics supplied by the Commission.)

<sup>61</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (op. cit.), p. 678. (Italics supplied by the Commission.)

<sup>62</sup> League of Nations, *Bases of Discussion ... (op. cit.)*, p. 21. (Italics supplied by the Commission.)

classic;<sup>63</sup> among the more recent, those by Sereni,<sup>64</sup> Levin,<sup>65</sup> Amerasinghe,<sup>66</sup> Jiménez de Aréchaga<sup>67</sup> and that given in the "Restatement of the Law" by the American Law Institute<sup>68</sup> are the clearest. Generally speaking, it may be said that most writers are substantially in agreement on this point, irrespective of their nationality or period.<sup>69</sup> There are reservations expressed by some writers concerning the necessity or utility of what has been called the subjective element of the internationally wrongful act are sometimes prompted by the idea, isolated and clearly invalidated by judicial decisions and practice, that the State would never answer for "its own" acts but only for the acts of individuals, whether having the status of organs or private persons.<sup>70</sup> In other cases, for the sake of being logically consistent with the premises adopted, some writers have felt bound to deny the existence of a normative operation whereby an action which is in fact performed by an individual is attached to a collective entity. Thus, for example, there are writers who maintain that, since the only conceivable "legal imputation" is that which consists in attributing the legal effects of an act to a given entity, the attribution of the act as such to the said entity cannot be anything other than a factual or psychological imputation.<sup>71</sup> There are still other writers who believe that the need to replace the idea of legal imputation by that of recognition of a link of factual causality must of necessity arise from the "real" character of collective entities, and of the State first and foremost.<sup>72</sup> More often,

<sup>63</sup> Responsibility arises from the *wrongful violation of the right of another* and generates the obligation to make reparation in so far as it is linked, i.e. *attributable, to an acting subject.*" (*Teoría...* (op. cit.), vol. II, p. 83). (Translation by the United Nations Secretariat.)

<sup>64</sup> *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III, p. 1505.

<sup>65</sup> *Otvetstvennost gosudarstv v sovremennom mezhdunarodnom prava* (Moscow, Mezhdunarodnye otnosheniya, 1966), p. 51.

<sup>66</sup> *State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), p. 37.

<sup>67</sup> *International Responsibility...* (op. cit.), p. 534.

<sup>68</sup> American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1965), p. 497.

<sup>69</sup> See, among other writers, Ch. de Visscher, *op. cit.*, pp. 90-91; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans Green, 1938), p. 22; R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 441 *et seq.* and 450 *et seq.*; J. Garde Castillo, "El acto ilícito internacional", *Revista española de derecho internacional* (Madrid, Consejo Superior de Investigaciones Científicas, 1950), vol. III, No. 1, p. 124; Ch. Rousseau, *Droit international public* (Paris, Sirey, 1953), p. 361; P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 1-2, 4-5; B. Cheng, *op. cit.*, p. 170; P. Reuter, "La responsabilité internationale", *Droit international public* (cours) (Paris, Les Nouvelles Institutes, 1955-1956), pp. 52 *et seq.*, 82 *et seq.*; G. Schwarzenberger, *A. Manual of International Law*, 4th ed. (London, Stevens, 1960), vol. 1, p. 163; G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, pp. 783 *et seq.*

<sup>70</sup> A. Soldati, *La responsabilité des Etats dans le droit international* (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 75 *et seq.*

<sup>71</sup> G. Arangio-Ruiz, *Gli enti soggetti dell'ordinamento internazionale* (Milan, Giuffrè, 1951), vol. I, pp. 128 *et seq.*, 337 *et seq.*

<sup>72</sup> R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), pp. 587-588.

however, the reservations expressed are simply the reflection of the uneasiness caused by the habitual use in this context of the terms "imputability" and "imputation", which only lead to confusion, and which the Commission, as mentioned below<sup>73</sup> decided to reject and replace by others less likely to give rise to misunderstanding.<sup>74</sup>

(4) As regards the *subjective element*, and more particularly the determination of conduct susceptible of being considered as State conduct, what can be said generally is that it can be either active (action) or passive (omission). It can even be said that cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on an action by a State, and whenever an international tribunal has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used in a case of active conduct.<sup>75</sup> Similarly, those States which replied to point V of the request for information submitted to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law expressly or implicitly recognized the principle that the responsibility of the State can be entailed by the omissions as well as by the actions of officials,<sup>76</sup> and this principle is confirmed in the articles adopted by the Conference on first reading.<sup>77</sup> Finally, it can be said that the principle has been accepted without question by writers<sup>78</sup> and explicitly or implicitly adopted in all the private codification drafts.

(5) Secondly, it is important to bring out the fact that in stipulating that for some particular conduct to be liable to be characterized as an internationally wrongful act, it must first and foremost be conduct attributable to the State, the sole purpose is to indicate that it must be possible for the action or omission in

<sup>73</sup> See para. (15) below.

<sup>74</sup> V. N. Elynchev, "Problema vmenenia v mezhdunarodnom prave", *Pravovedenie* (Leningrad), 1970, No. 5, pp. 83 *et seq.*

<sup>75</sup> The international responsibility of the State for an internationally wrongful omission was explicitly affirmed by the International Court of Justice in its judgment of 9 April 1949 in the *Corfu Channel case* (Merits) (*I.C.J. Reports, 1949*, pp. 22-23). See also the arbitral award of 10 July 1924 in the *Affaire relative à l'acquisition de la nationalité polonaise* (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2) p. 425).

<sup>76</sup> League of Nations, *Bases for Discussion...* (op. cit.), pp. 70 *et seq.*, and *Supplement to Volume III* (op. cit.), pp. 2-3, 12 *et seq.*

<sup>77</sup> See *Yearbook...* 1956, vol. II, pp. 225-226, document A/CN.4/96, annex 3, articles 6, 7 and 8.

<sup>78</sup> For studies concerning the specific character in international law of the offence of omission, see R. Ago, "Illecito commissivo e illecito omissivo del diritto internazionale", *Diritto internazionale* (Milan, Istituto per gli Studi di politica internazionale, 1938), pp. 9 *et seq.*; P. A. Zannas, *La responsabilité internationale des Etats pour les actes de négligence* (Montreux, Ganguin et Laubscher, 1952); G. Perrin, "L'agression contre la légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris), 3rd série, vol. XXVIII, No.3 (1957), pp. 410 *et seq.*; D. Lévy, "La responsabilité pour omission et la responsabilité pour risque en droit international", *ibid.* t. XXXII, No. 4 (1961), pp. 744 *et seq.*

question to be considered in international law as an "act of the State". The State is a real organized entity, but to recognize this "reality" is not to deny the elementary truth that the State as such is not capable of physical action. In the last analysis, therefore, conduct regarded as an "act of the State" can only be some physical action or omission by a human being or group of human beings.<sup>79</sup> Hence the necessity of establishing when and how an "act of the State" can be discerned in a given action or omission. In other words, it is a question of determining by whom and in what circumstances these actions or omissions must have been performed for them to be attributable to the State. This is what the articles in chapter II of the draft set out to do.

(6) It should first of all be made plain, however, that the attribution of conduct to the State cannot be based on simple recognition of a link of factual causality (*causalité naturelle*). It is sometimes—but not always—possible to speak of factual causality in reference to the relationship between particular conduct and the result of that conduct, but not in reference to the relationship between the person of the State and the action or omission attributed to it. There are no activities of the State that can be called "its own" from the point of view of factual causality (*causalité naturelle*), either in internal law or in international law. By the very nature of the State, the attribution of conduct to the State is of necessity a normative operation.<sup>80</sup> It must also be emphasized that the State to which particular conduct is attributed is the State seen as a person, as a subject of law, and not the State seen as a legal order or system of norms.<sup>81</sup> It should be added that in speaking of attribution to the State as a subject of law, what is of course meant is as a subject of international law, not as a subject of internal law.<sup>82</sup> Lastly, it must be made clear that the attribution of conduct to a State for the purpose of establishing the possible existence of an internationally wrongful act by that State can take place only in accordance with international law. The operation of attaching an action or

omission to a subject of international law in order to draw conclusions therefrom in the sphere of international legal relations cannot be performed in any other framework than that of international law itself.<sup>83</sup> It is thus an entirely separate operation from attribution of the same conduct to the State as a subject of internal law, and on the basis of internal law, without prejudice to any possible consideration by international law, for its own purposes, of the situation in internal law. The concrete difficulties sometimes met with in this connexion are frequently due to an insufficiently clear grasp of these different aspects.

(7) The second condition laid down for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach by the State of an international obligation of the State. This is what is called the *objective* element of the internationally wrongful act, the specific element which distinguishes it from the other acts of the State to which international law attaches legal consequences. The contrast between the State's actual conduct and the conduct which juridically it ought to have observed constitutes the very essence of the wrongfulness.

(8) It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is the breach of an international obligation of the State. In its judgement of 26 July 1927 on jurisdiction in the *Case concerning the Factory at Chorzow*,<sup>84</sup> the Permanent Court of International Justice used the words "breach of an engagement". It employed the same expression in its judgement of 13 September 1928 on the merits of the case.<sup>85</sup> The International Court of Justice referred explicitly to the Permanent Court's words in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>86</sup> In its advisory opinion of 18 July 1950 on the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* the Court held that "refusal to fulfil a treaty obligation" involved international responsibility.<sup>87</sup> In arbitration decisions, the classic definition is the one referred to above, given by the Mexico-United States General Claims Commission

<sup>79</sup> "States can act only by and through their agents and representatives." (Case of *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion No. 6, P.C.I.J., Series B, No. 6, p. 22.)

<sup>80</sup> See D. Anzilotti, *Corso...* (*op. cit.*), p. 222; J. G. Starke, "Imputability in International Delinquencies", *The British Year Book of International Law*, 1938 (London), vol. 19, p. 105; W. Wengler, *op. cit.*, vol. I, p. 39; C. Th. Eustathiades, "Les sujets du droit international et la responsabilité internationale—Nouvelles tendances", *Recueil des cours...* 1953-III, vol. 84 (Leyden, Sijthoff, 1955), p. 422.

<sup>81</sup> At one point, the identification of the legal person with a legal order led writers such as H. Kelsen, "Über Staatsrecht", *Zeitschrift für das privat und öffentliches Recht der Gegenwart* (Vienna, Hölder, 1914), Bd. 40, p. 114; and W. Burckardt, *Die völkerrechtliche Haftung der Staaten* (Berne, Haupt, 1924), pp. 10 *et seq.*, to conclude that a wrongful act cannot be attributed to the legal person, which is the expression of the unity of the special legal order that constitutes that person. For a criticism of the normative theory in relation to the identification of the State and its legal order, see V. N. Elynchev, *op. cit.*, pp. 85 *et seq.*

<sup>82</sup> For a recent reaffirmation of this aspect, see Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 426.

<sup>83</sup> See J. G. Starke, *loc. cit.*, pp. 106-107; T. Perassi, *Lezioni di diritto internazionale*, 4th Ed. (Rome, Foro Italiano, 1939), p. 116; R. Ago, "Le délit international" (*loc. cit.*), pp. 461-462; K. Furgler, *Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der Praxis der Vereinten Staaten und der Schweiz* (Zürich, Polygraphischer Verlag, 1948), pp. 19-20; P. Reuter, "La responsabilité internationale" (*loc. cit.*), p. 87; J. P. Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, Librairie générale de droit et de jurisprudence, 1966), p. 119. It was again his particular conception of the State and legal persons in general that led Kelsen to maintain that the question whether an act performed by an individual is or is not an act of State must be settled on the basis of national law (H. Kelsen, *Principles of International Law* (New York, Rinehart, 1952), p. 117).

<sup>84</sup> P.C.I.J. Series A, No. 9, p. 21.

<sup>85</sup> P.C.I.J. Series A, No. 17, p. 29.

<sup>86</sup> I.C.J. Reports 1949, p. 184.

<sup>87</sup> I.C.J. Reports 1950, p. 228.

in its decision in the *Dickson Car Wheel Company* case.<sup>88</sup> In State practice, the terms “non-execution of international obligations”, “acts incompatible with international obligations”, “breach of an international obligation” and “breach of an engagement” are commonly used to denote the very essence of an internationally wrongful act, source of responsibility. These expressions recur frequently in the replies by Governments, particularly on point III, to the request for information addressed to them by the Preparatory Committee for the 1930 Conference.<sup>89</sup> Moreover, the article 1 unanimously adopted on first reading by the Third Committee of the Conference contains these words: “any failure . . . to carry out the international obligations of the State”.<sup>90</sup> The same consistency of terminology is to be found in the literature and private draft codifications of State responsibility.

(9) It should be noted that in international law the idea of breach of an obligation can be regarded as the exact equivalent of the idea of infringement of the subjective rights of others. The Permanent Court of International Justice, which normally uses the expression “violation of an international obligation”, spoke of an act “. . . contrary to the treaty right of another State” in its judgement of 14 June 1938 in the *Phosphates in Morocco* case.<sup>91</sup> The correlation between legal obligation on the one hand and subjective right on the other admits of no exception; unlike the situation in municipal law, there are no obligations on a subject which are not matched by an international subjective right of another subject or subjects, or even, for those who share the view referred to in the commentary to article 1, of the totality of other subjects of international law.

(10) It is sometimes asked whether there should not be an exception to the principle that what is characteristic of an internationally wrongful act is that it consists in a breach by the State of an international obligation of the State. The question is prompted by the idea that, in certain cases, the *abusive exercise* of a right could constitute internationally wrongful conduct thereby entailing international responsibility. The Commission is of the opinion that the answer to this question has no direct bearing on the determination of the elements of an internationally wrongful act. It is a question of substance which concerns the existence or non-existence of a “primary” rule of international law—a rule whose effects is to limit the exercise by the State of its rights, or, as some writers would put it, its capacities, and to prohibit their abusive exercise. If it is agreed that a limitation and a prohibition of this kind are accepted by international law in force, then the abusive exercise of a right by a State will

necessarily constitute a breach of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others or encroaching on their competence. If the existence of an internationally wrongful act were to be recognized in such a case, the constitutive element would still be the breach of an obligation and not the exercise of a right. Accordingly, in defining in principle the conditions for the existence of an internationally wrongful act, it was considered that the reference to breach of an international obligation would also cover the case where the obligation in question was specifically an obligation not to exercise certain of the State’s own rights in an abusive or unreasonable manner. It should be added, however, that in taking this view the Commission did not definitely exclude the possibility that it might have to deal with the question of abuse of right in connexion with other provisions of the present draft. Again, it may in due course decide to deal separately with the codification of this particular matter, which concerns the framing of certain “primary” rules rather than the rules governing responsibility.

(11) Having thus concluded that there was no exception to the principle that two conditions must be met for the existence of an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation incumbent upon the State—the Commission considered whether those two necessary conditions were also sufficient. The first problem considered in this connexion was whether there should not sometimes also be a third condition for the existence of an internationally wrongful act—the occurrence of a certain *external event* as a result of the State’s conduct.<sup>92</sup> In certain cases—for example, failure by the State’s legislative organs to pass a law which the State, by treaty, has specifically undertaken to enact, or refusal by a coastal State to permit innocent passage through its territorial waters in peacetime to ships of another State—the conduct as such is itself sufficient to constitute a breach of an international obligation incumbent upon the State. That is what may be called an internationally wrongful act of conduct alone. There are however, other cases in which the situation is different. For a State to be said to have failed in its duty to protect the premises of a foreign embassy against injurious acts of third parties, it is not sufficient to show that the State was negligent in not providing adequate police protection; some injurious event must also have taken place as a result of that negligence, such as damage by hostile demonstrators or an attack on the embassy premises by private individuals. In a case of that kind, and in general in cases where the purpose of the international obligation is precisely to prevent the occurrence of certain injurious events, negligent conduct of the organs of the State does not become an actual breach of the international obligation unless the conduct itself is combined with a supplementary element, an external event, one of those events which the State should specifically have endeavoured to prevent. The Commission

<sup>88</sup> See paragraph 2 of the commentary. See also the decision given on 10 July 1924 in the *Affaire relative à l’acquisition de la nationalité polonaise* (United Nations, *Reports of International Arbitral Awards*, vol. I (*op. cit.*), p. 425).

<sup>89</sup> League of Nations, *Bases of Discussion . . .* (*op. cit.*), vol. III, pp. 25 *et seq.*, 30 *et seq.*, and 33 *et seq.*; *Supplement to Volume III* (*op. cit.*), pp. 2, 6 *et seq.*

<sup>90</sup> *Yearbook . . . 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>91</sup> *P.C.I.J. Series A/B*, No. 74, p. 28.

<sup>92</sup> See on this question, R. Ago, “Le délit international . . .” (*loc. cit.*), pp. 447 *et seq.*, p. 500.

does not think, however, that this distinction directly affects the formulation of the rule stating the conditions for the existence of an internationally wrongful act. Even if, in some cases, it has to be concluded that there is no internationally wrongful act so long as a particular external event has not occurred, that does not imply that the two conditions for the existence of an internationally wrongful act—conduct attributable to the State, and breach by that conduct of an international obligation—are no longer sufficient by themselves. If there is no internationally wrongful act so long as the event has not occurred, the reason is that until then the State's conduct has not resulted in the breach of an international obligation. It is really the objective element of the internationally wrongful act that is missing. In other words, the occurrence of an external event is a condition for the breach of an international obligation, and not a new element which has to be combined with the breach for there to be a wrongful act. The Commission will be able to consider the distinction made above between two different types of internationally wrongful acts when it takes up the various questions arising with regard to the breach of an international obligation.

(12) The second problem considered by the Commission in this connexion was whether before concluding that an internationally wrongful act existed, it was not also necessary to establish the presence, in the particular case under consideration, of a third constituent element, namely, *damage*, caused as a result of the State's conduct, to the detriment of the subject whose subjective right has been impaired. Some writers are of this opinion,<sup>93</sup> even if the way they commonly use the word "damage" does not necessarily indicate that they are referring to the same phenomenon or the same aspect. Even setting aside the opinions of those who by "damage" mean something else, or at all events something different from an injury caused by one State to another State at the international level,<sup>94</sup> it should

<sup>93</sup> See, for example, A. V. Freeman, *op. cit.*, p. 22; A. Ross, *op. cit.*, pp. 242 and 255; K. Furgler, *op. cit.*, p. 16; P. Guggenheim, *op. cit.*, vol. II, p. 1; E. Jiménez de Aréchaga, *op. cit.*, p. 534.

<sup>94</sup> Some writers who maintain that there must be damage for there to be an internationally wrongful act are really thinking more of the occurrence of the external event which, as just noted, must sometimes accompany the actual conduct of the State for that conduct to result in a breach of an international obligation. The occurrence of such an event, however, is only characteristic of a particular category of internationally wrongful acts, and where it is required, it does not represent a "third" constituent element of the internationally wrongful act; it is only a condition for the existence of the objective element of the violation. Other writers, when they refer to "damage", often have in mind not an injury caused to a State at the international level, but rather an injury caused to an individual at the municipal level. This is clearly so, for example, in the case of C. F. Amerasinghe, *op. cit.*, p. 55. The importance accorded to the element of damage is thus a consequence of the fact that only cases of State responsibility for injuries to individual aliens have been considered, and that consideration of the rules relating to responsibility has been combined with that of the substantive rules relating to the treatment of aliens. Injury to individuals, which is precisely what the rule concerning the treatment of aliens is designed to prevent, has nothing in common with damage at the strictly international level, which some consider must occur in addition to the breach of the obligation for an internationally wrongful act to exist. Such damage can only be damage suffered by a State.

be noted that the word "damage" is sometimes used by international lawyers to refer specifically to damage to economic or patrimonial interests. Where such damage has occurred, it may indeed be a decisive factor in determining the consequences of a wrongful act. As such, it will be considered in the part of the draft devoted to the forms and extent of reparation. But it seems clear that, in this sense, "damage" is not an essential condition for the existence of an internationally wrongful act, not an individual constituent element of that concept. More often it is maintained that "damage" should be understood to mean not just damage to economic interests but also to moral interests. It is in fact in this sense that the term is generally used when it is said that it constitutes an essential element of the internationally wrongful act.<sup>95</sup> The expression "moral damage", moreover, is not free from ambiguity, either. It may refer specifically to the injury constituted by a slight to the honour or dignity of a State. But even the combination of "moral" damage as thus understood, and strictly "economic" damage is obviously not enough to introduce an element which must be present for there to be an internationally wrongful act, and what the Commission is trying to do in article 3 is precisely to determine the constituent elements without which there can in no case be an internationally wrongful act. International law today lays more and more obligations on the State with regard to the treatment of its own subjects. For examples we need only turn to the conventions on human rights or the majority of the international labour conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the convention, or even any slight to their honour or dignity. Yet it manifestly constitutes an internationally wrongful act, so that if we maintain at all costs that "damage" is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of "injury" to that other State. But this is tantamount to saying that the "damage" which is inherent in any internationally wrongful act is the damage which is at the same time inherent in any breach of an international obligation.<sup>96</sup> Reference to the breach of an international obligation thus seemed to the Commission fully sufficient to cover that aspect as well, without the addition of anything further.<sup>97</sup> The Commission was thus able to conclude that the two elements respectively described as the "subjective" element and the "objective" element are the only necessary components of any internationally

<sup>95</sup> Thus, for example, E. Jiménez de Aréchaga, after referring to damage as a condition for international responsibility, adds that "in inter-State relations the concept of damage does not, however, have an essential material or patrimonial character" (*op. cit.*, p. 534).

<sup>96</sup> D. Anzilotti, *Corso . . .* (*op. cit.*), p. 425, brings out the fact that damage is often equated in international law with the breach of an obligation.

<sup>97</sup> To refer to "damage" as a constituent element of the internationally wrongful act separate from the breach of an obligation could even be dangerous, because it might give the impression that in the Commission's opinion, where there was breach of an international obligation without "damage", there was no wrongful act and no responsibility.

wrongful act. Other elements may be present in any particular case, or even in most cases, but are not indispensable.

(13) With regard to the wording of the rule, the Commission adopted a formula which, though it may seem a little schematic, at least establishes clearly the relationship between the questions dealt with in article 3 and those dealt with in subsequent chapters of the draft. *Sub-paragraph (a)*—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II of the draft (on the “act of the State”), which establishes what kinds of conduct are attributable to the State under international law. *Sub-paragraph (b)*—which states that such conduct must constitute a breach of an international obligation—corresponds to chapter III (which will deal with the “international breach of obligation”), which will indicate what conditions must be met for conduct to constitute such a breach and what different cases of breach of obligation are covered. As regards the order in which these two elements appear, it seemed more logical to mention the subjective element before the objective element, because it is necessary to determine whether State conduct exists before it can be determined whether or not it constitutes a breach of an international obligation. In the introductory phrase, the words “of a state” after the words “internationally wrongful act” follow from what was said in the introduction to this chapter of the report,<sup>98</sup> namely, that the draft is not concerned with the international responsibility of subjects of international law other than States.

(14) In *sub-paragraph (a)*, the Commission chose the term “attribution” to denote the operation of attaching a given action or omission to a State. This term seemed preferable to others frequently used in international practice and judicial decisions, such as “imputation”, although writers continually stress the fact that when the terms “imputability” or “imputation” are used in relation to the international responsibility of States, they do not have the same meanings as, for example, in internal criminal law, where “imputability” sometimes indicates an agent’s state of mind, ability to understand and to will as the basis of responsibility, or in criminal procedure, where “imputation” may mean the charging of a subject of internal law by a judicial authority. At all events the term “attribution” is more likely to prevent misinterpretations. In addition—and again in order to avoid any false analogy between the notion referred to here and that of a subsequent operation corresponding in some measure to a charge by a judicial organ in internal law, the Commission preferred to say “conduct... is *attributable* to the State under international law” rather than “conduct... is *attributed* to the State under international law”.

(15) The Commission considered it more appropriate to refer in *sub-paragraph (b)* of the article to “breach of an international obligation” rather than “breach of a rule” or of a “norm of international law”. “Breach of an obligation” is not only the expression commonly

used in judicial decisions and State practice, it is also the most accurate. A rule is the objective expression of the law; an obligation is a subjective legal phenomenon and it is by reference to that phenomenon that the conduct of a subject of international law is judged, whether it is in compliance with the obligation or whether it is in breach of it. Furthermore, an obligation the breach of which is a constituent element of an internationally wrongful act does not necessarily and in all cases flow from a rule, in the true sense of the term. It may very well have been created and imposed upon a subject by a particular legal instrument or by a decision of a judicial or arbitral tribunal. The term “obligation” was chosen by the Commission in preference to others that may be considered synonymous in international law, such as, for example, “duty” or “engagement”, because it is the term most commonly used in international judicial decisions and practice and in the literature. Finally, in the French version, the term “*violation*” was preferred to other similar terms, such as “*manquement*”, “*transgression*” or “*non-exécution*”, in particular because this term is used in Article 36, paragraph 2 (c), of the Statute of the International Court of Justice. For the same reason, the term “breach” is used in the English version and the term “*violación*” in the Spanish.

#### *Article 4. Characterization of an act of a State as internationally wrongful*

**An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.**

#### *Commentary*

(1) This article states in explicit form a principle which is already implicit in article 3, namely, the principle that the characterization of a given act as internationally wrongful is independent of any conclusion as to whether that act conforms or not to the provisions of the internal law of the State which committed it. The first sentence of the article implies, first, that an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State’s internal law. Secondly, it follows from the same sentence that an act of a State must be characterized as internationally wrongful as soon as it constitutes a breach of an international obligation, even if the act does not contravene any of the obligations imposed by the State’s internal law and even in the extreme case in which, under that law, the State was actually bound to adopt such conduct. The second sentence brings out very clearly the most important aspect of the principle stated in the first sentence, namely, that a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law if it constitutes a breach of an obligation imposed by international law. Furthermore, the combination of the rule laid down in article 1, that every internationally wrongful act of a State entails

<sup>98</sup> See para. 37 above.

the responsibility of that State, with the rule laid down in article 4 involves the conclusion that the international responsibility of the State ensuing from a particular act arises irrespective of whether that act conforms or not to the provisions of the internal law of the State concerned.

(2) The first conclusion to be drawn from article 4, namely, that there is no internationally wrongful act so long as there is no breach by a State of an international obligation but merely a failure on its part to fulfil an obligation imposed by its own legal system, needs no lengthy proof. It is expressly affirmed in international judicial decisions and practice and in the literature.<sup>99</sup>

(3) The clearest judicial decision on the subject is to be found in the Advisory Opinion of the Permanent Court of International Justice of 4 February 1932 in the case concerning the *Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzig Territory*.<sup>100</sup> The Court denied the Polish Governments the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig, on the ground that:

... according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law ...

The application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law. ... However, in cases of such a nature, it is not the Constitution and other laws as such, but the international obligation that gives rise to the responsibility of the Free City.

(4) In practice, States which considered themselves wrongfully accused of international responsibility for what was in fact nothing more than failure to observe a provision of internal law have successfully resisted the charge by relying on the above principle. The request for information submitted to States by the Preparatory Committee for the 1930 Codification Conference at the Hague drew a distinction between the international responsibility of the State flowing from the breach of an international obligation, and the purely internal responsibility flowing from the breach of an obligation established by the constitution or laws of that State. The Governments which replied to the request for information were in agreement on that point.<sup>101</sup> At the Hague Conference, article 1 of the draft Convention

<sup>99</sup> This principle is also set out very clearly in Part IV of *Restatement of the Law by the American Institute* (para. 167) (*Yearbook* ... 1971, vol. II (Part One), pp. 193-194, document A/CN.4/217/Add.2).

<sup>100</sup> *P.C.I.J.*, Series A/B, No. 44, pp. 24-25. In this connexion, see also the opinion expressed by the Permanent Court in its judgement of 7 September 1927 in the *Lotus Case* (*P.C.I.J.*, Series A, No. 10, p. 24).

<sup>101</sup> League of Nations, *Bases of Discussion* (*op. cit.*), pp. 16 *et seq.* and *Supplement to Volume III*, pp. 2 *et seq.* The principle in question was clearly set out in the reply of the German Government:

"International responsibility—the sole form of responsibility under consideration—can only become involved when a rule of international law has been broken ... when a law is infringed to the detriment of a foreigner, there can never be any question of a request put forward under international law by a foreign State." (League of Nations, *Bases of Discussion*, *op. cit.*, p. 16).

on State responsibility, which was approved unanimously on first reading, implicitly confirmed the same conclusion.<sup>102</sup>

(5) In the Commission's opinion, the essential importance of the principle relating to this aspect of the relationship between international law and internal law comes out particularly in the converse proposition to that stated in the above paragraphs: the fact that some particular conduct conforms to the provisions of internal law, or even is expressly prescribed by those provisions, in no way precludes its being characterized as internationally wrongful if it constitutes a breach of an obligation established by international law. As has been clearly stated, "the principle that a State cannot plead the provisions (or deficiencies) of ... its constitution as a ground for the non-observance of its international obligations ... is indeed one of the great principles of international law, informing the whole system and applying to every branch of it".<sup>103</sup> Judicial decisions, State practice and the works of writers on international law leave not the slightest doubt on that subject.

(6) It has been said that the Permanent Court of International Justice "affirmed this rule and elaborated it into one of the cornerstones of its jurisprudence".<sup>104</sup> The Court expressly recognized the principle in its first judgement, that of 17 August 1923, in the case of the *S.S. "Wimbledon"*<sup>105</sup> and subsequently reaffirmed it on several occasions. Among its most explicit formulations are the following:

... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;<sup>106</sup>

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;<sup>107</sup>

... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.<sup>108</sup>

<sup>102</sup> League of Nations, *Acts of the Conference* (*op. cit.*), p. 31.

<sup>103</sup> Sir Gerald Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours* ... 1957-II, vol. 92 (Leyden, Sijthoff, 1958), p. 85.

<sup>104</sup> G. Schwarzenberger, *International Law*, 3rd. ed. (London, Stevens, 1957), vol. I, p. 69.

<sup>105</sup> The Court rejected the argument of the German Government that the passage of the ship through the Kiel canal would have constituted a violation of the German neutrality orders, observing that:

"... a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. ...

"... under Article 380 of the Treaty of Versailles, it was her [Germany's] definite duty to allow it [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article" (*P.C.I.J.*, Series A, No. 1, pp. 29-30).

<sup>106</sup> *Case of the Greco-Bulgarian "Communities"*, Advisory Opinion of 31 July 1930 (*P.C.I.J.*, Series B, No. 17, p. 32).

<sup>107</sup> *Case of the Free Zones of Upper Savoy and the District of Gex* (second phase), Order of 6 December 1930 (*P.C.I.J.*, Series A, No. 24) p. 12, and *idem*, Judgement of 7 June 1932 (*P.C.I.J.*, Series A/B, No. 46), p. 167.

<sup>108</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February 1932 (*P.C.I.J.*, Series A/B, No. 44, p. 24).

The same principle, viewed from a different angle, is also affirmed in the Advisory Opinions of 21 February 1925 on the *Exchange of Greek and Turkish Populations*<sup>109</sup> and 3 March 1928 on the *Jurisdiction of the Courts of Danzig*.<sup>110</sup>

(7) The existence of a principle of international law that a State cannot escape its international obligations by pleading its internal law is confirmed by an examination of the decisions of the International Court of Justice. Even though the decisions of this Court may not provide affirmations of this principle as explicit as those to be found in the decisions of the Permanent Court, it is nevertheless true that the principle in question was recognized expressly in the Advisory Opinion concerning *Reparation for injuries suffered in the service of the United Nations*<sup>111</sup> and implicitly in several other judgements. It is interesting to note that several judges of the Court have seen fit to state explicitly, in their separate or dissenting opinions from these same judgements, the principle which the majority of members of the Court had implied.<sup>112</sup>

(8) Arbitral awards are no less categorical in this respect. As early as the period between the First and Second World Wars, there were many on these lines. Among the most important were the arbitral award of 1922 concerning the *Norwegian Shipowners' Claims*,<sup>113</sup> the award rendered by the arbitrator Taft in 1923 in the *Aguilar-Amory and the Royal Bank of Canada Claims* [Tinoco Case] (*Great Britain v. Costa Rica*),<sup>114</sup> and the award rendered in 1930 in the *Shufeldt Claim* by an Arbitral Tribunal established by the United States and Guatemala. The last-mentioned award states that:

... it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as

<sup>109</sup> *P.C.I.J.*, Series B, No. 10, p. 20.

<sup>110</sup> *P.C.I.J.*, Series B, No. 15, pp. 26-27; In the same connexion we may recall the observations by Lord Finlay on the Advisory Opinion of 15 September 1923 on the Question Concerning the Acquisition of Polish Nationality (*P.C.I.J.*, Series B, No. 7, p. 26). These observations are particularly interesting because they refer to a case in which the actual absence of provisions of municipal law is shown not to be an excuse for the non-fulfilment of international obligations.

<sup>111</sup> *I.C.J. Reports 1949*, p. 180.

<sup>112</sup> In this context, reference should be made to the Judgement of 18 December 1951 in the *Fisheries Case* (*I.C.J. Reports 1951*, p. 132), with the individual opinion of Judge Alvarez (*ibid.*, p. 152) and the dissenting opinion of Judge McNair (*ibid.*, p. 181); the Judgement of 18 November 1953 in the *Nottebohm Case* (Preliminary Objections) (*I.C.J. Reports 1953*, p. 123), with the declaration of Judge Klaestad (*ibid.*, p. 125); and above all the Judgement of 28 November 1958 in the *Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (*I.C.J. Reports 1958*, p. 67), with the separate opinions of Judge Badawi (*ibid.*, p. 74), Judge Lauterpacht (*ibid.*, p. 83) and Judge Spender (*ibid.*, especially pp. 125-126 and 128-129), and the dissenting opinions of Judge Winiarski (*ibid.*, pp. 137 and 138) and Judge Córdova (*ibid.*, p. 140).

<sup>113</sup> Award rendered on 13 October 1922 by the Arbitral Tribunal established under the agreement of 30 June 1921 between Norway and the United States of America (United Nations, *Reports of International Arbitral Awards*, vol. I (*op. cit.*), p. 331).

<sup>114</sup> Award of 18 October 1923, rendered by the Arbitral Tribunal established under the Convention of 12 January 1922 (*ibid.*, p. 386).

a bar to a claim by a sovereign for a wrong done to the latter's subject.<sup>115</sup>

With regard to more recent years, mention must be made of the decisions of the Italian-United States Conciliation Commission, established under article 83 of the 1947 Treaty of Peace,<sup>116</sup> and particularly the decision in the *Wollemborg Case*, rendered on 24 September 1956. The Commission stated:

... one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation. Judicial decisions of the Permanent Court of International Justice are all identical on this point.<sup>117</sup>

(9) The principle that a State cannot invoke its internal law to show that it has not violated an international obligation has been affirmed no less frequently in State practice than in international judicial decisions. It is sufficient to recall in this context the positions taken by States with regard to the disputes discussed in the League of Nations or submitted to the Permanent Court or the International Court of Justice, as well as the work on the codification of international law undertaken under the auspices of the League of Nations and the United Nations. In the aforementioned disputes, the plaintiff States firmly supported the principle that conformity to internal law did not exclude international responsibility. Moreover, it should be noted that the defendant States, too, generally agreed with that view. Examples of this kind are the attitude adopted by Danzig and Poland in the dispute concerning the *Jurisdiction of the Courts of Danzig*,<sup>118</sup> by Hungary and Romania in the dispute concerning the *Expropriation by the Romanian Government of the immovable property of Hungarian optants*,<sup>119</sup> by Switzerland in the dispute concerning *Reparation for damage suffered by Swiss citizens as a result of events during the war*,<sup>120</sup> by Switzerland and France in the *Case of the Free Zones of Upper Savoy and the District of Gex*,<sup>121</sup> by Yugoslavia in the

<sup>115</sup> Award of 24 July 1930 rendered by the Tribunal established by the Agreement of 2 November 1929 (*ibid.*, vol. II (*op. cit.*), p. 1098).

<sup>116</sup> United Nations, *Treaty Series*, vol. 49, p. 126.

<sup>117</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIV (*op. cit.*), p. 289. See also in the same connexion the decision in the *Flegenheimer Case* of 20 September 1958, rendered by the same Commission (*ibid.*, especially p. 360).

<sup>118</sup> During the discussion in the Permanent Court of International Justice, Mr. Gidel, representing the Danzig Government, stated:

"It is a universally accepted principle that the provisions or deficiencies of municipal law cannot be invoked by a State to avoid fulfilling international obligations or to evade the responsibilities flowing from the non-fulfilment of those obligations" [Translation from French] (*P.C.I.J.*, Series C, No. 14-I, p. 44). Mr. Limborg, representing the Polish Government, replied:

"My adversary, the eminent Professor, is quite right: generally speaking, a State can never plead in an international court that its laws are defective." [Translation from French] (*ibid.*, p. 59).

<sup>119</sup> League of Nations, *Official Journal*, 4th year, No. 7 (July 1923), p. 729; *ibid.*, No. 8 (August 1923), pp. 886-887 and 895; *ibid.*, 9th year, No. 4 (April 1928), pp. 562-563 and 570.

<sup>120</sup> *ibid.*, 15th year, No. 11 (November 1934), pp. 1438, 1486 and 1494-1495. The other parties to the dispute did not question the soundness of the position taken by Switzerland in that connexion.

<sup>121</sup> *P.C.I.J.*, Series C, No. 19, vol. I, pp. 210-211 and 344; *ibid.*, vol. III, p. 1222; *ibid.*, vol. IV, pp. 1636-1637 and 1912-1913.

*Case of Losinger et Cie, S.A.*,<sup>122</sup> by Italy and France in the *Phosphates in Morocco* case<sup>123</sup> and, lastly, by Liechtenstein in the *Nottebohm Case*.<sup>124</sup>

(10) The same identity of view was apparent in the work undertaken under the auspices of the League of Nations on the codification of the topic of State responsibility, and in the subsequent work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. In point I of the request for information sent to States by the Preparatory Committee for the 1930 Conference on State Responsibility, a distinction was drawn between the responsibility incumbent on a State under international law and the responsibility which might be incumbent on it under its municipal law, and it was stated:

In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.

In their replies, States agreed expressly or implicitly with this principle.<sup>125</sup> During the debate at the Conference, States expressed general approval of the idea embodied in point I and the only matters for discussion were, first the advisability of inserting in the convention a rule expressing that idea and then the choice of the most appropriate wording.<sup>126</sup> At the close of the debate, the Third Committee of the Conference adopted on first reading the following article (article 5):

A State cannot avoid international responsibility by invoking the state of its municipal law.<sup>127</sup>

(11) The International Law Commission of the United Nations, at its first session, in 1949, adopted a draft declaration on rights and duties of States. Article 13 of the draft, the contents of which were approved by all the members of the Commission, reads as follows:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform its duty.<sup>128</sup>

<sup>122</sup> *P.C.I.J.*, Series C, No. 78, p. 181.

<sup>123</sup> *P.C.I.J.*, Series C, No. 84, pp. 70, 455, 712, 826; and No. 85, p. 1172.

<sup>124</sup> *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J.*, *Pleadings*, vol. I, pp. 180-182; and vol. II, pp. 27-28.

<sup>125</sup> League of Nations, *Bases of Discussion* (*op. cit.*), vol. III, pp. 16 *et seq.*

<sup>126</sup> League of Nations, *Acts of the Conference . . .*, vol. IV (*op. cit.*), pp. 120 *et seq.*

<sup>127</sup> *Yearbook . . . 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>128</sup> See *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), pp. 8-9. For the debate in the Commission, see *Yearbook . . . 1949*, pp. 105-106 (14th meeting, paras. 1-16); 147-148 (20th meeting, paras. 78-80) and 171 (24th meeting, paras. 4-8). The text of the article adopted by the Commission reproduces, without substantive modifications, article 12 of the draft declaration on rights and duties of States submitted to the General Assembly by the Government of Panama (A/285) and used by the Commission as a basis for discussion. The soundness of the principle set out in those articles was stressed by several Governments in their comments on the Panamanian draft (*Preparatory study concerning a draft Declaration on the Rights and Duties of States* (memorandum prepared by the Secretary-General of the United Nations) (United

(12) At the first session of the United Nations Conference on the Law of Treaties, held at Vienna in 1968, the delegation of Pakistan proposed in the Committee of the Whole that a clause specifying that no party to a treaty might invoke the provisions of its internal law to justify the non-observance of a treaty should be inserted in the draft Convention. That proposal was adopted on first reading by 55 votes to none, with 30 abstentions, and referred to the Drafting Committee.<sup>129</sup> On second reading, the Committee of the Whole approved without a formal vote the text submitted by the Drafting Committee.<sup>130</sup> In 1969, at its second session, the Conference adopted by 72 votes to 2, with 24 abstentions, the text proposed by the Committee of the Whole, which became article 27 of the Vienna Convention on the Law of Treaties, and reads as follows:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.<sup>131</sup>

(13) The principle thus sanctioned by international judicial decisions and State practice is, further, expressly confirmed by writers belonging to different legal systems.<sup>132</sup> It is also included in most of the draft codi-

Nations publication, Sales No. 1949.V.4), pp. 82, 86-87), on the draft of the International Law Commission (*Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 48, documents A/1338 and Add.1 and A/1850) and in the debate in the General Assembly on the Commission's report (*ibid.*, *Fourth Session, Sixth Committee*, 168th-173rd and 175th-183rd meetings, and *ibid.*, *Plenary Meetings*, 270th meeting).

<sup>129</sup> The States which spoke in favour of the principle in the debate included the Byelorussian Soviet Socialist Republic, Chile, France, Israel, Italy, Turkey, the USSR, the United Kingdom and the United States of America. The United States delegation indicated that in its view the principle would be more appropriately placed in a convention on State responsibility (*Official Records of the United Nations Conference on the Law of Treaties, First Session—Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 150 *et seq.*, 28th meeting of the Committee of the Whole, paras. 49-70 and 29th meeting).

<sup>130</sup> The text was approved at the 72nd meeting of the Committee of the Whole (*ibid.*, pp. 427-428, 72nd meeting of the Committee of the Whole, paras. 29-48).

<sup>131</sup> *ibid.*, *Second Session, Summary records of the plenary meetings and of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 53-54, 13th meeting, paras. 30-40. The representative of Venezuela declared that article 27 was simply a repetition of article 46, paragraph 1 of which provides that: "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance." The representative of Iran considered that article 27 contradicted article 46.

<sup>132</sup> See, besides the course by Sir Gerald Fitzmaurice cited above (see foot-note 103), C. Eagleton, *op. cit.*, pp. 63 *et seq.*; A. Verdross, *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 114; H. W. Briggs, *The Law of Nations*, 2nd ed. (London, Stevens, 1953), pp. 62-63; E. Vitta, *La responsabilità internazionale dello Stato per atti legislativi* (Milan, Giuffrè, 1953), pp. 29 *et seq.*; M. Sorensen, "Principes de droit international public", *Recueil des cours . . . 1960-III* (Leyden, Sijthoff, 1961), vol. 101, pp. 110-111; I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1966), pp. 32-33; L. Cavaré, *Le droit international public positif*, 3rd ed., brought up to date by J.-P. Quéneudec (Paris, Pédone, 1967), vol. I, pp. 177 *et seq.*; and Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 428.

fications of State responsibility prepared by individuals or private institutions.<sup>133</sup>

(14) There is no exception to the principle that it is only by reference to an international legal obligation binding a State that an act of that State can be characterized as internationally wrongful. The rule that the characterization given by international law cannot be affected by the characterization of the same act in internal law makes no exception for cases where rules of international law require the State to conform to the provisions of internal law, for instance by applying to aliens the same treatment as to nationals. It is true that in such a case once the State has applied the provisions of internal law, there can be no internationally wrongful act; but even then, it is not the fact of keeping conduct in conformity with internal law that precludes its international wrongfulness, but the fact that conduct which thus conforms to internal law constitutes, by the very fact of its conformity, the performance of the international obligation. Conversely, if a State has, by its act or omission, contravened provisions of internal law, there will be an internationally wrongful act inasmuch as the violation of internal law constitutes at the same time a breach of the international legal obligation.

(15) As regards the wording of the rule, the Special Rapporteur had proposed: "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law". A formulation of that kind, which is to be found in much the same terms in most draft codes on State responsibility, including article 5 of the draft adopted on first reading at The Hague Conference of 1930 and article 27 of the Vienna Convention on the Law of Treaties, has the merit of making the true purpose of the rule immediately and clearly apparent, namely, that States cannot use their municipal law as a means of escaping international responsibility. However, the majority of the Commission took the view that such a formulation sounded too much like a rule of procedure and would be inappropriate for a statement of principle designed to appear in chapter I of the draft. Moreover, in the opinion of some members, the proposed wording was open to misunderstanding. They referred to cases in which the international responsibility of the State consists essentially in the requirement that its conduct shall be consistent with that required by municipal law. It was observed that in such cases it would not be incorrect to say that "municipal law can be invoked" to show that there has been no internationally wrongful act. Other members pointed out that, even in such cases as those, it was not municipal law as such which was invoked but the international law which referred to municipal law. Moreover, the purpose of the article

<sup>133</sup> Cf. article 5 of the draft code prepared by the Japanese branch of the International Law Association and the Kokusaiho Gakkwai; article I, second paragraph of the draft prepared by the Institute of International Law at Lausanne in 1927; article 2 of the draft prepared by the Harvard Law School in 1929 and article 2, paragraph 2 of the draft prepared in 1961; article 7 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930; article 4, third paragraph of the draft prepared by Strupp in 1927; and article 4 of the draft prepared by Roth in 1932. (See foot-note 14 above.)

was to take account of cases in which there would be a contradiction between the provisions of municipal law and the requirements of international law. In any event the Commission, in its concern to avoid any possible doubt, preferred to use a formulation which on the one hand, like those adopted for the three previous articles, avoids all resemblance to a rule of procedure and, on the other, refrains from mentioning the possibility or impossibility of "invoking municipal law".

(16) The question was raised in the Commission whether the article ought to refer just to the case where an act must be characterized as internationally wrongful because it is found to be such by international law even though lawful under internal law, or whether it ought also to mention the case where an act is lawful under international law even though a violation of internal law. The first sentence of article 4 covers both aspects of the principle. The second sentence stresses the aspect which the Commission considers the more important, namely, the need to prevent the State from attempting to use its internal law as a device for escaping its international responsibility.

(17) With regard to terminology, for the French version the Commission preferred the expression "*droit interne*" to such other expressions as "*législation interne*" and "*loi interne*", first because it balances the expression "*droit international*" used in the same article, and secondly because it covers, without any possible doubt, all valid provisions of the internal legal order, whether written or unwritten, constitutional or legislative rules, administrative decrees, judicial decisions, etc.<sup>134</sup> For the English version, the term "internal law" was preferred to "municipal law", first because the latter is sometimes used in a narrower sense, and secondly because the Vienna Convention on the Law of Treaties speaks of "internal law".

## CHAPTER II

### THE "ACT OF THE STATE" ACCORDING TO INTERNATIONAL LAW

#### Commentary

(1) The purpose of article 3 of chapter I of these draft articles, dealing with general principles, is to formulate the two essential conditions for the existence of an internationally wrongful act, the first being the presence of conduct consisting of an action or omission attributable to the State under international law, and the second, the fact that such conduct constitutes a breach of an international obligation. The possibility of attributing a given conduct to the State, or, in other words, of

<sup>134</sup> The Third Committee of the 1930 Codification Conference preferred for the French text the expression "*droit interne*" to the expression "*disposition de sa loi interne*" used by the Preparatory Committee in the *Bases of Discussion*. Similarly, at the United Nations Conference on the Law of Treaties, the Drafting Committee generally preferred to speak of "internal law" ("*droit interne*", "*derecho interno*") rather than "constitution" ("*constitution*", "*constitución*") or "laws" ("*legislation*", "*leyes*").

considering the conduct as "an act of the State", has been advanced as the *subjective element* of the internationally wrongful act. The next step is to determine when, in what circumstances and in what conditions such an attribution can be made, in other words, to determine what "conduct" is regarded by international law as an "act of the State" for the purpose of establishing the possible existence of an internationally wrongful act.

(2) The operation that consists of "attributing", for this purpose, an act to the State as a subject of international law is clearly one which is based on criteria determined by international law and not on the mere recognition of a link of factual causality (*causalité naturelle*). Though itself a normative operation, "attribution" does not imply any juridical characterization of the act to be attributed, and it must be clearly distinguished from the subsequent operation, which consists of ascertaining whether that act is wrongful. It is solely concerned with establishing when there is an act of the State, when it is the State which must be considered to have acted.

(3) Since the State can act physically only through actions or omissions by human beings or human collectivities, the problems posed by this fundamental notion of the "act of the State" which have to be resolved in the present chapter have a common denominator. The basic task is to establish when, according to international law, it is the State which must be regarded as acting: what actions or omissions can in principle be considered as conduct of the State, and in what circumstances, such conduct must have been engaged in, if it is to be actually attributable to the State as a subject of international law. In that connexion, it must first of all be pointed out that, in theory, there is nothing to prevent international law from attaching to the State the conduct of human beings or collectivities whose link with the State might even have no relation to its organization; for example, any actions or omissions taking place in its territory could be considered acts of the State. In practice, however, we find that what is, as a general rule, attributed to the State at the international level are the acts of members of its "organization", in other words, the acts of its "organs" or "agents". This is the basic principle. The purpose of the present chapter of the draft will, in fact, be to define and complete this principle, to determine its scope and limitations and the derogations to which it is subject.

(4) From this point of view, once the basic rule has been laid down which attributes to the State the acts of its organs, the question arises whether the activities of certain categories of organs should be excluded from the "acts of the State". Another point to be considered is whether or not, in addition to the conduct of organs which form part of the State machinery, it is appropriate to attribute to the State, at the international level, the conduct of organs of public institutions other than the State itself, or of persons who, though not "organs" in the proper sense of the term, engage in what are in fact public activities, or of organs of another subject of international law placed at the disposal of the State in question. Attention will then be

given to the question whether or not it is appropriate to regard as "acts of the State" the conduct of organs or, more generally, of persons whose activities are in principle attributed to the State, when such conduct is adopted in circumstances which cast doubt on the legitimacy of that attribution. This question arises, for example, where an organ exceeds its competence or acts contrary to the requirements of internal law concerning its activities. We next have to consider the treatment to be accorded to the conduct of private individuals acting solely in that capacity, and the basis on which the conduct of State organs in connexion with acts by private individuals may be regarded as a source of responsibility. Lastly, consideration will be given to the case of the conduct of organs of other subjects of international law acting in the territory of the State and to problems relating to the retroactive attribution to a State of acts of a victorious insurrectionary movement.

(5) The first point to be stressed in connexion with the problems to be dealt with in this chapter is the need to avoid identifying too closely the situations referred to here with others that are basically different despite certain common general features. International law takes the machinery or "organization" of the State into consideration for purposes which greatly exceed those of the attribution to the State of an internationally wrongful act. All activities of the State, including activities which consist of performing "acts" properly so called, i.e. producing manifestations of will with a view to attaining legal consequences, raise the problem of the attribution to the State of certain conduct. Attaching to the State a manifestation of will which is valid, for example, in order to establish its participation in a treaty is, however, in no way identifiable with the operation which consists of attributing to the State particular conduct for the purpose of imputing to it an internationally wrongful act entailing international responsibility. It would be wrong to adopt the same criteria in these two cases and to propose an identical solution based on a general and common definition of "act of the State". In the context of the responsibility of States for internationally wrongful acts, the "act of the State" has its own specific character and must be defined according to particular criteria. The *title* of this chapter must therefore be understood in relation to the object and scope of the draft articles as a whole.

(6) If the substance of the problem is to be understood and appropriate rules formulated, it is also desirable to avoid a double confusion which is at the root of the difficulties encountered by writers. In the first place, a clear distinction must be drawn between the operation of *attributing* to the State, for any particular purposes, the conduct adopted in certain circumstances by its "organs", i.e. by those which belong to its "organization", and the operation which consists of actually *establishing* that "organization", i.e. determining what are the individual and collective "organs" which, taken as a whole, make up the State machinery. In the second place, the necessary distinction must be drawn between the attribution of an act to the State as a subject of

international law and to the State as a subject of internal law. Failure to take this double distinction sufficiently into account explains why some of the best-known trends in legal literature have led to an impasse.<sup>135</sup>

(7) The "organization" of the State does not and cannot mean anything but the organization which the State autonomously gives itself. It follows that the "organs" of the State can only be those which the State considers as such within its own legal system and whose action it regulates for its own purposes. This regulation, which can be established only by the State, is obviously a prerequisite for the operation of attributing to the State the conduct of a member of its "organization". It is not by attributing to the State a certain action or omission that one gives the authors of that action or omission the status of organs of the State. The attribution can be made because they have that status, because they have the legal capacity to act on behalf of the State. In other words, the status of organ possessed by the author of the conduct being examined is the premise or condition, and not the effect, of treating that conduct as an "act of the State".

(8) This statement is even more valid when a certain conduct is attributed to the State as a subject of international law and not as a subject of internal law. The formation and regulation of the organization of the State are not governed by the international order. The organization of the State is not created but presupposed by international law.<sup>136</sup> In other words, the fact of forming part of the organization of the State is regarded in international law merely as a premise. That does not in any way mean that in international law it is not sometimes necessary to interpret or apply internal law; it is nevertheless true that international law merely presupposes the organization which the State has adopted within its internal legal order and regards it simply as a condition on which it bases some of its findings.<sup>137</sup>

(9) Three main conclusions emerge from what has been said above. The first concerns the meaning which should be given to the statement that, in international law, the conduct of the "organs" of the State subject of that law is attributed to the State in order to impose responsibility upon it, if appropriate. This proposition simply means that, in international law, the conduct of those who have the status of "organs" in the internal legal order, and solely in that order, is in principle considered as an "act of the State" and is attributed

<sup>135</sup> For a detailed analysis of these trends, the solutions proposed and the difficulties they raise, see the preliminary considerations in chapter II of the Special Rapporteur's third report (*Yearbook* . . . 1971, vol. II (Part One), p. 233, document A/CN.4/246 and Add.1-3).

<sup>136</sup> See, for example, M. Marinoni, *La responsabilità degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale* (Rome, Athenaeum, 1913), pp. 117-118; R. Ago, "Le délit international", *Recueil des cours* . . . (*loc. cit.*), pp. 464-465; G. Sperduti, *Lezioni di diritto internazionale* (Milan, Giuffrè, 1958), p. 109; J.-P. Quéneudec, *op. cit.*, pp. 29-30.

<sup>137</sup> One must not be misled by the use of the term "referral" ("*renvoi*") which is sometimes employed to describe this phenomenon. The structures of the State are not "received" into the international legal system and do not acquire the character of legal structures in it, even if international law takes them into consideration for its own purposes.

to the State.<sup>138</sup> It does not in any way mean that their status becomes an "international" status by virtue of such attribution.

(10) The second conclusion is that international law remains free when it takes into consideration the situation existing in the internal legal order. The attribution of an act to a State in international law is wholly independent of the attribution of that act in national law.<sup>139</sup> The treatment of certain acts as "act of the State" in international law may be based on criteria which are both wider and more limited than the corresponding treatment in internal law. In international practice, for example, the conduct of organs of public institutions other than the State and the conduct engaged in by organs of the State in excess of their competence is treated as an act of the State subject of international law. But the independence of international law in attributing an act to a State does not in any way mean that international law intends to introduce into the State machinery "organs" which the State itself has not designated as such in its own legal system.

(11) The third and last conclusion flows automatically from the acknowledged freedom international law possesses with regard to the determination of the conditions in which it considers some particular conduct as an "act of the State" at the international level. This determination has to be made solely on the basis of an examination of *what actually happens in the life of international society*, independently of the positions adopted at the national level and the theoretical examples drawn from national experience, on which so many jurists have focused their attention.

(12) The Commission has thus set itself the task of determining what conduct international law actually attributes to the State, basing itself primarily on the findings which result from an examination of State practice and the decisions of international tribunals. It is this method by which the Commission will mainly be guided in drawing up the provisions of chapter II of this draft. The solutions derived from practice and judicial decisions will be supplemented, where necessary, by elements of progressive development. As indicated in the introduction to this chapter,<sup>140</sup> the Commission has only been able to consider and adopt the first two

<sup>138</sup> From this point of view the situation remains the same in the exceptional cases in which international law limits the freedom of the State to establish its organization. In such cases, the limitative international rule does not itself in any way establish the machinery of the State or part of that machinery. It merely imposes on the State an obligation which the State respects in choosing to adopt one type of organization rather than another. The organs established in conformity with such an international obligation are not organs of international law.

<sup>139</sup> The distinction between the two attributions and their independence of one another is stressed by many writers. See for example, J. G. Starke, *loc. cit.*, p. 110; A. Ross, *op. cit.*, p. 251; T. Meron, "International Responsibility of States for Unauthorized Acts of their Officials", *The British Year Book of International Law*, 1957, vol. 33, (London, 1958), p. 88; P. Reuter, *La responsabilité internationale* . . . (*op. cit.*), p. 87; C. F. Amerasinghe, "Imputability in the Law of State Responsibility for injuries to Aliens", *Revue égyptienne de droit international* (Cairo), vol. 22, 1966, pp. 96 and 104.

<sup>140</sup> See para. 35 above.

articles of chapter II, i.e. articles 5 and 6 of the draft, at the twenty-fifth session. It intends to complete the adoption of the articles in the chapter after considering the relevant proposals by the Special Rapporteur in his third and fourth reports.

**Article 5. Attribution to the State  
of the conduct of its organs**

**For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.**

*Commentary*

(1) Observation of what actually happens in international life makes it possible to say at the outset that the acts of "organs" of the State, that is, of all the individual or collective entities which have the status of organs of the State under its internal law, are, as a general rule at least, considered as "acts of the State"; that is to say, they are attributed to the State in international law for the purpose of being characterized, where appropriate, as internationally wrongful acts. Article 5 propounds the rule which flows from that statement.

(2) This rule is clearly a fundamental one, a point of departure; it is not absolute and, above all, not exclusive. It should not lead automatically to far-fetched conclusions. There is no *a priori* implication that *all* acts of the "organs" of the State should be automatically considered as "acts of the State" under international law. More especially, there is no implication that, when one attributes to a State, as a subject of international law, the conduct of what are considered its "organs" according to its internal legal order, one *exhausts the list* of types of conduct to which international responsibility may attach. Taken a stage further, an analysis of the facts can and indeed does show that certain acts of individual or collective entities which do not have the status of "organs" of the State may likewise be attributed to the State in international law and thus become a source of responsibility to be borne by that State.

(3) The principle that the State is responsible for breaches of obligations committed by its own organs has long been unequivocally recognized in international judicial decisions. In most cases, the principle has simply been presupposed and taken for granted. In addition, however, to the very numerous cases in which the principle has been reaffirmed implicitly, there are others in which it has been expressed in clear and explicit terms. In the *Moses* case, for example, decided on 14 April 1871 by the Mexico-United States Mixed Claims Commission set up under the Convention of 4 July 1868, the umpire Lieber made the following statement: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in

authority".<sup>141</sup> An even clearer assertion is to be found in seven arbitral awards made at Lima on 30 September 1901 in the *Affaire des réclamations des sujets italiens résidant au Pérou*, concerning the damage suffered by Italian subjects during the Peruvian civil war of 1894-1895. Each of these awards reiterates that: "... a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" [translation from French].<sup>142</sup> The principle of attributing to the State, for the purposes of international responsibility, the acts of its "organs", "leaders" and "agents" is also confirmed in several other arbitral awards.<sup>143</sup>

(4) In State practice, we should note the positions adopted in connexion with specific disputes, and also the replies by Governments to points III, IV and V of the request for information addressed to them by the Preparatory Committee for the 1930 Conference.<sup>144</sup> These replies unanimously convey, explicitly or implicitly, the juridical conviction that the actions or omissions of organs of the State which give rise to a failure to fulfil an international obligation must be attributed to the State and be characterized as internationally wrongful acts of the State. The Third Committee of the Conference adopted in first reading, by the unanimous vote of the States represented, an article 1 which provides that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State...".<sup>145</sup>

(5) All the draft codes on international responsibility prepared by public institutions or learned societies formulate in similar terms the principle that the conduct of the organs of the State is attached to the State for the

<sup>141</sup> J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. III, p. 3129.

<sup>142</sup> See United Nations, *Reports of International Arbitral Awards*, vol. XV (*op. cit.*), p. 399 (Chiessa claim); p. 401 (Sessarego claim); p. 404 (Sanguinetti claim); p. 407 (Vercelli claim); p. 408 (Queirolo claim); p. 409 (Roggero claim); p. 411 (Miglia claim).

<sup>143</sup> For example, in the award made on 8 May 1902 by the arbitral tribunal established by the Protocol of 19 December 1901 between the United States of America and El Salvador in connexion with the claim of the *Salvador Commercial Company* (*ibid.*, p. 477); in the undated decision of the Italy-Venezuela Mixed Claims Commission constituted under the Protocols of 13 February and 7 May 1903 in the *Sambiaggio* case (*ibid.*, vol. X (United Nations publication, Sales No. 60.V.4), p. 512; in the undated award of the Netherlands-Venezuela Mixed Claims Commission constituted under the Protocol of 28 February 1903 in the *J. N. Henriquez* case (*ibid.*, pp. 714-715); and in the award rendered on 9 May 1934 by the arbitrator Algot Bagge in the *Finnish Shipowners Case* (Great Britain v. Finland) (*ibid.*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1501).

<sup>144</sup> League of Nations, *Bases of Discussion . . .*, vol. III (*op. cit.*), pp. 25 *et seq.*, 41 *et seq.*; 52 *et seq.*; *Supplement to Volume III* (*op. cit.*), pp. 2-3, 6 *et seq.* The three points of the request for information refer respectively to acts of the legislative organ, acts relating to the operation of the tribunals and acts of the executive organ.

<sup>145</sup> *Yearbook . . . 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

purpose of determining international responsibility.<sup>146</sup> The draft codes prepared by individual jurists contain clauses couched in similar terms.<sup>147</sup>

(6) Finally, the attribution to the State of the acts of its organs for the purpose of determining its international responsibility is accepted by writers on international law, who are practically unanimous on this point,<sup>148</sup> despite the differences of opinion which separate them on the issue whether all the actions or omissions of the "organs" of the State, and they alone, may or may not be attributed to it as "acts of the State".

(7) In this connexion, however, a fundamental distinction must always be borne in mind. The element of truth which exists in the identification of the organ with the State should not make us forget that the organs of the State are ultimately composed of human beings who are still capable of acting on their own account. It is therefore necessary to ascertain in each specific case whether, on that occasion, they have acted as organs of the State, under cover of that status, or as private individuals. The practical difficulties which may sometimes arise in this connexion in no way detract from the clarity of the distinction from the standpoint of principles.

(8) This conclusion, together with the corollary which in principle precludes attribution to the State, as acts which

<sup>146</sup> See for example, article 1 of the draft prepared by the Japanese branch of the International Law Association and the Kokusaiho Gakkwai; article I of the resolution adopted in 1927 by the Institute of International Law; article 7 (a) and (b) of the draft prepared in 1929 by the Harvard Law School; article 15 of the draft prepared in 1961 by the Harvard Law School; article 1 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht; article V of the principles of International Law that Govern the Responsibility of the State in the Opinion of the Latin American Countries, prepared in 1962 by the Inter-American Juridical Committee; article II, III and IV of the Principles of International Law that Govern the Responsibility of the States in the Opinion of the United States of America, prepared in 1965 by the Inter-American Juridical Committee; and para. 169 of the *Restatement of the Law of the American Law Institute*. (See foot-note 14 above.)

<sup>147</sup> See, for example, article 1 of the draft prepared by Strupp in 1927 and article 1 of the draft prepared by Roth in 1932. See also No. II of the Bases of Discussion prepared in 1965 by Mr. García Amador, Special Rapporteur of the International Law Commission, as well as chapter II of his preliminary draft of 1957 and article 12 of his revised preliminary draft of 1961. (See foot-note 14 above.)

<sup>148</sup> For example, E. M. Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claims* (New York, Banks Law Publishing, 1928), p. 189; K. Strupp, "Das Völkerrechtliche Delikt", (*loc. cit.*), pp. 35 *et seq.*; A. Decencière-Ferrandière, *La responsabilité des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), pp. 64 *et seq.*; C. Eagleton, *op. cit.*, p. 44; H. Kelsen, "Unrecht und Unrechtsfolge in Völkerrecht", *Zeitschrift für Öffentliches Recht* (Vienna), vol. XII, fasc. X, October, 1932; p. 504 *et seq.* (in the case of this writer, however, special aspects of his ideas should be treated with reserve); J. G. Starke, *loc. cit.*, p. 106; L. Oppenheim, *op. cit.*, pp. 340 *et seq.*; B. Cheng, *op. cit.*, pp. 192 *et seq.*; H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours* . . . 1959-I, vol. 96 (Leyden, Sijthoff, 1960), p. 371; A. Ulloa, *Derecho internacional público*, 4th ed. (Madrid, Ediciones Iberoamericanas, 1957, vol. II, p. 256; I. von Münch, *op. cit.*, p. 170; C. F. Amerasinghe, "Imputability . . ." (*loc. cit.*), p. 95; D. Levin, *Otvetsvenost gosusarstv* . . . (*op. cit.*), pp. 69 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 544; Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 426; V. N. Elynychev, "Problema vnenenia . . ." (*loc. cit.*), p. 87.

may give rise to responsibility, of actions or omissions committed in a purely private capacity by the human beings who compose its organs, is unanimously recognized in international practice and in international judicial decisions. It will therefore suffice to recall here just a few cases of that recognition. For instance, Governments took a very clear position on the point at the 1930 Codification Conference. Point V, No. 2 (d), of the request for information submitted by the Preparatory Committee of the Conference concerned the question whether the State becomes responsible for "acts or omissions of officials unconnected with their official duties". All the Governments which dealt with that point in their replies considered that the State was not responsible in such a case.<sup>149</sup> This criterion was subsequently accepted by the State representatives at the Conference and was implicitly incorporated in the text of article 8 of the draft adopted in first reading by the Third Committee of the Conference.<sup>150</sup>

(9) The same idea has been explicitly expressed on more than one occasion in arbitral awards and decisions of international and national claims commissions. One of the decisions most frequently quoted is that concerning the *Bensleys* case, handed down on 20 February 1850 by the Commission established under the Act of Congress of the United States of America on 3 March 1849. The following reason was given for the rejection of the claim for reparation submitted for the detention of a young United States boy in the house of a Mexican governor: "The detention of the boy appears to have been a wanton trespass committed by the governor, under no colour of official proceedings, and without any connexion with his official duties."<sup>151</sup> The French-Mexican Claims Commission established under the Convention of 25 September 1924, in its decision of 7 June 1929 concerning the *Caire* case, stated that the only case in which the State was not responsible was that "in which the act had no connexion with the official function and was, in fact, merely the act of a private individual" [translation from French].<sup>152</sup> In many other cases the criterion to which we are referring is not stated so explicitly, but nonetheless appears to have been implicitly accepted. This is so, for example, in the *Putnam* case,<sup>153</sup> and the *Morton* case,<sup>154</sup> decided by the United States of America/Mexico General Claims Commission established by the Convention of 8 September 1923. Generally speaking the various draft codes, whether public or private in origin, set forth the principle of attribution to the State, as a subject of international law, of the acts of its organs, but take care to exclude conduct adopted in a purely private capacity from that attribution.

<sup>149</sup> League of Nations, *Bases of Discussion* . . . , vol. III (*op. cit.*), pp. 82 *et seq.* and *Supplement to Volume III* (*op. cit.*), pp. 3, 17.

<sup>150</sup> *Yearbook* . . . 1956, vol. II, p. 226, document A/CN.4/96, annex 3.

<sup>151</sup> See J. B. Moore, *History and Digest* . . . (*op. cit.*), vol. III, p. 3018. See also the decision in the Case of the Castelains, handed down by the France-United States Mixed Commission established under the convention of 15 January 1880 (*ibid.*, pp. 2999-3000).

<sup>152</sup> United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 531.

<sup>153</sup> *Ibid.*, vol. IV (*op. cit.*), pp. 151 *et seq.*

<sup>154</sup> *Ibid.*, pp. 428 *et seq.*

Some of these drafts even make this exclusion the subject of a separate provision.<sup>155</sup> In the case of theoretical works, almost all writers mention the need for such an exclusion, and some of them even lay particular stress on it.<sup>156</sup>

(10) The questions raised by actions or omissions on the part of persons acting in a private capacity who at the same time have the status of "organs" of the State will be considered in their various aspects in the more general context of the discussion of the conduct of private individuals which appears in a later part of this chapter of the draft articles. At that point, it will be necessary to see whether or not purely private conduct can, in certain circumstances, be attributed to the State for the purpose of the draft articles on the international responsibility of States. At this initial stage, our only concern need be to ensure that the demarcation line which we have drawn is indicated with the necessary clarity. It must be pointed out forthwith, however, that the case of purely private conduct should not be confused with the quite different case of an organ functioning as such but acting *ultra vires*, or, more generally, in breach of the rules governing its operation. In this latter case, which will also be discussed in this chapter, the organ is nevertheless acting in the name of the State. This distinction has been clearly drawn in international arbitral decisions, for example, in the award in the *Mallén* case, rendered on 27 April 1927 by the United States of America/Mexico General Claims Commission. In that decision, two separate events were successively taken into consideration: firstly, the action of an official acting in a private capacity, and secondly, another action committed by the same official acting in his official capacity, although in an abusive way.<sup>157</sup> In other cases, the distinction was less easy to apply and the tribunals concerned had to make a close examination of the facts before they could rule on the nature of the act.<sup>158</sup> It should be noted, however,

<sup>155</sup> This is so in the case of the draft prepared by the Kokusaiho Gakkwai (article 2, second paragraph) and of the draft prepared by the *Deutsche Gesellschaft für Völkerrecht* (article 1, para. 4, second sentence. (See foot-note 14).

<sup>156</sup> See, for example, C. Eagleton, *Responsibility of States ... (op. cit.)*, pp. 58-59; B. Cheng, *op. cit.*, pp. 197 *et seq.*; F. V. García Amador, Second report on State responsibility (*Yearbook ... 1957*, vol. II, pp. 109-110, document A/CN.4/106); G. Schwarzenberger, *International Law (op. cit.)*, pp. 615 *et seq.*; D. P. O'Connell, *International Law* (London, Stevens, 1965), vol. II, p. 1045; J.-P. Quéneudec, *La responsabilité internationale de l'Etat ... (op. cit.)*, pp. 82 *et seq.*

<sup>157</sup> United Nations *Reports of International Arbitral Awards*, vol. IV (*op. cit.*), pp. 173 *et seq.*

<sup>158</sup> For example, in the *Corrie* case, which was decided on 5 March 1929 by the United States of America/Mexico General Claims Commission, and in the *Gordon* case, settled on 8 October 1930 by the same Commission (*ibid.*, pp. 416-417 and pp. 586 *et seq.*). One sphere in which the application of the distinction we have mentioned has sometimes given rise to difficulties is that of looting and destruction committed by soldiers who were not acting under the command of officers. In the case concerning *D. Earnshaw and other (the Zafro Case)*, settled on 30 November 1925 by a Great Britain-United States arbitral tribunal (*ibid.*, vol. VI (United Nations publication, Sales No. 1955.V.3) pp. 163 *et seq.*), the action of the men concerned was regarded as a private act. The decisions in other cases are less definite. On this point, see A. V. Freeman, "Responsibility of States for Unlawful Acts of their Armed Forces", *Recueil des cours ... 1955-II*, vol. 88 (Leyden, Sijtoff, 1956), pp. 325 *et seq.*

that the principle of the distinction has never been questioned.

(11) Having regard to the foregoing considerations, article 5 provides that:

For the purposes of the present articles, conduct for any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

By adopting this formula, the Commission has left the door open for the subsequent establishment of other rules, resulting from further observations, which will be the subject of other articles of chapter II of the draft and will serve to extend or, where appropriate, restrict the rule stated in article 5. The purpose of the opening proviso ("For the purposes of the present articles") is to specify that article 5 concerns the attribution to the State of the conduct of its organs, not in general but solely in the context of the responsibility of States for internationally wrongful acts.

(12) The wording "conduct of any State organ having that status ..." was preferred to other wording, such as "the conduct of a person or group of persons who ... possess the status of organs of the State", in order to avoid entering into theoretical problems concerning the definition of the notion of an organ itself. The Commission did not consider it necessary to add the words "an action or omission" after the word "conduct", since the latter is already defined as an action or omission in article 3 (a) of the draft. In order to make it clear that the status of organ must have existed at the time of the conduct in question, the concluding verb ("was acting") has been placed in the past tense.

(13) Finally, without prejudice to the different meanings which the term "organ" may have, particularly in the internal public law of different legal systems, it was agreed that the article should employ only the term "organ" and not the two terms "organ" and "agent". The term "agent" would seem to denote, especially in English, a person acting on behalf of the State rather than a person having the actual status of an organ. Actions or omissions on the part of persons of this kind will be dealt with in another article of this chapter.

#### *Article 6. Irrelevance of the position of the organ in the organization of the State*

**The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.**

#### *Commentary*

(1) It was pointed out that the rule laid down in article 5 concerning the attribution to the State of the conduct of its organs was only an initial rule which would have to be supplemented by other rules. The purpose of the present article is to make it clear that the position of an

organ of the State in the organization of that State does not enter into consideration for the purpose of attributing the organ's conduct to the State—that is to say, of considering such conduct as an “act of the State” under international law. In other words, the purpose of article 6 is to indicate the scope of the expression “any State organ” as used in article 5.

(2) In the Commission's opinion there are three separate questions to be considered in relation to the problems raised by this article. The first is whether only the conduct of a State organ responsible for “external” relations can constitute a wrongful act of the State under international law or whether the conduct of an organ performing “internal” functions may also enter into consideration for this purpose. The second is whether it is only the conduct of a “governmental” or “executive” organ of the State which can give rise to an internationally wrongful act, or whether in fact no distinction should be made in this respect between an act or omission of such an organ and an act or omission of a constituent, legislative, judicial or other body, whatever it may be. The third is whether a distinction should or should not be made for these purposes between the conduct of a “superior” and that of a “subordinate” organ.

(3) With regard to the first question, it is an obsolete theory that only an act or omission of an organ responsible for conducting the external relations of the State can constitute an internationally wrongful act of the State. On that theory, the State would be called upon to answer only “indirectly” for the conduct of organs performing internal functions, such as administrative officials or judges, just as it is for the actions of private individuals; it would be responsible only if one of its organs responsible for external relations had endorsed the act or omission of the organ responsible for internal functions. This theory obviously resulted from confusion between the consideration of certain conduct as an internationally wrongful act and the attribution to the State of a manifestation of will capable of constituting a valid international legal act or establishing participation in such an act. International judicial decisions and practice show that there is no justification for the theory. Indeed, for a long time now writers have mentioned it only in order to reject it.<sup>159</sup>

(4) The second question may seem at first sight rather more complex. The study of possible cases of internationally wrongful acts on the part of particular organs has often been taken up separately in connexion with one or other of the main traditional branches of government: the legislature (or constituent power),<sup>160</sup> the

<sup>159</sup> For example Ch. de Visscher, “La responsabilité des Etats”, *Biblioteca Visseriana* (op. cit.), p. 94, P. Reuter, “La responsabilité internationale” (loc. cit.), pp. 86-87; I. von Münch, op. cit., p. 170; J.-P. Quéneudec, op. cit., pp. 41 et seq.

<sup>160</sup> Various writers have devoted monographs or articles to international responsibility resulting from the acts of legislative organs. For example O. Hoijer, “La responsabilité internationale des Etats en matière d'actes législatifs”, *Revue de droit international* (Paris), 3rd year, vol. IV, 1929, pp. 577 et seq.; M. Sibert, “Contribution à l'étude des réparations pour les dommages causés aux étrangers en conséquence d'une législation contraire au droit des gens”, *Revue générale de droit international public* (Paris), 3rd series, vol. XV, vol. I, 1941-1945, pp. 5 et seq.; A. S. Bilge, *La respon-*

executive<sup>161</sup> and the judiciary.<sup>162</sup> This procedure has made it possible to go thoroughly into certain questions, but has also certainly given rise to difficulties which have not real bearing on the topic considered here, for most such questions go far beyond the limits of the problems which arise in the context of chapter II of this draft. They often amount merely to asking whether the conduct of a given organ does or does not objectively constitute a breach of an international obligation, rather than whether it should or should not be attributed to the State as a subject of international law. Sometimes they go beyond the bounds of international wrong and responsibility. Moreover the Commission found that the division of powers was by no means so clear-cut in practice as it might seem in theory and, in particular, that it was understood very differently in the various legal and political systems.

(5) For nearly a century there has not been a single international judicial or arbitral decision which has stated, or even implicitly accepted, the principle of non-responsibility of the State for the acts of its legislative or judicial organs. On the contrary, the opposite principle has been expressly confirmed in a number of decisions and implicitly recognized in many others. Thus, in the award of 8 May 1902 in the *Salvador Commercial Company* case, the United States of America/El Salvador arbitration tribunal, established under the Protocol of 19 December 1901 endorsed the opinion that:

... a State is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity.<sup>163</sup>

The Permanent Court of International Justice, in its Judgement No. 7 of 25 May 1926 in the *Case concerning*

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*sabilité internationale des Etats et son application en matière d'actes législatifs* (Istanbul, Tsitouris, 1950); E. Vitta, “Responsabilité . . .” (loc. cit.). Similarly some general works contain a separate, detailed analysis of the acts or omissions of the organs of the different “powers”, and, especially, of legislative organs.

<sup>161</sup> Questions relating to the responsibility of the State for the acts of administrative organs have been examined in detail by such writers as K. Strupp, “Das völkerrechtliche Delikt” (loc. cit.), pp. 85 et seq.; K. Furgler, op. cit., pp. 28 et seq.; and I. von Münch, op. cit., pp. 195 et seq. On the specific question of responsibility for the acts of armed forces, see A. V. Freeman, “Responsibility of States . . .” (loc. cit.), pp. 267 et seq.

<sup>162</sup> Among writers who have dealt with the international responsibility of States for the acts or omissions of their judicial organs, mention may be made of O. Hoijer, “Responsabilité internationale des Etats en matière d'actes judiciaires”, *Revue de droit international* (Paris), 4th year, vol. V, 1930, pp. 115 et seq.; C. Th. Eustathiades, *La responsabilité internationale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Paris, Pédone, 1936); G. Pau, “Responsabilità internazionale dello Stato per atti di giurisdizione”, in Istituto di scienze giuridiche economiche e politiche della Università di Cagliari, *Studi economico-giuridici*, vol. XXXIII (1949-1950) (Rome, Pinnarò, 1950), pp. 197 et seq. There is also an abundant legal literature on the specific concept of denial of Justice. In this context mention should be made in particular of O. Rabasa, *Responsabilidad internacional del Estado con referencia especial a la responsabilidad por denegación de justicia* (México, Imprenta de la Secretaría de Relaciones Exteriores, 1933), and A. V. Freeman, *International Responsibility of States for Denial of Justice* (op. cit.).

<sup>163</sup> United Nations, *Reports of International Arbitral Awards*, vol. XV (op. cit.), p. 477.

certain German interests in Polish Upper Silesia (Merits), affirmed the principle that:

From the standpoint of international law and of the Court which is its organ, municipal laws . . . express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.<sup>164</sup>

More recently, the Franco-Italian Conciliation Commission, set up under article 83 of the Treaty of Peace of 10 February 1947, expressed the following opinion in its decision of 7 December 1955 in the dispute concerning the interpretation of article 79 of the Treaty of Peace:

Although in some arbitral awards of the XIXth century the opinion is expressed that the independence of the courts, in accordance with the principle of the separation of powers generally recognized . . . , excludes the international responsibility of the State for acts of the judiciary contrary to law, this theory now seems to be universally and rightly rejected

by writers and by international judicial decisions.<sup>165</sup> The possibility of attributing to the State acts committed by its legislative<sup>166</sup> or judicial<sup>167</sup> organs has been accepted in a great many international awards.

(6) With regard to State practice, the Commission found no evidence that the thesis of the impossibility of invoking international responsibility for acts of legislative or judicial organs had ever been advanced, at least not for the last few decades. On the other hand it noted that the possibility of invoking international responsibility for such acts had been directly or indirectly recognized on many occasions.<sup>168</sup> Countries which have

been parties to disputes, either as claimants or as respondents, have always explicitly or implicitly acknowledged the possibility of attributing to the State an internationally wrongful act due to the conduct of a legislative or judicial organ, just as much as one due to the conduct of an executive or administrative organ.<sup>169</sup> The most conclusive evidence of the opinion of States on this point is to be found in the opinions they expressed on the occasion of the 1930 Codification Conference. The request for information submitted to Governments by the Preparatory Committee contained questions concerning "Acts of the legislative organ" (point III), "Acts relating to the operation of the tribunals" (point IV) and "Acts of the executive organ" (point V). Governments replied in the affirmative to each of the questions asked on the above three points.<sup>170</sup> Equally concordant opinions were expressed later by the representatives who took part in the discussions in the Third Committee of the 1930 Conference.<sup>171</sup> Three of the ten articles adopted on first reading by the Committee at the end of the discussions established the responsibility of the State ensuing from an act or omission of its legislative (article 6), executive (article 7) or judicial (article 9) organs incompatible with its international obligations.<sup>172</sup>

(7) With regard to the doctrine, apart from differences of approach to the question which sometimes lead to complications, the writers agree that the conduct of any State organ, whatever branch of the State "power" it may belong to, can be considered as an "act of the State" for the purposes of characterization as an internationally wrongful act.<sup>173</sup> Codification drafts, both official and private, follow the same basic principles. They differ only in the wording of the formulations proposed.

<sup>164</sup> P.C.I.J., Series A, No. 7, p. 19. See also the award of 23 July 1927 made in the *Chattin* case by the United States/Mexico General Claims Commission set up under the Convention of 8 September 1923 (United Nations, *Reports of International Arbitral Awards*, vol. IV (*op. cit.*), p. 286).

<sup>165</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 438.

<sup>166</sup> See, for example, the judgements and advisory opinions rendered by the Permanent Court of International Justice in the cases concerning *settlers of German origin in the territory ceded by Germany to Poland* (P.C.I.J., Series B, No. 6, 1923, particularly pp. 35 *et seq.*); *the Treatment of Polish nationals in the Danzig Territory* (*idem*, Series A/B, No. 44, 1932, particularly pp. 24-25, and *Phosphates in Morocco* (*idem*, Series A/B, No. 74, 1938, particularly pp. 25-26); and those rendered by the International Court of Justice in the *Case concerning the rights of nationals of the United States of America in Morocco* (I.C.J. Reports 1952, pp. 176 *et seq.*), the *Case of the monetary gold removed from Rome in 1943* (*ibid.*, 1954, pp. 19 *et seq.*, and particularly p. 32), and the *Case concerning the application of the Convention of 1902 on the Guardianship of Infants* (*ibid.*, 1958, pp. 55 *et seq.*).

<sup>167</sup> See for example the judgements and advisory opinions of the Permanent Court of International Justice in the *Lotus* case (P.C.I.J., Series A, No. 10, 1927, p. 24), the case concerning *The jurisdiction of the Courts of Danzig* (*idem*, Series B, No. 15, 1928, p. 24) and the *Phosphates in Morocco* case (*idem*, Series A/B, No. 74, 1938, particularly p. 28); and the judgement of the International Court of Justice in the *Ambatielos* case (I.C.J. Reports 1953, pp. 10 *et seq.*, and particularly pp. 21 *et seq.*). Mention may also be made of the decisions by the Arbitrator between Great Britain and Spain (1925) in the *Case of British property in Spanish Morocco* (United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), pp. 615 *et seq.*, and particularly p. 646).

<sup>168</sup> For example, with regard to the acts of legislative organs, reference may be made to the opinions expressed respectively in a note dated 28 February 1913 from the British Ambassador at Washington addressed to the United States Secretary of State

(A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 548) and in a note by the Legal Department of the Quai d'Orsay dated 23 January 1937 (A.-Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1965), vol. III, p. 526). With regard to the acts of judicial organs, reference may be made to the report sent on 26 February 1887 by Secretary of State Bayard to the President of the United States of America (J. B. Moore, *A Digest of International Law*, vol. VI (Washington, U.S. Government Printing Office, 1906), p. 667).

<sup>169</sup> See for example Ch. de Visscher's case for Poland when an advisory opinion was requested from the Permanent Court of International Justice concerning *The treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory* (P.C.I.J., Series C, No. 56, p. 246).

<sup>170</sup> League of Nations, *Bases of Discussion*, vol. III (*op. cit.*), pp. 25 *et seq.*, 41 *et seq.* and 52 *et seq.*; and *Supplement to Volume III* (*op. cit.*), pp. 2-3 and 6 *et seq.*

<sup>171</sup> See League of Nations, *Acts of the Conference . . .*, vol. IV (*op. cit.*), pp. 32 *et seq.*, 59 *et seq.*, 103 *et seq.* and 152 *et seq.*

<sup>172</sup> See *Yearbook . . . 1956*, vol. II, pp. 225 and 226, document A/CN.4/96, annex 3.

<sup>173</sup> In addition to the writers mentioned above in foot-notes 160, 161 and 162, this view has been expressed by, for example, C. Eagleton, *The Responsibility of States . . .* (*op. cit.*), pp. 59 *et seq.*; H. Accioly, *Principes généraux de la responsabilité internationale . . .* (*loc. cit.*), pp. 371 *et seq.*; Colombo, "Responsabilidad del Estado por los actos de los poderes legislativo, ejecutivo y judicial", *Revista de ciencias jurídicas y sociales* (Santa Fe, 1954), pp. 5 *et seq.*; C. F. Amerasinghe, "Imputability . . ." (*loc. cit.*), pp. 63 *et seq.*; E. Jiménez de Aréchaga, *International Responsibility* (*op. cit.*), pp. 544 *et seq.*; and Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 427-428.

(8) In the Commission's view, therefore, there is no need to appeal to ideas of progressive development of international law in order to reach the conclusion that acts or omissions of any State organ—whether of the constituent or legislative power, the executive or the judiciary—can be attributed to the State as internationally wrongful acts. No one now supports the old theories that legislative organs were an exception because of the "sovereignty" of Parliament, or judicial organs because of the principles of the independence of the judiciary or the authority of *res judicata*. Cases in which States resorted to arguments based on principles of that kind, and found arbitral tribunals willing to accept them, belong to the distant past.<sup>174</sup> Today the opinion that the respective positions of the different branches of government are important only in constitutional law and of no consequence whatsoever in international law, which regards the State as a single entity, is firmly rooted in international judicial decisions, the practice of States and the literature of international law.

(9) It remains to consider the last of the three questions mentioned at the beginning of the commentary to the present article, whether a further distinction, based on the superior or subordinate rank of the organ in the State hierarchy, should be made between State organs in order to determine those organs, an act or omission of which may be attributed to the State as an internationally wrongful act of the State. The view that the acts or omissions of "subordinate" ("subsidiary" or "minor") organs can be attributed to the State as a possible source of international responsibility, just as well as the acts or omissions of higher organs, is now generally accepted. But this has not always been so.

(10) One school of thought,<sup>175</sup> which in its day found favour with certain legal writers in the United States and has continued to attract some support,<sup>176</sup> holds that in international law only the conduct of "superior" organs is attributable to the State. It maintains that the State cannot be held responsible for an act by a "subordinate" organ except in cases where it appears that the conduct of that organ has been explicitly or implicitly endorsed by superior organs; in fact, that the State is responsible only for the acts of its superior organs.<sup>177</sup>

(11) This thesis, however, encountered some reservations and even firm opposition in the legal literature of

<sup>174</sup> The theory of the independence of the judiciary was advanced by Portugal to avoid recognizing its international responsibility in the *Croft* (1856) and *Yuille, Shortridge and Co.* (1861) cases (see A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1923), vol. II, pp. 22 *et seq.*, 101 *et seq.*, and 103).

<sup>175</sup> The principal spokesman for this school of thought was E. M. Borchard, *Diplomatic Protection . . .* (*op. cit.*), pp. 189 *et seq.*

<sup>176</sup> See in particular C. Fenwick, *International Law*, 3rd ed. (New York, Appleton-Century-Crofts, 1948), pp. 280 *et seq.* See also G. Von Glahn, *Law among Nations: An Introduction to Public International Law*, 2nd ed. (London, MacMillan, 1970), p. 227.

<sup>177</sup> This opinion is reflected in article 7 (b) of the draft convention prepared by the Harvard Law School under Borchard's personal supervision in 1929 for the Hague Codification Conference (see Harvard Law School, *Research in International Law* (Cambridge, Mass., 1929), pp. 157 *et seq.* and 165 *et seq.*).

the time.<sup>178</sup> In particular, it seems to have escaped the notice of its advocates that the point relied on in specific cases to prove that the conduct of a particular organ could not be attributed to the State was not the "subordinate" or "subsidiary" character of the organ but the fact that the organ had acted with a complete disregard for the law and the limits of its own even apparent authority.<sup>179</sup> The thesis seems to have originated from a confusion with the requirement of exhaustion of local remedies and its effect on responsibility. The essence of the "local redress rule" is that a breach of an international obligation cannot, at least as a general rule, be deemed to have finally taken place so long as a single one of the organs capable of fulfilling the obligations has not yet taken any steps in the matter. Now it is obvious that such a situation will occur more frequently when the organ which acted first is of inferior rank. Nevertheless, the legal position does not change because of a mere increase in probability. Whether it is an act or an omission of a higher organ, if remedies are available against its injurious conduct, the responsibility of the State will not normally be involved until those remedies have been exhausted.<sup>180</sup>

(12) The Commission recognized, however, that on this question diplomatic practice and arbitral awards between 1850 and 1914 were far from clear and unanimous. Some support for the view that the conduct of minor State organs cannot be attributed to the State derives from the fact that the legal system in the United States of America, unlike—for—the example systems of continental Europe, often provides in the case of injurious acts by government officials, especially minor officials, for the possibility of personal recourse against the individual/organ, but not against the government as such. Hence diplomatic notes from the United States Government,<sup>181</sup> or arbitral awards in disputes to which it was

<sup>178</sup> For the clearest and best-documented opposition, see C. Eagleton, *Responsibility of States . . .* (*op. cit.*), pp. 45 *et seq.* See also K. Strupp, *Das völkerrechtliche Delikt* (*op. cit.*), pp. 37-38 (note 5); C. C. Hyde, *International Law chiefly as Interpreted and Applied in the United States*, 2nd ed. rev. (Boston, Little, Brown, 1951), vol. 2, pp. 935-936; F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (London, Oxford University Press, 1932), pp. 125 *et seq.*

<sup>179</sup> For example, in a letter dated 14 August 1900 from Mr. Adee, the United States Secretary of State, addressed to Baron de Fava, the Italian Ambassador at Washington (J. B. Moore, *A Digest . . .* (*op. cit.*), p. 743), it is stated that the misconduct of petty officials and agents had been committed outside the range not only of their real but even of their apparent authority.

<sup>180</sup> It should also be noted that the idea of excluding the conduct of minor organs from "act of State" certainly stems from a basic misunderstanding due to the practice of stating the problem, not—as would be correct—in terms of attribution of such acts or omissions to the State, but directly in terms of responsibility. The conduct of any organ is attributable to the State as a subject of international law, even in the case where such conduct is not sufficient in itself to generate international responsibility but must be accompanied by the conduct of other organs before their combined conduct can be regarded as an internationally wrongful act and give rise to responsibility.

<sup>181</sup> See, for example, the position taken by Cushing, Attorney-General of the United States, on a claim made against the United States Government for the loss of a vessel through the negligence of a pilot at San Francisco (J. B. Moore, *A Digest . . .* (*op. cit.*), pp. 740-741).

a party,<sup>182</sup> have sometimes pointed out that such personal recourse was available to the plaintiff, and that he should not apply to the State. An attitude of this kind could be interpreted as indicating a failure to exhaust local remedies, but it could also be interpreted as expressing the opinion that the acts of inferior organs could not be regarded as acts capable of being attributed to the State. That helps to explain the differences of opinion sometimes noted in this connexion in the diplomatic correspondence exchanged before the First World War between the United States Government and Governments of European countries.<sup>183</sup>

(13) Despite these uncertainties and the reasons for them, there can be no doubt that pre-First World War arbitral awards and diplomatic practice provide many examples of recognition of the principle of the attributability to the State as a subject of international law of the acts and omissions of subordinate organs, and that applies also to decisions in disputes involving countries of the American continent.<sup>184</sup> At all events, the uncertainty which may have existed earlier seems to have disappeared between the end of the First World War and 1930. The prevailing view among Governments was clearly expressed first during the preparatory work, and then during the actual proceedings, of the 1930 Codification Conference. In the light of the replies received from Governments, the Preparatory Committee, in the bases of discussion which it prepared for the Conference, did not allow for any difference of treatment between higher organs and subordinate organs. At the Conference itself, the question of organs of lower rank was considered only sporadically during the discussion,<sup>185</sup> and no trace of it remained in the conclusions.

(14) International judicial practice over the last few decades does not seem to furnish any examples of dissenting opinions. The attribution to the State of the conduct of its subordinate organs was clearly affirmed after the First World War by a series of claims commissions,

<sup>182</sup> See for example the position taken by the United States member of the United States/Mexico Mixed Commission established under the Convention of 4 July 1968 in the *Leichardt* case (J. B. Moore, *History and Digest . . .* (op. cit.), vol. III, p. 3134).

<sup>183</sup> The position of the Governments of European countries amounted to regarding the acts and omissions of the State's subordinate organs as emanating from the State for the purposes of generating its international responsibility. An expression of this view can be found, for example, in the instructions sent on 8 March 1882 by Mancini, then Italian Minister for Foreign Affairs, to the Italian Minister to Peru (Società Italiana per l'Organizzazione Internazionale—Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861-1887), vol. II, p. 862).

<sup>184</sup> See for example the decision rendered by the Netherlands-Venezuela Mixed Commission established under the Protocol of 28 February 1903 in the *Maal* case (United Nations, *Reports of International Arbitral Awards*, vol. X (op. cit.), p. 132). See also the *Moses* case referred to in paragraph (3) of the commentary to article 5.

<sup>185</sup> The Mexican delegate proposed an amendment to basis of discussion No. 12 (which later became article 8) to provide that in the case of acts or omissions by subordinate officials, the State would not incur any international responsibility if it disavowed the act and punished the guilty official. No State supported the Mexican delegate's amendment and he withdrew it (League of Nations, *Acts of the Conference . . .* (op. cit.), pp. 82 et seq.).

such as the Mexico/United States of America General Claims Commission established under the Convention of 8 September 1923,<sup>186</sup> and the United States of America/Panama General Claims Commission established under the agreement of 28 July 1926.<sup>187</sup> After the Second World War the Italian/United States of America, Franco-Italian and Anglo-Italian Conciliation Commissions established under article 83 of the Treaty of Peace of 10 February 1947 often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officials, and always agreed to treat the acts of such persons as acts attributable to the State.<sup>188</sup> As regards the most recent legal literature it can be said that, with one or two exceptions, international lawyers trained in the most widely different systems of law all support the view that the conduct of even minor organs can be regarded as an act of the State.<sup>189</sup> It should also be noted that none of the codification drafts, official or private—with the exception of the 1929 Harvard Draft already mentioned—makes any distinction between higher and subordinate organs. The same applies to the new 1961 Harvard Draft and to the *Restatement of the Law* by the American Law Institute.

(15) The Commission can therefore conclude, with regard to the third question, that there is no place today for the idea, which once found favour, of making a distinction between organs of the State according to their rank. There is no reason to consider only the conduct of higher officials as conduct of the State for purposes of international responsibility. Such a restriction, as we have seen, is almost unanimously rejected. Even if that were not so, such a view would have to be opposed from the standpoint of the progressive development of international law. To accept such a distinction would be to introduce a serious element of uncertainty into international relations.

(16) In conclusion, the Commission unanimously recognized that, for the purposes of the present draft, there was no justification for any distinction between different categories of State organs. The unity of the State requires that the acts or omissions of all its organs, individual or collective, should be regarded as acts or omissions of the State at the international level, i.e. as "acts of the State" capable of entailing its international

<sup>186</sup> See in particular the awards rendered by the Commission in the *Roper* case (United Nations, *Reports of International Arbitral Awards*, vol. IV (op. cit.), p. 145 et seq.), the *Masse* case (*ibid.*, p. 155 et seq.) and the *Way* case (*ibid.*, p. 400).

<sup>187</sup> *Baldwin* case (*ibid.*, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 328 et seq.).

<sup>188</sup> See for example, *inter alia*, the *Currie* case (1954), (*ibid.*, vol. XIV (op. cit.), p. 24), the *Différend concernant l'interprétation de l'article 79 du Traité de Paix avec l'Italie* (1955) (*ibid.*, vol. XIII (op. cit.), pp. 431-432) and the *Différend Dame Mossé* (1953) (*ibid.*, pp. 492 et seq.).

<sup>189</sup> See for example A. V. Freeman, "Responsibility of States . . ." (*loc. cit.*), pp. 284 et seq.; B. Cheng, *op. cit.*, pp. 195-196; P. Reuter, "La responsabilité internationale" (*op. cit.*), p. 92; T. Meron, "Responsibility . . ." (*loc. cit.*), pp. 97-98; H. Accioly "Principes généraux de la responsabilité . . ." (*loc. cit.*), pp. 392-393; I. von Münch, *op. cit.*, pp. 202-203; J.-P. Quéneudec, *op. cit.*, pp. 55 et seq.; C. F. Amerasinghe, "Imputability . . ." (*loc. cit.*), p. 106; and Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 427.

responsibility. It would, moreover, be absurd to suppose that there was a category of organs specially designated for the commission of internationally wrongful acts. Any organ of the State, if it is materially able to engage in conduct that conflicts with an international obligation of the State, may be the source of an internationally wrongful act of the State. Of course there are organs which, by the nature of their duties, will in practice have more opportunities than others in this respect, but the diversity of international obligations does not permit any *a priori* distinction between organs which can commit internationally wrongful acts and those which cannot.

(17) It might have been thought that the rule laid down in article 5 already made it sufficiently clear that the position of an organ in the organization of the State is irrelevant for the purpose of attributing conduct of

the organ to the State. The Commission, however, feels it necessary to include an express provision on that point in the draft. It must be sure that certain views held in the past and mentioned in this commentary will not be put forward again in the future, whether supported by the same old arguments or by new ones. Article 6 provides a safeguard against such an eventuality and at the same time reflects purely and simply the present state of international law in the matter. With regard to the formulation of the rule to be laid down, the Commission considered that the substance of the rule would be most clearly expressed by a single consolidated formula. The text it adopted for article 6 is therefore based on this criterion. The Commission wishes to emphasize that the enumeration of the "powers" in the text of the article is not exhaustive; indeed, this should be clear from the words "or other" after the words "constituent, legislative, executive, judicial".

### Chapter III

## SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

### A. Introduction

59. The introduction to this chapter briefly reviews past work on the question of succession of States in respect of matters other than treaties, and examines some general questions relating to the draft articles which the Commission began to prepare at its twenty-fifth session.

#### 1. HISTORICAL REVIEW OF THE COMMISSION'S WORK

##### (a) *Division of the question of succession into three separate topics*

60. As mentioned in the Commission's report on its twenty-fourth Session<sup>190</sup> the Commission, at its nineteenth session, in 1967, made new arrangements<sup>191</sup> for dealing with the topic "Succession of States and Governments", which was among the topics it had selected for codification in 1949,<sup>192</sup> and decided to divide the topic among more than one special rapporteur, the basis for the division being the three main "headings" of the broad outline of the subject laid down in the report submitted in 1963 by its Sub-Committee on Succession of States and Governments.<sup>193</sup> Those three headings were as follows:

- (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.

61. In 1967, the Commission also appointed Sir Humphrey Waldock Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui Special Rapporteur for succession in respect of rights and duties resulting from sources other than treaties. It decided to leave aside, for the time being, the third heading, namely succession in respect of membership of international organizations.<sup>194</sup>

##### (b) *Adoption by the Commission in 1972 of provisional draft articles on succession of States in respect of treaties*

62. Between 1968 and 1972, Sir Humphrey Waldock submitted to the Commission five reports on succession of States in respect of treaties.<sup>195</sup> In 1972, at its twenty-fourth session, the Commission adopted, in the light of those reports, a set of 31 provisional draft articles on the topic,<sup>196</sup> which were transmitted in the same year to Governments of Member States for their comments, in accordance with articles 16 and 21 of the Commission's Statute.<sup>197</sup>

<sup>190</sup> *Yearbook . . . 1972*, vol. II, pp. 223 *et seq.*, document A/8710/Rev.1, paras. 14 *et seq.*

<sup>191</sup> For a detailed account of the historical background of the topics as a whole, see *Yearbook . . . 1968*, vol. II, pp. 213 *et seq.*, document A/7209/Rev.1, paras. 29-42) and *Yearbook . . . 1969*, vol. II, pp. 222 *et seq.*, document A/7610/Rev.1, paras. 20-34).

<sup>192</sup> *Yearbook . . . 1949*, p. 281), document A/925, para. 16).

<sup>193</sup> *Yearbook . . . 1963*, vol. II, p. 260, document A/5509, annex II.

<sup>194</sup> *Yearbook . . . 1967*, vol. II, p. 368, document A/6709/Rev.1, paras. 38-41.

<sup>195</sup> *Yearbook . . . 1972*, vol. II, p. 224, document A/8710/Rev.1, paras. 17-21.

<sup>196</sup> *Ibid.*, p. 230, chap. II, section C.

<sup>197</sup> *Ibid.*, p. 225, para. 23.

(c) *Preliminary work on succession of States in respect of matters other than treaties*

63. To facilitate the study of the question of succession, the Secretariat has, since 1962, prepared and distributed several documents and publications<sup>198</sup> in accordance with the Commission's requests. Most of these documents and publications deal exclusively with succession in respect of treaties, while others concern succession in respect of membership of international organizations. Some, however, are more general in nature and include information on the practice relating to succession of States in respect of matters other than treaties. The publications concerned are: (a) a study entitled "Digest of the decisions of international tribunals relating to State succession"<sup>199</sup> and a supplement thereto;<sup>200</sup> (b) a study entitled "Digest of decisions of national courts relating to succession of States and Governments";<sup>201</sup> and (c) a volume in the *United Nations Legislative Series* entitled *Materials on succession of States*,<sup>202</sup> containing the information supplied by Governments of Member States in reply to the Secretary-General's request. A supplement to that volume was circulated as a document<sup>203</sup> at the twenty-fourth session of the Commission.

64. Following his appointment as Special Rapporteur,<sup>204</sup> Mr. Bedjaoui submitted to the Commission in 1968 a first report on succession of States in respect of rights and duties resulting from sources other than treaties.<sup>205</sup> In it, he considered *inter alia* the scope of the subject which had been entrusted to him and, accordingly, the appropriate title for the subject, as well as various aspects into which it could be divided. Following the discussion of that report, the Commission in the same year, at its twentieth session, took several decisions, one of which concerned the scope and title of the topic and another the priority to be given to one particular aspect of succession of States.

(i) *Scope and title of the topic*

65. Endorsing the recommendations contained in the first report by the Special Rapporteur, Mr. Bedjaoui, the Commission considered that the criterion for delimitation of the topic entrusted to him and the topic of succession in respect of treaties should be "the subject-matter of succession". It decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to sources in order to avoid any ambiguity regarding the delimitation of the topic entrusted to the Special Rapporteur. The Commission accordingly changed the title of the topic and replaced the original title "Succession in respect of rights and duties resulting from sources other than treaties" by the

title "Succession in respect of matters other than treaties".<sup>206</sup>

66. This decision was confirmed by the General Assembly in paragraph 4 (b) of its resolution 2634 (XXV), which recommended that the Commission should continue its work with a view to making "progress in the consideration of succession of States in respect of matters other than treaties".<sup>207</sup> The absence of any reference to "succession of Governments" in that recommendation by the General Assembly reflects the decision taken by the Commission at its twentieth session to give priority to State succession and to consider succession of Governments, for the time being, "only to the extent necessary to supplement the study on State succession".<sup>208</sup>

(ii) *Priority given to succession of States in economic and financial matters*

67. As mentioned above, the first report by Mr. Bedjaoui reviewed the various particular aspects of the topic of succession of States in respect of matters other than treaties. The report of the Commission on the work of its twentieth session notes in this connexion that, during the debate,

some members of the Commission referred to certain particular aspects of the topic (public property; public debts; territorial problems; legal régime of the predecessor State; status of the inhabitants; acquired rights) and made a few preliminary comments on them.

It adds that, in view of the breadth and complexity of the topic,

the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later.<sup>209</sup>

The report also notes that the predominant view of members of the Commission was that the economic aspects of succession should be considered first. It states:

At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources so as to cover problems of succession in respect of the different economic resources (interests and rights) including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next [twenty-first] session.<sup>210</sup>

68. The second report by Mr. Bedjaoui,<sup>211</sup> submitted at the twenty-first session of the Commission, was entitled "Economic and financial acquired rights and

<sup>198</sup> *Ibid.*, para. 24.

<sup>199</sup> *Yearbook* . . . 1962, vol. II, p. 131, document A/CN.4/151.

<sup>200</sup> *Yearbook* . . . 1970, vol. II, p. 170, document A/CN.4/232.

<sup>201</sup> *Yearbook* . . . 1963, vol. II, p. 95, document A/CN.4/157.

<sup>202</sup> United Nations publication, Sales No. E/F.68 V.5.

<sup>203</sup> A/CN.4/263.

<sup>204</sup> See para. 61 above.

<sup>205</sup> *Yearbook* . . . 1968, vol. II, p. 94, document A/CN.4/204.

<sup>206</sup> *Ibid.*, p. 216, document A/7209/Rev.1, para. 46.

<sup>207</sup> See para. 70 below.

<sup>208</sup> *Yearbook* . . . 1963, vol. II, p. 224, document A/5509, para. 57.

<sup>209</sup> *Yearbook* . . . 1968, vol. II, pp. 220 and 221, document A/7209/Rev.1, paras. 73 and 78.

<sup>210</sup> *Ibid.*, p. 221, para. 79.

<sup>211</sup> *Yearbook* . . . 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

State succession". The report of the Commission on the work of that session notes that during the discussion on the subject most of the members were of the opinion that the topic of acquired rights was extremely controversial and that its study, at a premature stage, could only delay the Commission's work on the topic as a whole. They considered that "an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts".<sup>212</sup> The report notes that the Commission "requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters". It further records that "the Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts".<sup>213</sup>

(iii) *Reports by the Special Rapporteur on succession of States to public property*

69. Between 1970 and 1972, Mr. Bedjaoui submitted three reports to the Commission—his third report<sup>214</sup> in 1970, fourth<sup>215</sup> in 1971 and fifth<sup>216</sup> in 1972. Each of these reports dealt with succession of States to public property and contained draft articles on the subject. Being occupied with other tasks, the Commission was unable to consider any of these reports during its twenty-second (1970), twenty-third (1971) or twenty-fourth (1972) sessions. It did, however, include a summary of the third and fourth reports in its report on the work of its twenty-third session<sup>217</sup> and an outline of the fifth report in its report on the work of its twenty-fourth session.<sup>218</sup>

70. At the twenty-fifth (1970), twenty-sixth (1971) and twenty-seventh sessions of the General Assembly, during the Sixth Committee's consideration of the reports of the International Law Commission, several representatives expressed the wish that progress should be made with the study on succession of States in respect of matters other than treaties.<sup>219</sup> On 12 November 1970, the General Assembly adopted resolution 2634 (XXV), in paragraph 4 (b) of which it recommended that the Commission should continue

its work on succession of States, taking into account the views and considerations referred to in General Assembly resolutions 1765

(XVII)<sup>220</sup> of 20 November 1962 and 1902 (XVIII)<sup>221</sup> of 18 November 1963, with a view to . . . making progress in the consideration of succession of States in respect of matters other than treaties.

On 3 December 1971, in paragraph 4 (a) of part I of its resolution 2780 (XXVI), the General Assembly again recommended that the Commission should make "progress in the consideration of succession of States in respect of matters other than treaties". Lastly, on 28 November 1972, in paragraph 3 (c) of part I of its resolution 2926 (XXVII), the General Assembly recommended that the Commission should "continue its work on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

71. In 1973, for the present session of the Commission, Mr. Bedjaoui submitted a sixth report (A/CN.4/267)<sup>222</sup> dealing, like his three previous reports, with succession of States to public property. The sixth report revises and supplements the draft articles submitted earlier in the light, *inter alia*, of the provisional draft on succession of States in respect of treaties adopted by the Commission in 1972.<sup>223</sup> The results of this recasting are submitted by the Special Rapporteur in two series of draft articles, the articles in the second series being numbered in sequence after those in the first.

72. The first series of draft articles concerns questions bearing on the topic entrusted to the Special Rapporteur as a whole and is entitled "Preliminary provisions relating to succession of States in respect of matters other than treaties". It contains articles 1, 2 and 3. These articles define the scope of the draft articles, the cases of succession covered by them and the meaning of certain terms, including "succession of States".

73. The second series of draft articles is concerned exclusively with succession of States to public property and is entitled "Draft articles on succession to public property". It contains articles 4 to 40, arranged in seven parts.

74. Parts one and two, containing articles 4 to 8, deal with general questions bearing on the whole topic

<sup>220</sup> The General Assembly was referring in particular to para. 3 (c) of resolution 1765 (XVII), in which the Assembly recommends that the Commission should:

"Continue its work on the succession of States and Governments, taking into account the view expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments [see paragraph 60 above], with appropriate reference to the views of States which have achieved independence since the Second World War";

<sup>221</sup> The General Assembly was referring, *inter alia*, to operative paragraph 4 (c) of resolution 1902 (XVIII), in which the Assembly recommends that the Commission should:

"(c) Continue its work on the succession of States and Governments, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments [see paragraph 60 above] and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War,".

<sup>222</sup> See p. 3 above.

<sup>223</sup> See para. 62 above.

<sup>212</sup> *Ibid.*, p. 228, document A/7610/Rev.1, para. 61.

<sup>213</sup> *Ibid.*, pp. 228-229, para. 62.

<sup>214</sup> *Yearbook . . . 1970*, vol. II, p. 131, document A/CN.4/226.

<sup>215</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

<sup>216</sup> *Yearbook . . . 1972*, vol. II, document A/CN.4/259.

<sup>217</sup> *Yearbook . . . 1971*, vol. II (Part One), pp. 314-344, document A/8410/Rev.1, paras. 77-98.

<sup>218</sup> *Yearbook . . . 1972*, vol. II, p. 323, document A/8710/Rev.1, para. 71.

<sup>219</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para 72; *ibid.*, *Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 135; *ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 194.

of succession of States to public property, such as the sphere of application of the articles in the second series, the definition and determination of public property, the transfer of public property as it exists, the date of its transfer and the general treatment of public property according to ownership.

75. Part three, consisting of articles 9 to 11, sets forth the provisions common to all types of succession of States—the general principle of the transfer of State property, rights in respect of the authority to grant concessions, and succession to public debt-claims.

76. Part four, consisting of articles 12 to 31, sets forth the provisions peculiar to each type of succession of States. These provisions deal, for each type considered, with questions relating to currency and the privilege of issue, the treasury and public funds, archives and public libraries, and property situated outside the transferred territory. The Special Rapporteur has been guided, in part four, by the typology adopted by the Commission in its provisional draft articles on succession of States in respect of treaties.<sup>224</sup> The specific characteristics of his subject led him, however, to formulate this typology in a slightly different manner.

77. Part five (articles 32 to 35), part six (articles 36 to 39) and part seven (article 40) comprise special provisions concerning public establishments, territorial authorities and property of foundations.

(d) *Preparation of draft articles  
by the Commission at its twenty-fifth session*

78. At its twenty-fifth session, the Commission continued its consideration of succession of States in respect of matters other than treaties and began the preparation of draft articles on the topic in the light of Mr. Bedjaoui's sixth report. At its 1219th to 1229th meetings, it considered draft articles 1 to 7 contained in the sixth report, and also the commentaries to these articles. At its 1231st and 1232nd meetings, it considered the new article 9 (A/CN.4/L.197)<sup>225</sup> submitted by the Special Rapporteur to replace articles 8 and 9 of his sixth report. All these texts were referred to the Drafting Committee, and at its 1230th, 1231st, 1239th and 1240th meetings the Commission, on the basis of the Committee's report, adopted on first reading the text of articles 1 to 8 which is reproduced below,<sup>226</sup> for the information of the General Assembly.

79. The Commission wishes to draw attention to the fact that the articles reproduced in this chapter are only the first provisions of the draft which it proposes to prepare, a general outline of which is given below.<sup>227</sup> It also wishes to emphasize the provisional nature of the text of these articles; this will be explained later.<sup>228</sup>

<sup>224</sup> *Ibid.*

<sup>225</sup> See *Yearbook . . . 1973*, vol. I, p. 152, 1231st meeting, para. 68.

<sup>226</sup> See section B of the present chapter.

<sup>227</sup> See paras. 85-89.

<sup>228</sup> See para. 91 below.

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

80. At this initial stage in the preparation of the draft articles on succession of States in respect of matters other than treaties, the Commission will confine itself to a brief consideration of four general questions, the first three of which relate to the draft as a whole, while the last relates to the provisions adopted during the present session.

(a) *Form of the draft*

81. As in the case of the codification of other topics<sup>229</sup> by the Commission, the form to be given to the codification of succession of States in respect of matters other than treaties cannot be determined until its study of this subject has been completed. The Commission, in accordance with its Statute, will then formulate the recommendations it considers appropriate. Without prejudging those recommendations, it has already decided to set out its study in the form of *draft articles*, since it believes that this is the best method of discerning or developing the rules of international law in the matter. The draft is being prepared in a form which would permit its use as a basis for a convention, if it were decided that a convention should be concluded.

(b) *The expression "matters other than treaties"*

82. The expression "matters other than treaties" did not appear in the titles of the three topics into which the question of succession was divided in 1967, namely, (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.<sup>230</sup> In 1968, in a report submitted at the twentieth session of the Commission, the Special Rapporteur for the second topic pointed out that, if the title of that topic (succession in respect of rights and duties resulting from sources other than treaties) were compared with the title of the first topic (succession in respect of treaties), it would be found that the word "treaty" was considered, in the two titles, from two different points of view. In the first case the treaty was regarded as a subject-matter of the law of succession and in the second as a source of succession. The Special Rapporteur pointed out that, apart from the lack of homogeneity, this division of the question had the drawback of excluding from the second topic all matters which were the subject of treaty provisions. He noted that in many cases State succession was accompanied by the conclusion of a treaty regulating *inter alia* certain aspects of the succession, which were thereby excluded from the second topic as entitled in 1967. Since these aspects did not come under the first topic either, the Commission would have been obliged, if this title had been retained, to leave a substantial part of the subject-matter aside in its study on State succession.<sup>231</sup>

<sup>229</sup> For example, see para. 36 above.

<sup>230</sup> See para. 60 above.

<sup>231</sup> *Yearbook . . . 1968*, vol. II, pp. 96-97, document A/CN.4/204, paras. 18-21.

83. Consequently, the Special Rapporteur proposed taking the *subject-matter of succession* as the criterion for the second topic, and entitling it: "Succession in respect of matters other than treaties".<sup>232</sup> This proposal was adopted by the Commission, which stated in its report on the work of the twentieth session that:

All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was "the subject matter of succession", i.e., the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to "sources", since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession.<sup>233</sup>

84. Until the study has been completed, the Commission will not be able to indicate precisely what "matters other than treaties" are included in the topic.

(c) *Scheme of the draft  
and research to be undertaken*

85. At its twentieth session, the Commission considered that, in view of the magnitude and complexity of the topic, it would be well to begin by studying one or two particular aspects, and it gave priority to economic and financial matters. At the same time it specified that "this did not in any way imply that all the other questions coming under the same heading would not be considered later".<sup>234</sup> Accordingly, at its twenty-fifth session, the Commission expressed the intention, subject to any later decision, to include in the draft articles as many "matters other than treaties" as possible.

86. At the present stage of its work, the Commission intends to divide the draft into an *introduction* and a *number of parts*. The introduction will contain those provisions which apply to the draft as a whole, and each part will contain those which apply exclusively to one category of specific matters.

87. At the present session, the Commission provisionally adopted three articles for inclusion in the *introduction* and five articles for *part I*, entitled "Succession to State property".<sup>235</sup> Mr. Bedjaoui's sixth report, on the basis of which these provisions were prepared, contains a series of draft articles relating to public property in general.<sup>236</sup> It states that public property may be divided into the following three categories: property of the State; property of territorial authorities other than States or of public enterprises or public bodies; and property of the territory affected by the State succession. Wishing to consider these problems one by one, the Commission decided, after full discussion and on the

proposal of the Special Rapporteur, to begin its study with State property, to which *part I* of the draft articles is devoted.

88. The Commission intends to include in *section I* of *part I* those provisions which are common to all State property, whatever its nature and whatever the type of succession envisaged. The other sections will be devoted to specific types of succession or to particular types of State property.

89. After completing its study of State property, the Commission proposes to consider the other two categories of public property listed by the Special Rapporteur. Subject to any decisions it may take later, the Commission intends after that to move on to the study of public debts. It will also decide in what order the other matters included in the topic are to be considered.

90. To facilitate the execution of the programme of work described above, the Commission requested the Secretariat, in consultation with the Special Rapporteur, to compile documentation on international practice in regard to succession of States in respect of matters other than treaties. This documentation would consist essentially of the relevant provisions of treaties and would also reflect the state of international and national jurisprudence and, as far as possible, the practice of Governments and international organizations. It would cover a representative selection of cases of State succession, primarily cases which have occurred since the Second World War but without entirely neglecting earlier cases, and would be compiled with a view to the publication by the Secretariat of a series of studies of which the first would be devoted to succession of States to public debts. The Commission invited the Secretariat to request Governments and international organizations to furnish all relevant information.

(d) *Provisional nature of the provisions adopted  
at the twenty-fifth session*

91. The Commission deems it necessary, for the information of the General Assembly, to place at the beginning of its draft articles a series of general provisions defining in particular the meaning of the expressions "succession of States"<sup>237</sup> and "State property".<sup>238</sup> However, the final content of provisions of this nature will depend to a considerable extent on the results reached by the Commission in its further work. The Commission therefore intends, during the first reading of the draft, to reconsider the text of the articles adopted provisionally at the present session, with a view to making any amendments which may be found necessary.

**B. Draft articles on succession of States in respect  
of matters other than treaties**

92. The text of articles 1 to 8 and the commentaries thereto, adopted by the Commission at the twenty-fifth session on the proposal of the Special Rapporteur,

<sup>232</sup> For the General Assembly's insertion of the words "of States" after the word "Succession" in the title of the topic, see para. 66 above.

<sup>233</sup> *Yearbook . . . 1968*, vol. II, pp. 216 and 217, document A/7209/Rev.1, para. 46.

<sup>234</sup> See para. 67 above.

<sup>235</sup> See below, section B of the present chapter.

<sup>236</sup> See above, paras. 73-77.

<sup>237</sup> See sect. B, article 3 (a) below.

<sup>238</sup> *Ibid.*, article 5.

are reproduced below for the information of the General Assembly.

## INTRODUCTION

### *Commentary*

As the Commission has pointed out above,<sup>239</sup> the introduction to the draft articles contains provisions which relate, not to one particular aspect of succession of States in respect of matters other than treaties, but to the topic as a whole. At present it comprises articles 1, 2 and 3.

### *Article 1. Scope of the present articles*

**The present articles apply to the effects of succession of States in respect of matters other than treaties.**

### *Commentary*

(1) This article corresponds to article 1 of the draft articles on succession of States in respect of treaties, adopted by the Commission at its twenty-fourth session.<sup>240</sup> Its purpose is to limit the scope of the present draft articles in two important respects.

(2) First, article 1 reflects the decision by the General Assembly that the topic under consideration should be entitled: "Succession of States in respect of matters other than treaties".<sup>241</sup> In incorporating this wording in article 1, the Commission intended to exclude from the field of application of the present draft articles the succession of Governments and the succession of subjects of international law other than States, an exclusion which also results from article 3 (a). The Commission also intended to limit the field of application of the draft articles to "matters other than treaties". It has already considered the meaning of this term in the introduction to the present chapter.<sup>242</sup> It considered that it would be premature at the present stage of its work to give a complete enumeration of the matters which will be covered by the draft when it is completed.

(3) Secondly, article 1 limits the field of application of the draft articles to the *effects* of succession of States in respect of matters other than treaties. Article 3 (a), specifies that " 'Succession of States' means the replacement of one State by another in the responsibility for the international relations of territory". In using the term "effects" in article 1, the Commission wished to indicate that it intends to draft provisions concerning not the replacement itself but its legal effects, i.e., the rights and obligations deriving from it.

<sup>239</sup> See para. 86 above.

<sup>240</sup> See para. 62 above.

<sup>241</sup> See paras. 65 and 66 above.

<sup>242</sup> See paras. 82-84 above.

### *Article 2. Cases of succession of States covered by the present articles*

**The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.**

### *Commentary*

(1) This provision reproduces the terms of article 6 of the draft articles on succession of States in respect of treaties.

(2) As it stated in the report on its twenty-fourth session, the Commission, in preparing draft articles for the codification of general international law, normally assumes that these articles are to apply to facts occurring or situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Thus, when the Commission, at its twenty-fourth session, was preparing its draft articles on succession of States in respect of treaties, several members considered that it was unnecessary to specify in the draft that its provisions would apply only to the effects of a succession of States occurring in conformity with international law.<sup>243</sup>

(3) Other members, however, pointed out that when matters not in conformity with international law called for specific treatment, the Commission had expressly so noted. They cited as examples the provisions of the draft on the law of treaties concerning treaties procured by coercion, treaties which conflict with norms of *jus cogens*, and various situations which might imply a breach of an international obligation. Accordingly, those members were of the opinion that, in regard particularly to transfers of territory, it should be expressly stipulated that only transfers occurring in conformity with international law would fall within the concept of "succession of States" for the purpose of the draft articles being prepared. The Commission adopted that view. However, the Commission's report notes that

Since to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States, the Commission decided to include amongst the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law.<sup>244</sup>

(4) At the twenty-fifth session the Commission decided to include, in the introduction to the draft articles on succession of States in respect of matters other than treaties, a provision identical with that of article 6 of the draft articles on succession of States in respect of treaties. It took the view that there was now an

<sup>243</sup> *Yearbook . . . 1972*, vol. II, p. 236, document A/8710/Rev.1, chap. II, section C, paras. 1 and 2 of the commentary to article 6.

<sup>244</sup> *Ibid.*, para. 2 of the commentary to article 6.

important argument to be added to those which had been put forward at the twenty-fourth session in favour of article 6: the absence from the draft articles on succession of States in respect of matters other than treaties, of the provisions contained in article 6 of the draft articles on succession of States in respect of treaties might give rise to doubts as to the applicability to the present draft of the general presumption that the texts prepared by the Commission relate to facts occurring or situations established in conformity with international law.

### *Article 3. Use of terms*

**For the purposes of the present articles:**

**(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;**

**(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;**

**(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;**

**(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.**

### *Commentary*

(1) This article reproduces the first words and sub-paragraphs (b), (c), (d) and (e) of article 2, paragraph 1, of the draft articles on succession of States in respect of treaties. As the title and the words in question indicate, the purpose of article 3 is simply to specify the sense in which the terms referred to are used in the present draft articles. For the time being the Commission has included in article 3 only the terms appearing in the provisions adopted at the twenty-fifth session. It intends to add to it as further provisions are adopted. It will also consider the possibility of including in article 3 a second paragraph on the lines of article 2, paragraph 2, of the draft articles on succession of States in respect of treaties.

(2) *Sub-paragraph (a)* of article 3 reproduces the definition of the term "succession of States" contained in article 2, paragraph 1 (b), of the draft articles on succession of States in respect of treaties.

(3) The report of the Commission on the work of its twenty-fourth session specified in the commentary to article 2 that the definition of succession of States given in that article referred exclusively to *the fact of the replacement* of one State by another "in the responsibility for the international relations of territory", leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. It went on to say that the rights and obligations deriving from a

succession of States were those specifically provided for in the draft articles on succession of States in respect of treaties. It further noted that the Commission had considered that the expression "in the responsibility for the international relations of territory" was preferable to other expressions such as "in the sovereignty in respect of territory" or "in the treaty-making competence in respect of territory", because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case, independently of the particular status of the territory in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The report specified that the word "responsibility" should be read in conjunction with the words "for the international relations of territory" and was not intended to convey any notion of "State responsibility", a topic being studied separately by the Commission.<sup>245</sup>

(4) At the twenty-fifth session, the Commission decided to include provisionally, in the draft articles in preparation, the definition of "succession of States" contained in the draft articles on succession of States in respect of treaties. It considered that as far as possible it was desirable that, where there were two separate sets of draft articles referring to one and the same phenomenon, they should give identical definitions of it. Furthermore, article 1 supplements the definition of "succession of States" by specifying that the draft articles apply, not to the replacement of one State by another in the responsibility for the international relations of territory, but to the effects of that replacement. At the same time the Commission wishes to emphasize that its decision is provisional<sup>246</sup> and that it intends to reconsider the definition of "succession of States" when it has completed its first reading of the present draft.

(5) Several members expressed reservations regarding the Commission's decision to retain provisionally in the present draft the definition of "succession of States" adopted at the twenty-fourth session for the draft on succession of States in respect of treaties. They considered that it was already clear that this definition was too narrow to cover all aspects of succession of States in respect of matters other than treaties. It was also maintained that the expression "in the responsibility for the international relations of the territory" was not appropriate in the present draft and might give rise to misunderstandings.

(6) *Sub-paragraphs (b), (c) and (d)* of article 3 reproduce the terms of sub-paragraphs (c), (d) and (e) of article 2, paragraph 1, of the draft articles on succession of States in respect of treaties. The meaning which they attribute to the terms "predecessor State", "successor State" and "date of the succession of States" derives, in each case, from the meaning given to the term "succession of States" in sub-paragraph (a), and would not seem to call for any comment.

<sup>245</sup> *Ibid.*, p. 231, paras. 3 and 4 of the commentary to article 2.

<sup>246</sup> See para. 91 above.

## PART I

## SUCCESSION TO STATE PROPERTY

*Commentary*

As stated above,<sup>247</sup> the Commission decided to consider separately the three categories of public property envisaged by the Special Rapporteur and to begin its study with property in the first category, namely, State property. Part I of these draft articles is therefore concerned with State property.

## SECTION 1. GENERAL PROVISIONS

*Article 4. Scope of the articles in the present Part*

The articles in the present Part apply to the effects of succession of States in respect of State property.

*Commentary*

The purpose of this provision is simply to make it clear that the articles in Part I deal with only one category of public property, namely, State property. It should be read in the light of article 1, which states that "The present articles apply to the effects of succession of States in respect of matters other than treaties". State property constitutes, for the purposes of article 4 and Part I in general, a special category of the "matters other than treaties" referred to in article 1.

*Article 5. State property*

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

*Commentary*

(1) The purpose of article 5 is not to settle what is to become of the State property of the predecessor State, but merely to establish a criterion for determining such property.

(2) There are in practice quite a number of examples of treaty provisions which determine, in connexion with a succession of States, the State property of the predecessor State, sometimes in detail. They include article 10 of the Treaty of Utrecht of 11 April 1713;<sup>248</sup> article II of the Treaty of 30 April 1803 between France

and the United States, for the sale of Louisiana;<sup>249</sup> article 2 of the Treaty of 9 January 1895, by which King Leopold ceded the Congo to the Belgian State;<sup>250</sup> article II of the Treaty of Peace of Shimonoseki of 17 April 1895 between China and Japan,<sup>251</sup> and article I of the Convention of Retrocession of 8 November 1895 between the same States;<sup>252</sup> article VIII of the Treaty of Peace of 10 December 1898 between Spain and the United States of America;<sup>253</sup> and the annexes to the Treaty of 16 August 1960 concerning the establishment of the Republic of Cyprus.<sup>254</sup>

(3) An exact specification of the property to be transferred by the predecessor State to the successor State in two particular cases of succession of States is also to be found in two resolutions adopted by the General Assembly in pursuance of the provisions of the Treaty of Peace with Italy of 10 February 1947.<sup>255</sup> The first of these, resolution 388 (V), was adopted on 15 December 1950, with the title "Economic and financial provisions relating to Libya". The second, resolution 530 (VI), was adopted on 29 January 1952, with the title "Economic and financial provisions relating to Eritrea".

(4) No generally applicable criteria, however, can be deduced from the treaty provisions mentioned above, the content of which varied according to the circumstances of the case, or from the two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations. Moreover, as the Franco-Italian Conciliation Commission stated in an award of 26 September 1964, "customary international law has not established any autonomous criterion for determining what constitutes State property".<sup>256</sup>

(5) Up to the moment when the succession of States takes place, it is the internal law of the predecessor State which governs that State's property and determines its status as State property. The successor State receives it as it is into its own juridical order. As a sovereign State, it is free, within the limits of general international law, to change its status, but any decision it takes in that connexion is necessarily subsequent to the succession of States and derives from its competence as a State and not from its capacity as the successor State. Such a decision is outside the scope of State succession.

(6) The Commission notes, however, that there are several cases in diplomatic practice where the successor State has not taken the internal law of the predecessor

<sup>249</sup> G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Librairie Dietrich, 1831), vol. VII, p. 709.

<sup>250</sup> G. F. de Martens, ed., *Nouveau recueil général de traités* (Göttingen, Librairie Dietrich, 1896), 2nd series, vol. XXI, p. 693.

<sup>251</sup> *British and Foreign State Papers*, vol. 86 (London, H.M. Stationery Office, 1900), p. 800.

<sup>252</sup> *Ibid.*, p. 1195.

<sup>253</sup> G. F. de Martens, ed., *Nouveau recueil général de traités* (Leipzig, Librairie Dietrich, 1905), 2nd Series, vol. XXXII, p. 76.

<sup>254</sup> United Nations, *Treaty Series*, vol. 382, p. 8.

<sup>255</sup> *Ibid.*, vol. 49, p. 3.

<sup>256</sup> Award in "Dispute regarding property belonging to the Order of St. Maurice and St. Lazarus", *Annuaire français de droit international*, XI, 1965 (Paris), p. 323.

<sup>247</sup> See para. 87 above.

<sup>248</sup> F. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House publishers in association with McGraw-Hill Book Co., 1967), vol. I, pp. 207-208. French text in M. de Clercq, *Recueil des Traités de la France* (Paris, Durand et Pédone-Lauriel, 1880), vol. I (1713-1802), pp. 5-6.

State into consideration in characterizing State property. Some decisions by international courts have done the same in relation to the property in dispute.

(7) For example, in its judgement of 15 December 1933 in the *Peter Pázmány University* case, the Permanent Court of International Justice took the view that it had "no need to rely upon"<sup>257</sup> the interpretation of the law of the predecessor State in order to decide whether the property in dispute was public property. It is true that the matter was governed by various provisions of the Treaty of Trianon,<sup>258</sup> which limited the Court's freedom of judgement. In another case, in which Italy was the predecessor State, the United Nations Tribunal in Libya ruled on 27 June 1955 that in deciding whether an institution was public or private, the Tribunal was not bound by Italian law and judicial decisions.<sup>259</sup> Here again, the matter was governed by special provisions—in this case, those of resolution 388 (V) already mentioned<sup>260</sup> which limited the Court's freedom of judgement.

(8) In view of the judicial decisions cited in the previous paragraph and the practice already referred to,<sup>261</sup> the Commission intends to reconsider the rule stated in article 5 in the light of the provisions it adopts during the first reading of the draft, in order to determine whether any exceptions should be made to it.

(9) The opening words of article 5 emphasize that the rule it states applies only to the provisions of Part I of the present draft and that, as usual in such cases, the Commission did not in any way intend to put forward a general definition.

(10) The Commission wishes to stress that the expression "property, rights and interests" in article 5 refers only to rights and interests of a legal nature. This expression is to be found in many treaty provisions, such as article 297 of the Treaty of Versailles,<sup>262</sup> article 249 of the Treaty of Saint-Germain-en-Laye<sup>263</sup> article 177 of the Treaty of Neuilly-sur-Seine,<sup>264</sup> article 232 of the Treaty of Trianon<sup>265</sup> and article 79 of the Treaty of Peace with Italy.<sup>266</sup> Although the expression is frequently used, it has no equivalent in some legal systems. The Commission therefore proposes to try, during the first reading of these draft articles, to find another expression

<sup>257</sup> *P.C.I.J.*, Series A/B No. 61, p. 236.

<sup>258</sup> E. Parkes, J. E. Field and R. C. Thompson, eds., *British and Foreign State Papers, 1920*, vol. 113 (London, H.M. Stationery Office, 1923), p. 486.

<sup>259</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 390.

<sup>260</sup> See above, para. 3.

<sup>261</sup> See above para. 6.

<sup>262</sup> E. Parkes, J. E. Field and R. C. Thompson, eds., *British and Foreign State Papers, 1919*, vol. 112 (London, H.M. Stationery Office, 1922), p. 146.

<sup>263</sup> *Ibid.*, p. 434.

<sup>264</sup> *Ibid.*, p. 839.

<sup>265</sup> E. Parkes, J. E. Field and R. C. Thompson, eds., *British and Foreign State Papers, 1920*, vol. 113 (London, H.M. Stationery Office, 1923), p. 839.

<sup>266</sup> United Nations, *Treaty Series*, vol. 49, p. 163.

for the whole of a State's tangible and intangible property which would be more generally understood.

(11) In article 5, the expression "internal law of the predecessor State" refers to rules of the legal order of the predecessor State which are applicable to State property. For States whose legislation is not unified, these rules include, in particular, those which determine the specific law of the predecessor State—national, federal, metropolitan or territorial—that applies to each piece of its State property.

(12) While accepting the text of article 5 provisionally, some members pointed out that the expression "State property" was used at the beginning of the text without qualification. That, and also the title of the article, seem to indicate an intention on the part of the Commission to formulate a general criterion for determining State property, applicable to the property of all States without distinction. The concluding phrase of the article, however, showed that the article concerned only the property of a particular State, namely, the predecessor State. Those members considered that it would have been better to amend that phrase so as to preserve the general character of the criterion, even if it meant specifying in every provision of the draft relating to State property which particular State it was whose property was referred to.

#### *Article 6. Rights of the successor State to State property passing to it*

**A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.**

#### *Commentary*

(1) Article 6 makes it clear that a succession of States has a dual juridical effect on the respective rights of the predecessor State and the successor State as regards State property passing from the former to the latter. It entails, on the one hand, the extinction of the rights of the predecessor State to the property in question and, on the other hand and simultaneously, the arising of the rights of the successor State to that property. As indicated by the clause "such of the State property as passes to the successor State in accordance with the provisions of the present articles", the purpose of article 6 is not to determine what State property passes to the successor State. The Commission considered that it was unable at the present stage of its work to establish a general criterion in this respect and it intends to formulate, at a future session, a series of special criteria for each type of succession. It is to the provisions in which those special criteria will be set out that article 6 refers in the above-mentioned clause.

(2) Article 6 gives expression in a single provision to a consistent practice, and reflects the endeavour to translate, by a variety of formulae, the rule that a suc-

cession of States entails the extinction of the rights of the predecessor State and the arising of those of the successor State to State property passing to the successor State. The terminology used for this purpose has varied according to time and place. One of the first notions found in peace treaties is that of the renunciation by the predecessor State of all rights over the ceded territories, including those relating to State property. This notion already appears in the Treaty of the Pyrénées of 1659,<sup>267</sup> and found expression again in 1923 in the Treaty of Lausanne<sup>268</sup> and in 1951 in the Treaty of Peace with Japan.<sup>269</sup> The Treaty of Versailles expresses a similar idea concerning State property in a clause which stipulates that "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States".<sup>270</sup> A similar clause is found in the Treaties of Saint-Germain-en-Laye,<sup>271</sup> Neuilly-sur-Seine<sup>272</sup> and Trianon.<sup>273</sup> The notion of cession is also frequently used in several treaties.<sup>274</sup> Despite the variety of formulae, the large majority of treaties relating to transfers of territory contain a consistent rule, namely, that of the extinction and simultaneous arising of rights to State property.

(3) For article 6, the Commission adopted the notion of the "passing" of State property, rather than of the "transfer" of such property, because it considered that the notion of transfer was inconsistent with the juridical nature of the effects of a succession of States on the rights of the two States in question to State property. On the one hand, a transfer often presupposes an act of will on the part of the transferor. As indicated by the word "entails" in the text of article 6, however, the extinction of the rights of the predecessor State and the arising of the rights of the successor State take place as of right. On the other hand, a transfer implies a certain continuity, whereas a simultaneous extinction and arising imply a break in continuity. The Commission nevertheless wishes to make two comments on this latter point.

<sup>267</sup> Article XLI. (English text in F. Israel, ed., *op. cit.*, vol. I, p. 51, in French Text in J. du Mont, *Corp universel diplomatique du droit des gens, contenant un recueil des traités d'alliance, de paix, de trêve . . .* (Amsterdam, Brunel, 1728), vol. VI, part II, p. 264.

<sup>268</sup> See in particular articles 15, 16 and 17 (League of Nations, *Treaty Series*, vol. XXVIII, p. 23).

<sup>269</sup> Article 2 (United Nations, *Treaty Series*, vol. 136, pp. 48 and 50).

<sup>270</sup> Article 256 (E. Parkes, J. E. Field and R. C. Thompson, eds., *British and Foreign State Papers, 1919*, vol. 112 (London, H.M. Stationery Office, 1922), p. 125.

<sup>271</sup> Article 208 (*ibid.*, pp. 412-414).

<sup>272</sup> Article 142 (*ibid.*, vol. 112, pp. 821-822).

<sup>273</sup> Article 191 (*ibid.*, 1921, vol. 113, pp. 564-565).

<sup>274</sup> See, for example, article 1 of the Convention of 4 August 1916 between the United States of America and Denmark concerning the cession of the Danish West Indies (English text in *Supplement to the American Journal of International Law* (New York, American Society of International Law, Oxford University Press, 1971), vol. II, p. 54; French text in *Revue générale de droit international public, 1971* (Paris, 1971), t. XXIV, p. 54) and article V of the Treaty of 2 February 1951 concerning the cession to India of the Free Town of Chandernagore (United Nations, *Treaty Series*, vol. 203, p. 158).

(4) In the first place, the successor State may create a certain element of continuity by maintaining provisionally in force the rules of the law of the predecessor State relating to the régime of State property. Such rules are certainly no longer applied on behalf of the predecessor State, but rather on behalf of the successor State, which has received them into its own law by a decision taken in its capacity as a sovereign State. Although, however, at the moment of succession, it is another juridical order that is in question, the material content of the rules remains the same. Consequently, in the case envisaged, the effect of the succession of States is essentially to change the entitlement to the rights to the State property.

(5) In the second place, the legal passing of the State property of the predecessor State to the successor State is often, in practice, followed by a material transfer of such property between the said States, accompanied by the drawing-up of inventories, certificates of delivery and other documents.

(6) As regards the actual text of article 6, some members criticized the word "*passes*" in the expression "such of the State property as *passes* to the successor State". They maintained that since this article gave expression to the principle of the extinction of the rights of the predecessor State to State property, it could not be a question of the passing of such property, but rather of its acquisition by the successor State. Other members claimed that an essential element was lacking in article 6 because it did not specify at what moment the extinction of the rights of the predecessor State to State property and the arising of the rights of the successor State took place. As in the case of the other provisions adopted at the present session, the Commission intends to take into consideration all the comments of members on the text of article 6 when it reconsiders it during the first reading of the draft.<sup>275</sup>

#### *Article 7. Date of the passing of State property*

**Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.**

#### *Commentary*

(1) Article 7 contains a residuary provision specifying that the date of the passing of State property is that of the succession of States. It should be read together with article 3 (*d*), which states that " 'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

(2) The residuary character of the provision in article 7 is brought out by the subsidiary clause with which the article begins: "Unless otherwise agreed or decided". It follows from that clause that the date of the passing of State property may be fixed either by agreement or by a decision.

<sup>275</sup> See para. 91 above.

(3) In fact, it sometimes occurs in practice that the States concerned agree to choose a date for the passing of State property other than that of the succession of States. It is that situation which is referred to by the term "agreed" in the above-mentioned opening clause. Some members of the Commission suggested that the words "between the predecessor State and the successor State" should be added. Others, however, opposed that suggestion on the grounds that for State property situated in the territory of a third State the date of passing might be laid down by a tripartite agreement concluded between the predecessor State, the successor State and the third State. At the present stage of its work, and until it has considered the question in greater detail, the Commission preferred not to limit the scope of the initial provision of article 7.

(4) There have also been cases where an international court has ruled on the question what was the date of the passing of certain State property from the predecessor State to the successor State.<sup>276</sup> The Commission therefore added the words "or decided" after the word "agreed" at the beginning of article 7. However, the Commission did not intend to specify from whom a decision might come.

(5) Several members expressed the view that not only article 7 but most of the other articles of the draft were residuary, and that the draft should include a general provision to that effect. In their opinion, such a provision would make the opening clause of article 7 unnecessary.

(6) As for the main provision of article 7, which is contained in the second clause of the article, it was stated during the discussion in the Commission that the date of the passing of State property varied from one type of succession to another and could not be made the subject of a general provision. Moreover, it was argued, article 7 as it stood merely gave a definition of the date of the passing of State property and imposed no obligation on the States concerned. The right place for such a text, if the Commission decided that it should be retained, was in article 3, on use of terms.

#### *Article 8. Passing of State property without compensation*

**Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.**

<sup>276</sup> See, for example, the Judgement No. 7 handed down on 25 May 1926 by the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia* (P.C.I.J., Series A, No. 7), and its Advisory Opinion of 10 September 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland (*ibid.*, Series B, No. 6, pp. 6-43).

#### *Commentary*

(1) Article 8 comprises a main provision and two subsidiary clauses. The main provision lays down the rule that the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation. It constitutes a necessary complement to article 6, but, like that article—and for the same reasons<sup>277</sup> it is not intended to determine what State property passes to the successor State.

(2) With some exceptions,<sup>278</sup> practice confirms the rule set forth in the main provision of article 8. In many treaties concerning the transfer of territories, acceptance of this rule is implied by the fact that no obligation is imposed on the successor State to pay compensation for the cession by the predecessor State of public property, including State property. Other treaties state the rule expressly, stipulating that such cession shall be without compensation. These treaties contain phrases such as "without compensation",<sup>279</sup> "in full Right",<sup>280</sup> "without payment" ("*sans paiement*")<sup>281</sup> or "*gratuitement*".<sup>282</sup>

(3) However, several members were not sure whether the Commission might not subsequently have to allow certain exceptions to the rule that State property passes without compensation in order to take into account the particular circumstances of each case of State succession and especially the nature of the State property

<sup>277</sup> See above, para. 1 of the commentary to article 6.

<sup>278</sup> These exceptions are to be found, *inter alia*, in four of the peace treaties concluded after the First World War (see article 256 of the Treaty of Versailles (*British and Foreign State Papers, 1919*, vol. 112, p. 125 (*op. cit.*)); article 208 of the Treaty of Saint-Germain-en-Laye (*ibid.*, p. 413; article 142 of the Treaty of Neuilly-sur-Seine (*ibid.*, vol. 112); and article 191 of the Treaty of Trianon (*ibid.*, 1920, vol. 113, (*op. cit.*), p. 494). Under the terms of these treaties, the value of the State property ceded by the predecessor States to the successor States was deducted from the amount of the reparations due by the former to the latter. It should, however, be noted that in the case of some State property, the treaties in question provided for transfer without any *quid pro quo*. Thus, article 56 of the Treaty of Versailles (*ibid.*, 1919, vol. 112, p. 43) specified that "France shall enter into possession of all property and estate within the territories referred to in Article 51, which belong to the German Empire or German States [i.e. in Alsace-Lorraine], without any payment or credit on this account to any of the States ceding the territories".

<sup>279</sup> Article III, para. 4 of the Agreement between the United States of America and Japan concerning the Amami Islands, signed at Tokyo on 24 December 1953 (United Nations, *Treaty Series*, vol. 222, p. 195).

<sup>280</sup> Article 10 of the Treaty of Utrecht of 11 April 1713 concerning the cession of the Bay and Straits of Hudson by France to Great Britain (F. Israel, *op. cit.*, p. 207; French text in M. de Clercq, *Recueil des traités de la France* (Paris, A. Durand and Pédone-Lauriel, 1880), vol. I, p. 5).

<sup>281</sup> Annex X, para. 1, and Annex XIV, para. 1, of the Treaty of Peace with Italy (United Nations, *Treaty Series*, vol. 49, pp. 209 and 225); and United Nations General Assembly resolutions 388 (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya" (article 1, para. 1), and 530 (VI) of 29 January 1972, entitled "Economic and financial provisions relating to Eritrea" (article 1, para. 1).

<sup>282</sup> Article 60 of the Treaty of Lausanne (League of Nations, *Treaty Series*, vol. XXVIII, p. 53).

in question or the type of succession envisaged. Other members even expressed doubts as to the possibility of framing a general rule on the subject.

(4) The first subsidiary clause of article 8 reserves the rights of third parties, a question which the Commission proposes to study at a later stage.

(5) The second subsidiary clause of article 8 reads:

“unless otherwise agreed or decided”. Its purpose is to provide expressly for the possibility of derogating from the rule in this article. It is identical with the clause in article 7 on which the Commission has already commented.<sup>283</sup>

<sup>283</sup> See above, paras. 2-5 of the commentary to article 7.

## Chapter IV

### THE MOST-FAVoured-NATION CLAUSE

#### A. Introduction

##### 1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

93. At its sixteenth session, in 1964, the Commission considered a proposal by one of its members, Mr. Jiménez de Aréchaga, that it should include in its draft on the law of treaties a provision on the so-called “most-favoured-nation clause”. The suggested provision was intended formally to reserve the clause from the operation of the articles dealing with the problem of the effect of treaties on third states.<sup>284</sup> In support of the proposal it was urged that the broad and general terms in which the articles relating to third States had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties. The Commission, however, while recognizing the importance of not prejudicing the operation of most-favoured-nation clauses, did not consider that these clauses were in any way touched by the articles in question and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.<sup>285</sup> The Commission maintained this position at its eighteenth session.<sup>286</sup>

94. At its nineteenth session, in 1967, the Commission noted that several representative in the Sixth Committee at the twenty-first session of the General Assembly had urged that it should deal with the most-favoured-nation clause as an aspect of the general law of treaties.

In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to UNCITRAL the Commission decided to place on its programme the topic of “most-favoured-nation clauses in the law of treaties” and appointed Mr. Endre Ustor as Special Rapporteur on that topic.<sup>287</sup>

95. At the Commission's twentieth session, in 1968, the Special Rapporteur submitted a working paper giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage.<sup>288</sup> The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. It wished to base its studies on the broadest possible foundations without, however, entering into fields outside its functions. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which might have particular experience in the application of the most-favoured-nation clause.

96. The Commission decided at the same session to shorten the title of the topic to, simply, “The most-favoured-nation clause”.<sup>289</sup>

97. By resolution 2400 (XXIII), of 11 December 1968, the General Assembly recommended that the Commission, *inter alia*, continue its study of the most-favoured-nation

<sup>284</sup> *Yearbook . . . 1964*, vol. I, p. 184, 752nd meeting, para. 2.

<sup>285</sup> *Yearbook . . . 1964*, vol. II, p. 176, document A/5809, para. 21.

<sup>286</sup> *Yearbook . . . 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 32.

<sup>287</sup> *Yearbook . . . 1967*, vol. II, p. 369, document A/6709/Rev.1, para. 48.

<sup>288</sup> *Yearbook . . . 1968*, vol. II, p. 165, document A/CN.4/L.127.

<sup>289</sup> *Yearbook . . . 1968*, vol. I, p. 250, 987th meeting, paras. 7-12.

clause. Subsequently, the General Assembly made the same recommendation in its resolutions 2501 (XXIV), of 12 November 1969, 2634 (XXV), of 12 November 1970, 2780 (XXVI), of 3 December 1971, and 2926 (XXVII), of 28 November 1972.

98. At the twenty-first session of the Commission in 1969, the Special Rapporteur submitted his first report<sup>290</sup> containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report and, accepting the suggestion of the Special Rapporteur, instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.<sup>291</sup>

99. Following the instructions of the Commission, the Special Rapporteur submitted his second report<sup>292</sup> at the twenty-second session of the Commission in 1970. In part I of this report, he attempted an analytical survey of the views held by the parties and the judges on the nature and function of the clause in the three cases dealt with by the International Court of Justice pertaining to the clause: the *Anglo-Iranian Oil Company Case (Jurisdiction)* [1952],<sup>293</sup> the *Case concerning the rights of nationals of the United States of America in Morocco (Judgment)* [1952]<sup>294</sup> and the *Ambatielos Case (merits: obligation to arbitrate)* [1953].<sup>295</sup> He also dealt with the Award handed down on 6 March 1956 by the Commission of Arbitration established by the Agreement of 24 February 1955 between the Governments of Greece and the United Kingdom for the arbitration of the *Ambatielos* claim.<sup>296</sup>

100. In part II of his second report, he set out in a systematic manner the replies of international organizations and interested agencies to the circular letter of the Secretary-General dated 23 January 1969. In this letter the organizations concerned were requested to submit, for transmittal to the Special Rapporteur, all the information derived from their experience which might assist him and the Commission in the work of codification and progressive development of the rules of international law concerning the most-favoured-nation clause. They were particularly requested to draw attention to any relevant bilateral or multilateral treaty, statement, practice or fact and to give their views as to the existing rules which could be discerned in respect of the clause. A number of international organizations gave a detailed answer to the circular letter and those answers served as a basis

<sup>290</sup> *Yearbook* . . . 1969, vol. II, p. 157, document A/CN.4/213.

<sup>291</sup> *Yearbook* . . . 1969, vol. II, p. 234, document A/7610/Rev.1, para. 89.

<sup>292</sup> *Yearbook* . . . 1970, vol. II, p. 199, document A/CN.4/228 and Add.1.

<sup>293</sup> *I.C.J. Reports 1952*, p. 93.

<sup>294</sup> *Ibid.*, p. 176.

<sup>295</sup> *I.C.J. Reports 1953*, p. 10.

<sup>296</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), p. 91.

for part II of the Special Rapporteur's second report.<sup>297</sup>

101. Owing to lack of time, the Commission was unable to consider the topic at its twenty-second (1970) and twenty-third (1971) sessions.

102. At its twenty-third session, however, the Commission, on the suggestion of the Special Rapporteur, requested the Secretariat to prepare, on the basis of the collections of law reports available to it and of the information to be requested from Governments, a "Digest of decisions of national courts relating to most-favoured-nation clauses".<sup>298</sup>

103. At the twenty-fourth session of the Commission, in 1972, the Special Rapporteur submitted his third report,<sup>299</sup> containing a set of five draft articles on the most-favoured-nation clause, with commentaries. The articles defined the terms used in the draft, in particular the terms "most-favoured-nation clause" and "most-favoured-nation treatment". The commentary pointed out that the undertaking to accord most-favoured-nation treatment was the constitutive element of any most-favoured-nation clause. The report recalled that States have no general right to most-favoured-nation treatment, which can be claimed only on the basis of a legal obligation. It pointed out that the right of the beneficiary State to claim the advantages accorded by the granting State to a third State arises from a most-favoured-nation clause. In other words, the legal bond between the granting State and the beneficiary State originates in the treaty containing such a clause and not in the collateral treaty concluded between the granting State and the third State.

104. Being fully occupied with the completion of draft articles on succession of States in respect of treaties and draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was unable to examine the topic at its twenty-fourth session (1972).

105. At that session, however, at the suggestion of the Special Rapporteur, the Commission requested the Secretariat to prepare a study on the most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series*, which would survey the fields of application of the clauses in question, examine their relation to national treatment clauses, the exceptions provided for in treaties, and the practice concerning succession of States in respect of most-favoured-nation clauses.<sup>300</sup>

106. At the present session, the Special Rapporteur submitted his fourth report (A/CN.4/266)<sup>301</sup> containing three more draft articles, with commentaries, dealing with the presumption of unconditional character of the clause, the *ejusdem generis* rule and the acquired rights of the beneficiary State.

<sup>297</sup> *Yearbook* . . . 1971, vol. II (Part One), p. 347, document A/8410/Rev.1, para. 111.

<sup>298</sup> *Ibid.*, para. 113.

<sup>299</sup> *Yearbook* . . . 1972, vol. II, document A/CN.4/257 and Add.1.

<sup>300</sup> *Yearbook* . . . 1972, vol. II, pp. 323-324, document A/8710/Rev.1, paras. 74-75.

<sup>301</sup> See p. 97 above.

107. The Commission considered the Special Rapporteur's third report at its 1214th to 1218th meetings and referred draft articles 2, 3, 4 and 5 contained therein to the Drafting Committee. At its 1238th meeting, the Commission considered the reports of the Drafting Committee and adopted on first reading articles 1 to 7.

108. The text of the draft articles and the commentaries thereon as adopted by the Commission are reproduced in the present report for the information of the General Assembly.<sup>302</sup> In doing so, the Commission wishes to draw the attention of the General Assembly to the fact that the adoption of the seven draft articles constitutes only the initial stage of its work in the preparation of draft articles on the topic. Thus the Commission, as has been its usual practice, adopted an article on the use of terms only on a provisional basis. The final decision on such an article could not, in the Commission's view, be taken until the substantive articles contained in a full set of draft articles had been considered by the Commission.

109. In its future consideration of the topic, it is the Commission's intention to consider, *inter alia*, the three draft articles contained in the Special Rapporteur's fourth report submitted at the present session. The report states that, unless most-favoured-nation treatment is accorded under the conditions of material reciprocity, it is presumed that the granting State is obliged to accord, and the beneficiary State is entitled to receive, most-favoured-nation treatment irrespective of whether the favours accorded by the granting State to any third State are accorded gratuitously or against compensation. It states the rule that the beneficiary State cannot claim under a most-favoured-nation clause any rights other than those relating to the subject-matter of the clause and falling within its scope. Finally, the report states that the rights of the beneficiary State under a most-favoured-nation clause are not affected by an agreement between the granting State and one or more third States confining certain benefits to their mutual relations, without the written consent of the beneficiary State.

110. The Rapporteur of the Commission suggested at the present session that the Special Rapporteur indicate to the Commission those problems with which he proposed to deal in future draft articles.<sup>303</sup> The Special Rapporteur accordingly indicated that it was his intention to deal, in future draft articles, with such problems as the contingent character of the most-favoured-nation clause and the question of the beginning and termination of the operation of the clause. The interaction between the operation of most-favoured-nation clauses and national treatment clauses would be considered, particularly the attraction by most-favoured-nation clauses of benefits obtained under national treatment clauses. In addition, future draft articles would deal with the question of exceptions to the operation of the clause. Besides the exceptions provided by customs unions, free trade areas, frontier traffic, etc. he drew particular attention to the question of excepting from the operation of the clause preferences granted to developing States by developed

States. He intended to examine the question whether and to what extent the beneficiary State has a right to be informed of the advantages or benefits accorded by the granting State to a third State, which relate to the most-favoured-nation clause in force between the granting State and the beneficiary State. Finally, he indicated that the question of the succession of States in respect of most-favoured-nation clauses might be dealt with in the future.

111. At the present session, the Secretariat distributed a document entitled "Digest of decisions of national courts relating to the most-favoured-nation clause" (A/CN.4/269),<sup>304</sup> prepared in accordance with the Commission's request.<sup>305</sup> The Secretariat has also been requested to prepare a study on the most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series*.<sup>306</sup>

## 2. SCOPE OF THE DRAFT ARTICLES

112. As already noted, the idea that the Commission should undertake a study of the most-favoured-nation clause arose in the course of its work on the law of treaties.<sup>307</sup> The Commission felt that although the clause, conceived as a treaty provision, fell entirely under the general law of treaties, it would be desirable to make a special study of it. While it recognized that there was a particular interest in taking up this study because of the attention devoted to the clause as a device frequently used in economic fields, it understood its task as being to deal with the clause as an aspect of the law of treaties.<sup>308</sup> When it first discussed the question on the basis of the preparatory work of the Special Rapporteur in 1968, the Commission decided to concentrate on the legal character of the clause and the legal conditions of its application in order that the scope and effect of the clause as a legal institution might be clarified.<sup>309</sup>

113. The Commission maintains the position which it took in 1968 and points out that the fact that the original title of the topic was changed from "most-favoured-nation clauses in the law of treaties" to "the most-favoured-nation clause" does not indicate any change in its intention to deal with the clause as a legal institution and to explore the rules of law pertaining to the clause. The Commission's approach remains the same: while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, it does not wish to confine its study to the operation of the clause in this field but to extend the Study to the operation of the clause in as many fields as possible.

114. On the other hand, while it is not the Commission's intention to deal with matters not included in its functions, it wishes to take into consideration all modern developments which may have a bearing upon the

<sup>302</sup> See below, section B of the present chapter.

<sup>303</sup> *Yearbook* . . . 1973, vol. I, p. 80, 1217th meeting, para. 76.

<sup>304</sup> See p. 117 above.

<sup>305</sup> See para. 102 above.

<sup>306</sup> See para. 105 above.

<sup>307</sup> See para. 93 above.

<sup>308</sup> See para. 94 above.

<sup>309</sup> See para. 95 above.

codification or progressive development of rules pertaining to the operation of the clause. In this connexion, the Commission wishes to devote special attention to the question of the manner in which the need of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the field of international trade, can be given expression in legal rules.<sup>310</sup>

115. The Commission also limited the scope of the present draft articles by the introduction of articles 1 and 3; the reasons for this are given in the commentaries to those articles.

### 3. THE MOST-FAVOURLED-NATION CLAUSE AND THE PRINCIPLE OF NON-DISCRIMINATION

116. The Commission considered the relationship and interaction between the most-favoured-nation clause and the principle of non-discrimination. It discussed particularly the question whether the principle of non-discrimination did not imply the generalization of most-favoured-nation treatment.

117. The Commission recognized several years ago that the rule of non-discrimination "is a general rule which follows from the equality of States"<sup>311</sup> and that non-discrimination is "a general rule inherent in the sovereign equality of States".<sup>312</sup> The General Assembly, by resolution 2625 (XXV) of 24 October 1970, approved the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which States, *inter alia*:

States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality. . . .

118. The most-favoured-nation clause, in the Commission's view, may be considered as a technique or means for promoting the equality of States or non-discrimination. The International Court of Justice has stated that the intention of the clause is "to establish and maintain at all times fundamental equality without discrimination among all of the countries concerned".<sup>313</sup>

119. The Commission observed, however, that the close relationship between the most-favoured-nation clause and the general principle of non-discrimination should not blur the differences between the two notions. Those differences are illustrated by the relevant articles in the Vienna Conventions on Diplomatic Relations<sup>314</sup> and on Consular Relations.<sup>315</sup> Both Conventions contain an article reading, in part, as follows:

<sup>310</sup> See paras. 120 *et seq.* below.

<sup>311</sup> *Yearbook . . . 1958*, vol. II, p. 105, document A/3859, chap. III, section II, para. 1 of the commentary to article 44 of the draft articles on diplomatic intercourse and immunities.

<sup>312</sup> *Yearbook . . . 1961*, vol. II, p. 128, document A/4843, chap. II, sect. IV, para. 1 of the commentary to article 70 of the draft articles on consular relations.

<sup>313</sup> *Case concerning Rights of Nationals of the United States of America in Morocco (Judgment) (I.C.J. Reports 1952, p. 192).*

<sup>314</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>315</sup> *Ibid.*, vol. 596, p. 261.

1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place: . . .

(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.<sup>316</sup>

These provisions reflect the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature. In other words, the principle of non-discrimination may be considered as a general rule which can always be invoked by any State. But a State cannot normally invoke the principle against another State which has extended particularly favourable treatment to a third State, provided that the State concerned had itself received the general non-discriminatory treatment on a par with other States. The claim to be assimilated to a State put in a favoured position can only be raised on the basis of an explicit commitment of the State granting the favours in the form of a conventional stipulation, namely, a most-favoured-nation clause.

### 4. THE MOST-FAVOURLED-NATION CLAUSE AND THE DIFFERENT LEVELS OF ECONOMIC DEVELOPMENT

120. The Commission, though at an early stage of its work, took cognizance of the problem which the application of the most-favoured-nation clause creates in the field of international trade when a striking inequality exists between the development of the States concerned. It recalled the report on "International trade and the most-favoured-nation clause" prepared by the secretariat of UNCTAD (the UNCTAD memorandum) which states, *inter alia*:

To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause. . . . The recognition of the trade and development needs of developing countries requires that for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations.<sup>317</sup>

121. It also recalled General Principle Eight of annex A.I.I. of the recommendations adopted by UNCTAD at its first session, which states, *inter alia*:

<sup>316</sup> Article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.

<sup>317</sup> See *Yearbook . . . 1970*, vol. II, p. 231, document A/CN.4/288 and Add.1, para. 188. One member of the Commission has recalled the Aristotelian definition of equality:

"There will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal equal shares, that quarrels and complaints arise."<sup>3</sup>

<sup>3</sup> See Aristotle, *Nicomachean Ethics*, V; iii, 6. (*Yearbook . . . 1968*, vol. I, p. 186, 967th meeting, para. 6.)

International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them.<sup>318</sup>

122. In recalling the question of the operation of the most-favoured-nation clause in trade relations between States at different levels of economic development, the Commission was aware that it could not enter into fields outside its functions and was not in a position to deal with economic matters and suggest rules for the organization of international trade. Nevertheless, it recognized that the operation of the clause in the sphere of international trade with particular reference to the developing countries posed serious problems, some of which related to the Commission's work on the topic. As indicated by the Special Rapporteur,<sup>319</sup> the Commission intends to examine, in future draft articles, the question of exceptions to the operation of the clause; it recognizes the importance of the question and intends to revert to it in the course of its future work.

#### B. Draft articles on the most-favoured-nation clause

123. The text of articles 1 to 7 and the commentaries thereto, adopted by the Commission at the present session on the proposal of the Special Rapporteur, is reproduced below for the information of the General Assembly.

##### *Article 1. Scope of the present articles*

**The present articles apply to most-favoured-nation clauses contained in treaties between States.**

##### *Commentary*

(1) This article corresponds to article 1 of the Vienna Convention on the Law of Treaties; its purpose is to define the scope of the present articles.

(2) It gives effect to the Commission's decision that the scope of the present articles should be restricted to most-favoured-nation clauses contained in treaties concluded between States. It therefore emphasizes that the provisions which follow are designed for application only to most-favoured-nation clauses contained in treaties between States. This restriction also finds expression in article 2 (a), which gives the term "treaty" the same meaning as in the Vienna Convention on the Law of Treaties, a meaning which specifically limits the term to "an international agreement concluded between States".

<sup>318</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

<sup>319</sup> See para. 110 above.

(3) It follows from the use of the term "treaty" and from the meaning given to it in article 2 (a), that article 1 restricts the scope of the articles to most-favoured-nation clauses contained in international agreements between States in written form.

(4) Consequently, the present articles have not been drafted so as to apply to clauses contained in oral agreements between States and in international agreements concluded between States and other subjects of international law. At the same time, the Commission recognized that the principles which the articles contain may also be applicable in some measure to international agreements falling outside the scope of the present articles. Accordingly, in article 3 it has made a general reservation on this point analogous to that in article 3 of the Vienna Convention on the Law of Treaties.

(5) The Commission adopted article 1 provisionally with a view to reverting to it if, in the course of the elaboration of the articles, some enlargement of the scope of the draft should seem desirable.

##### *Article 2. Use of terms*

**For the purposes of the present articles:**

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "granting State" means a State which grants most-favoured-nation treatment;

(c) "beneficiary State" means a State which has been granted most-favoured-nation treatment;

(d) "third State" means any State other than the granting State or the beneficiary State.

##### *Commentary*

(1) Following the example of many of its previous drafts, the Commission has specified in article 2 the meaning of the expressions most frequently used in the draft.

(2) As the introductory words of the article indicate, the definitions contained therein are limited to the draft articles. They only state the meanings in which the expressions listed in the article should be understood for the purposes of the draft articles.

(3) Paragraph (a) reproduces the definition of the term "treaty" given in article 2, paragraph 1 (a), of the Vienna Convention on the Law of Treaties. It results from the general conclusions reached by the Commission concerning the scope of the present draft articles and its relationship with the Vienna Convention.<sup>320</sup> Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general

<sup>320</sup> See paras. 112-115 above.

term covering all forms of international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(4) Paragraphs (b) and (c) define the terms "granting State" and "beneficiary State". These expressions denote the States parties to a treaty which contains a "most-favoured-nation" clause, parties which are promisors and promisees, respectively, of the most-favoured-nation treatment. The verb "grant" has been used to convey the meaning not only of an actual according or enjoyment of the treatment but also the creation of the legal obligation and corresponding right to that treatment. A State party to a treaty including a most-favoured-nation clause may be a granting State and a beneficiary State at the same time if, by the same clause, it grants to another State most-favoured-nation treatment and is granted by that State the same treatment.

(5) Paragraph (d), in defining the term "third State", departs from the meaning assigned to that term by article 2, paragraph 1 (h), of the Vienna Convention on the Law of Treaties. According to that sub-paragraph, "third State" means a State not a party to the treaty. In cases where a most-favoured-nation clause is contained in a bilateral treaty, that definition could have been applicable. However, most-favoured-nation clauses can be, and indeed are, included in multilateral treaties. In such clauses, the parties undertake to accord each other the treatment granted by them to any third State. In such cases, the third State is not necessarily outside the bounds of the treaty: it may also be one of the parties to the multilateral treaty in question. It is for this reason that article 2 defines the term "third State" as meaning "any State other than the granting State or the beneficiary State".

(6) Article 2 has been adopted by the Commission provisionally. The Commission may possibly include definitions of other terms in the article if, in the course of the adoption of further articles on the most-favoured-nation clause, it deems that to be necessary. The final text of the article will be established after the formulation of all the articles that will constitute the draft.

*Article 3. Clauses not within the scope  
of the present articles*

The fact that the present articles do not apply (1) to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form, or (2) to a clause contained in an international agreement by which a State undertakes to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law, or (3) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to a State, shall not affect:

(a) The legal effect of any such clause;

(b) The application to such a clause of any of the rules set forth in the present articles to which it would be subject under international law independently of the articles;

(c) The application of the provisions of the present articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties.

*Commentary*

(1) This article is drafted on the pattern of article 3 of the Vienna Convention on the Law of Treaties. Its first purpose is to prevent any misconception which might result from the express limitation of the scope of the draft articles to clauses contained in treaties concluded between States and in written form.

(2) Article 3 recognizes that the present articles do not apply to the clauses enumerated therein, under (1), (2) and (3). However, it preserves the legal effect of such clauses and the possibility of the application to such clauses of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles.

(3) Article 3 follows in this respect the system of the Vienna Convention which, in its article 3, preserved the legal force of certain agreements and the possibility of the application to them of certain rules of the Vienna Convention. Article 3 does not refer to exactly the same types of international agreements as does the Vienna Convention. Article 3 refers (1) to clauses on most-favoured-nation treatment contained in international agreements between States not in written form, (2) to clauses contained in international agreements by which States undertake to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law, and (3) to clauses contained in international agreements by which subjects of international law other than States undertake to accord most-favoured-nation treatment to States. It does not, however, refer to clauses in international agreements by which subjects of international law other than States undertake to accord to each other treatment not less favourable than that accorded by them to other such subjects of international law. The reason for the omission of a reference to such clauses is that the Commission is not aware of such clauses having arisen in practice, though hypothetically it is not impossible.

(4) The reservation in paragraph (c) is based on the provision contained in article 3, paragraph (c), of the Vienna Convention. It safeguards the application of the rules set forth in the draft articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States when such clauses are contained in international agreements in written form to which other subjects of international law are also parties. The reservation in paragraph (c)—in contradistinction to the parallel paragraph (c) of article 3 of the Vienna Con-

vention—refers to clauses contained in international agreements *in written form*. The provisions of the present articles will obviously not be applicable to clauses contained in international agreement concluded by States and other subjects of international law not in written form. This is, however, such a hypothetical case that the Commission has not found it necessary to provide for it in the articles.

#### *Article 4. Most-favoured-nation clause*

**“Most-favoured-nation clause” means a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations.**

#### *Commentary*

(1) Articles 4 and 5 contain definitions which could have found their place in article 2 on the use of terms. Because of the importance of the terms “most-favoured-nation clause” and “most-favoured-nation treatment”, which are the cornerstones of these articles, the Commission decided to keep these articles separate from the article on the use of terms.

(2) As to the expressions “most-favoured-nation clause” and “most-favoured-nation treatment”, it was pointed out in the course of the discussion in the Commission that they are not legally precise. They refer to a “nation” instead of a State and to “most-favoured” nation although the “most-favoured” third State in question may indeed be less favoured than the beneficiary State.<sup>321</sup> Nevertheless, the Commission has retained these expressions. There are other expressions in international law, like the very term international law itself, which could be criticized on grounds of precision, but which having been sanctioned by practice remain in constant use.

(3) The use of the word “clause” was also discussed. In the course of the discussion it was pointed out that there are cases where a whole treaty consists of nothing else but a more or less detailed stipulation of most-favoured-nation pledges. It is the understanding of the Commission that the word “clause” covers both single provisions of treaties or other agreements and such stipulations, sometimes lengthy, which make up a whole treaty. From the point of view of the present articles, it is irrelevant whether a most-favoured-nation clause is short and concise or long and detailed, or whether it amounts to the whole content of a treaty or not.

(4) The articles apply to clauses of treaties in the sense of the word “treaty” as defined in article 2 of the Vienna Convention on the Law of Treaties and in article 2 of the present draft. This definition does not affect the provision contained in article 3, paragraph (c), according to which the present articles are also applicable to the clauses described in that paragraph.

(5) Article 4 explains the contents of the clause as a treaty provision whereby a State undertakes to accord

most-favoured-nation treatment to another State. In the simplest form of the clause, one State, the granting State, makes this undertaking and the other State, the beneficiary State, accepts it. This constitutes a unilateral clause which is today a rather exceptional phenomenon. Most-favoured-nation pledges are usually undertaken by the States parties to a treaty in a synallagmatic way, i.e., reciprocally.

(6) Unilateral most-favoured-nation clauses were found in capitulatory régimes and have largely disappeared with them. They were also provided, for a shorter period, in favour of the victorious powers in the Peace Treaties which concluded the World Wars. (These clauses were justified by the fact that the war terminated the commercial treaties between the contesting parties and the victorious powers wanted to be treated by the vanquished—even before the conclusion of a new commercial treaty—at least on an equal footing with the allies of the latter.) The usual practice today is for States parties to a treaty to extend to each other most-favoured-nation treatment. There are, however, exceptional situations in which in the nature of things only one of the contracting parties is in the position to offer most-favoured-nation treatment in a certain sphere of relations, possibly against a different type of compensation. Such unilateral clauses occur, for example, in treaties by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting maritime State. The land-locked State not being in a position to reciprocate in kind, the clause remains unilateral. The same treaty may of course provide for another type of compensation against the granting of most-favoured-nation treatment. There are other exceptional situations: the States associated with the European Economic Community have extended to the Community—against special preferences—unilateral most-favoured nation treatment of imports and exports in certain agreements on association and commerce.<sup>322</sup>

(7) In the usual case, both States parties to a treaty, or in the case of a multilateral treaty all States parties, extend to each other most-favoured-nation treatment, becoming thereby granting and beneficiary States at the same time. The expressions “granting” and “beneficiary” then become somewhat artificial. These expressions were found useful, however, in the examination of the situations which may arise from reciprocal pledges.

(8) Although most-favoured-nation treatment is usually granted by States parties to a treaty reciprocally, this reciprocity is in the simplest and unconditional form of the most-favoured-nation clause only a formal reciprocity. There is no guarantee that States granting each other most-favoured-nation treatment will receive materially equal advantages. (The questions connected with the conditional clauses will be considered by the Commission

<sup>322</sup> Convention of Yaoundé (article 11), Agreements of Arusha (article 8), of Rabat (article 4, para. 1) and of Tunis (article 4, para. 1). Cited in D. Vignes, “La clause de la nation la plus favorisée et sa pratique contemporaine” (*Recueil des cours de l’Académie de droit international de La Haye, 1970-II*, vol. 130 (Sijthoff, Leyden, 1971), p. 324). See also the pledge of Cyprus, quoted in para. 14 below.

<sup>321</sup> See para. 4 of the commentary to article 5.

later, on the basis of the relevant article presented by the Special Rapporteur in his fourth report (A/CN.4/266).<sup>323</sup> The grant of most-favoured-nation treatment is not necessarily a great advantage to the beneficiary State. It may be no advantage at all if the granting State does not extend any favours to third States in the domain covered by the clause. All that the most-favoured-nation clause promises is that the contracting party concerned will treat the other party as well as it treats any third country, which may be very badly. It has been rightly said in this connexion that, in the absence of any undertakings to third States, the clause remains but an empty shell.

(9) The drafting of a clause is usually done in a positive form, i.e. the parties promise each other most-favourable treatment. An example of this is the most-favoured-nation clause of article I, paragraph 1, of the General Agreement on Tariffs and Trade.<sup>324</sup> The clause may be formulated in a negative way when the pledge is for the least unfavourable treatment. An example of the latter formula is article 4 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959:

... natural and manufactured products imported from the territory of one Contracting Party ... shall not be liable to any duties, taxes or similar charges other or higher, or to regulations other or formalities more burdensome, than those imposed on similar natural and manufactured products of any third State.<sup>325</sup>

(10) Article 4 is intended to cover most-favoured-nation clauses in bilateral as well as multilateral treaties. Traditionally, most-favoured-nation clauses appear in bilateral treaties. With the increase of multilateralism in international relations, such clauses have found their way into multilateral treaties. The most notable examples of the latter are the clauses of the General Agreement on Tariffs and Trade of 30 October 1947, and that of the Treaty Establishing a Free Trade Area and Instituting the Latin American Free-Trade Association, signed at Montevideo on 18 February 1960. The most important most-favoured-nation clause in the General Agreement (article I, paragraph 1) reads as follows:

With respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connexion with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III [i.e., matters of internal taxation and quantitative and other regulations], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.<sup>326</sup>

<sup>323</sup> See p. 97 above.

<sup>324</sup> See para. 10 below.

<sup>325</sup> United Nations, *Treaty Series*, vol. 374, p. 116.

<sup>326</sup> *Ibid.*, vol. 55, pp. 196 and 198; and *ibid.*, vol. 138, p. 336. The texts of the relevant GATT articles are referred to in *Yearbook ... 1970*, vol. II, pp. 217-236, document A/CN.4/228 and Add.1, part II, sect. B.

The most-favoured-nation clause of the Montevideo Treaty reads as follows:

#### Article 18

Any advantage, benefit, franchise, immunity or privilege applied by a Contracting Party in respect of a product originating in or intended for consignment to any other country shall be immediately and unconditionally extended to the similar product originating in or intended for consignment to the territory of the other Contracting Parties.<sup>327</sup>

Unless multilateral treaties containing a most-favoured-nation clause stipulate otherwise, the relations created by such clauses are essentially bilateral, i.e., every party to the treaty may demand from any other party to accord it equal treatment to that accorded to any third State, irrespective of whether that third State is a party to the treaty or not. Under the GATT system (under article II of the Agreement), each contracting party is obliged to apply its duty reductions to all other parties. The General Agreement goes beyond the most-favoured-nation principle in this respect. Each member granting a concession is directly bound to grant the same concession to all other members in their own right; this is not the same thing as obliging all other members to rely on continued agreement between the party granting the concession and the party that negotiated it.<sup>328</sup> Thus, the operation of the GATT clause differs in this respect from that of the usual bilateral most-favoured-nation clause.

(11) Article 4 expresses the idea that a most-favoured-nation pledge is an international, i.e., inter-State, undertaking. The beneficiary of this undertaking is the beneficiary State and only through the latter State do the persons in a particular relationship with that State, usually its nationals, enjoy the treatment stipulated by the granting State.<sup>329</sup>

(12) It follows from the definition of the most-favoured-nation clause, as given in article 4, that the undertaking to accord most-favoured-nation treatment is the constitutive element of a most-favoured-nation clause. Consequently, clauses which do not contain this element will fall outside the scope of the present articles even if they aim at an effect similar to that of a most-favoured-nation clause. A case in point is article XVII, paragraph 2, of GATT where "fair and equitable treatment" is demanded from the contracting parties with respect to imports of products for immediate governmental use.<sup>330</sup> Other examples are article XIII, paragraph 1, of the General Agreement, which requires that the administration of quantitative restrictions shall be non-dis-

<sup>327</sup> United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No. 62.II.G.3), p. 59 (quoted in *Yearbook ... 1970*, vol. II, p. 222, document A/CN.4/228 and Add.1, para. 149).

<sup>328</sup> H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart, 1951), p. 226.

<sup>329</sup> See para. 2 of the commentary to article 5.

<sup>330</sup> See United Nations, *Treaty Series*, vol. 55, p. 252, quoted in *Yearbook ... 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 162.

crimatory,<sup>331</sup> and article 23 of the Montevideo Treaty.<sup>332</sup> While a most-favoured-nation clause insures the beneficiary against discrimination, a clause promising non-discrimination will not necessarily yield the same advantages as a most-favoured-nation clause. Cases in point are article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.<sup>333</sup> These clauses, while assuring the States parties to the Conventions of non-discrimination by other parties to the treaty, do not give any right to most-favoured-nation treatment.

(13) Whether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation. Most-favoured-nation clauses can be drafted in the most diverse ways and that is why an eminent authority on the matter stated: "although it is customary to speak of *the* most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and effect of such clauses must be made, and accepted, with caution".<sup>334</sup> Expressed in other words: "Speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination",<sup>335</sup> and further: "there are innumerable most-favoured-nation clauses, but there is only *one* most-favoured-nation [treatment] standard".<sup>336</sup> These considerations were taken into account when the form of the definition of the clause was chosen. In that form stress is laid upon most-favoured-nation treatment, the essence of the definition being that any treaty stipulation according most-favoured-nation treatment is a most-favoured-nation clause.

(14) Article 4 states that the grant of most-favoured-nation treatment to another State by a most-favoured-nation clause shall be in "an agreed sphere of relations". Most-favoured-nation clauses have been customarily categorized as "general" or "special" clauses. A "general" clause means a clause which promises most-favoured-nation treatment in all relations between the parties concerned, whereas a "special" one refers to relations in certain limited fields. Although States are free to agree to grant each other most-favoured-nation treatment in all fields which are susceptible to such agreements, this is rather an exception today. A recent case in point is a stipulation in the treaty concerning the establishment of the Republic of Cyprus signed at Nicosia on 16 August 1960, which is rather a *pactum de contrahendo* concerning future agreements on most-favoured-nation grants: "The Republic of Cyprus shall, by the agreement on appropriate terms, accord most-favoured-nation treat-

ment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature".<sup>337</sup>

(15) The usual type of a "general clause", however, does not embrace all relations between the respective countries, it refers to all relations in certain fields. Thus, for example, "in all matters relating to trade, navigation and all other economic relations . . .".<sup>338</sup> Most-favoured-nation clauses may be less broad but still general, the "general clause" of article I, paragraph 1 of GATT being a well-known example.<sup>339</sup>

(16) The fields in which most-favoured-nation clauses are used are extremely varied. A tentative classification of the fields in question, which does not claim to be exhaustive, can be given as follows:

(a) International regulation of trade and payments (exports, imports, customs tariffs);

(b) Transport in general and treatment of foreign means of transport (in particular, ships, airplanes, trains, motor vehicles, etc.)

(c) Establishment of foreign physical and juridical persons, their personal rights and obligations;

(d) Establishment of diplomatic, consular and other missions, their privileges and immunities and treatment in general;

(e) Intellectual property (rights in industrial property, literary and artistic rights);

(f) Administration of justice, access to courts and to administrative tribunals in all degrees of jurisdiction, recognition and execution of foreign judgements, *cautio judicatum solvi*, etc.

The study to be undertaken by the Secretariat<sup>340</sup> will survey the most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series* and will examine the fields to which these clauses are applicable. A most-favoured-nation clause can apply to one or more of the fields enumerated above. The important point is that the clause always applies to a determined sphere of relations agreed upon by the parties to the treaty concerned.

(17) The *ejusdem generis* rule, according to which no other rights can be claimed under a most-favoured-nation clause than those relating to the subject-matter of the clause and falling within the scope of the clause, will be dealt with later in connexion with article 7, which is contained in the Special Rapporteur's fourth report.

<sup>331</sup> See United Nations, *Treaty Series*, vol. 55, p. 234, quoted in *Yearbook . . . 1970*, vol. II, pp. 223-224, document A/CN.4/228 and Add.1, para. 160.

<sup>332</sup> United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I (*op. cit.*), p. 60, quoted in *Yearbook . . . 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 161.

<sup>333</sup> See para. 119 above.

<sup>334</sup> A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 273.

<sup>335</sup> D. Anzilotti and A. D. McNair, quoted in Schwarzenberger, *International Law and Order* (London, Stevens, 1961), p. 138.

<sup>336</sup> *Ibid.*, p. 159.

<sup>337</sup> United Nations, *Treaty Series*, vol. 382, p. 144 (Annex F, Part II). This provision has been embodied in the Constitution of Cyprus as article 170 (see A. Peaslee, *Constitutions of Nations* (The Hague, Nijhoff, 1968), vol. III, p. 201).

<sup>338</sup> Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic (article 2) (United Nations, *Treaty Series*, vol. 374, p. 114).

<sup>339</sup> Quoted above in para.10 of this commentary.

<sup>340</sup> See above, para. 105 of the present report.

### Article 5. Most-favoured-nation treatment

Most-favoured-nation treatment means treatment by the granting State of the beneficiary State or of persons or things in a determined relationship with that State, not less favourable than treatment by the granting State of a third State or of persons or things in the same relationship with a third State.

#### Commentary

(1) While article 4 defines "most-favoured-nation clause" by "most-favoured-nation treatment", article 5 explains the meaning of the latter term. In the course of the discussion in the Commission, attention was drawn to the fact that in some languages most-favoured-nation treatment is expressed as most favourable treatment, as in the Russian term: "*rezhim naibolshego blagopriatsvovaniya*". The Commission wishes to retain in English, French, Russian and Spanish, the customary forms of expression: "most-favoured-nation treatment"; "*traitement de la nation la plus favorisée*"; "*rezhim naibolec blagopriatzvenoi natzii*"; and "*trato de la nación más favorecida*".

(2) While the commitment to grant most-favoured-nation treatment is undertaken by one State vis-à-vis another, the treatment promised thereby is one given in most cases to persons and things and only in a minority of cases to States themselves (e.g. in cases promising most-favoured-nation treatment to embassies or consulates<sup>341</sup>). By what methods and under what circumstances the person concerned (or the things for that matter) will come to enjoy the treatment depends on the intention of the parties to the treaty in question and on the internal law of the beneficiary State. The High Commissioner of Danzig, in his decision of 8 April 1927 regarding the jurisdiction of Danzig courts in actions brought by railway officials against the Railway Administration, explained the relationship between a treaty and the application of its provisions to individuals as follows:

It is a rule of law generally recognized in doctrine and in practice that international treaties do not confer direct rights on individuals, but merely on the governments concerned. Very often a government is obliged, under a treaty, to accord certain benefits or rights to individuals, but in this case the individuals do not themselves automatically acquire these rights. The government has to introduce certain provisions into its internal legislation in order to carry out the obligations into which it has entered with another government. Should it be necessary to insist on the carrying out or application of this obligation, the only Party to the case who can legally take action is the other government. That government moreover would not institute proceedings in civil courts but would take diplomatic action or apply to the competent organs of international justice.

The case in question is not comparable to that of an undertaking on behalf of a third Party . . . which figures in certain civil codes, precisely because international treaties are not civil contracts under which governments assume obligations at private law on behalf of the persons concerned. To give an example: "the most-favoured-

nation" clause in a treaty of commerce does not entitle an individual to refuse to pay customs duties on the ground that in his opinion they are too high to be compatible with the clause; he can only base his action on the internal customs legislation which should be drafted in conformity with the clauses of the treaty of commerce.<sup>342</sup>

Although the Court reversed the decision of the High Commissioner in the case in question, referring to the intention of the parties and the special characteristics of the case, the situation in countries where treaties are not self-executing is primarily the one described by the High Commissioner of Danzig. This is the case with regard to treaties in general, and most-favoured-nation clauses in particular, in the United Kingdom and Australia (see the statements quoted in the "Digest of decisions of national courts relating to the most-favoured-nation clause" prepared by the Secretariat (A/CN.4/269)<sup>343</sup>). The situation is similar in the Federal Republic of Germany where the courts have explicitly refused in several instances to recognize a direct application of article III of GATT (on national treatment on internal taxation and regulation) on the ground that this commitment binds the States parties to the Agreement alone and individuals may therefore derive no rights from this provision.<sup>344</sup> In the United States, however, self-execution is the rule for treaties embodying most-favoured-nation clauses for the following reasons:

. . . Unconditional most-favoured-nation clauses . . . [provide] for United States private interests the benefit in a particular country of the best economic opportunity given by that country to any alien goods or alien capital, whether arising before or after the treaty with the United States has come into effect. But trade and establishment treaties, including the most-favored-nation clauses in them, must run both ways, for states will not enter into such arrangements on any other basis. This means that the United States must be able at any given moment to show that the goods and capital of the other party may claim unconditional most-favored-nation treatment in this country. It would be difficult for the United States to be able to give the required reciprocity, considering the fact that unconditional most-favoured-nation clauses are open-ended (i.e. they promise the best treatment given in any other treaty, regardless of whether the other treaty is later or earlier in time) if in each instance implementing legislation by the Congress had to be obtained to extend the benefit of a treaty with a third country to the country claiming most-favoured-nation rights. Self-execution is the only feasible answer to the problem. . . .<sup>345</sup>

(3) Article 5 states that the persons or things whose treatment is in question have to be in a "determined relationship" with the beneficiary State and that their treatment is contingent upon the treatment extended by the granting State to persons or things which are in the "same relationship" with a third State. A "determined relationship" in this context means that the relationship between the States concerned and the persons and things concerned is determined by the

<sup>342</sup> Jurisdiction of the Courts of Danzig Case (*P.C.I.J.*, Series B, No. 15, p. 31).

<sup>343</sup> See p. 117 above.

<sup>344</sup> See G. Bebr, "Directly Applicable Provisions of Community Law: the Development of a Community Concept", *International and Comparative Law Quarterly* (London), vol. 19, April 1970, p. 257.

<sup>345</sup> *Restatement of the Law, Second, Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1965), para. 154, Reporters' Note 3.

<sup>341</sup> See article 3, para. 1 of the United Kingdom-Norway Consular Convention of 1951 according to which "Either High Contracting Party may establish and maintain consulates in the territories of the other at any place where any third State possesses a consulate . . ." (United Nations, *Treaty Series*, vol. 326, p. 214).

clause, i.e., by the treaty. The clause embodied in the treaty between the granting and the beneficiary State has to determine the persons or things to whom and to which the most-favoured-nation treatment is applicable and this determination has to include, obviously, the link between the beneficiary State and the persons and things concerned. The most frequent such relationship is nationality or citizenship of persons, place of registry of vessels, State of origin of products, etc. Under article 5, the beneficiary State can claim most-favoured-nation treatment in respect of its nationals, ships, products, etc., only to the extent that the granting State confers the same benefits upon the nationals, ships, products, etc., of a third State. The beneficiary State is normally not entitled to claim for its residents the benefits which the granting State extends to the nationals of the third State. Although residence creates also a certain relationship between a person and a State, this is not the same relationship as that of the link of nationality. These two relationships are not interchangeable. This example explains the meaning of the expression "same relationship" as used in article 5. The expression "same relationship", however, has to be used with caution because, to continue the example, the relationship between State A and its nationals is not necessarily the "same" as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws. The meaning of the word "same" in this context could perhaps be better expressed by the expressions "the same type of" or "the same kind of". The Commission came, however, to the conclusion that the wording of article 5 was clear enough and that an over-burdening of the text would not be desirable.

(4) Article 5 describes the treatment to which the beneficiary State is entitled as "not less favourable" than the treatment accorded by the granting State to a third State. The Commission considered whether it should not use the adjective "equal" to denote the relationship between the terms of the treatment enjoyed by a third State and those promised by the granting State to the beneficiary State. Arguments adduced in favour of the use of the word "equal" were based on the fact that the notion of "equality of treatment" is particularly closely attached to the operation of the most-favoured-nation clause. It has been argued that the clause represents and is the instrument of the principle of equality of treatment and that the clause is a means to an end: the application of the rule of equality of treatment in international relations. The arguments put forward against the use of the adjective "equal" admitted that "equal" was not as rigid as "identical" and not as vague as "similar" and was therefore more appropriate than those expressions. However, although a most-favoured-nation pledge does not oblige the granting State to accord to the beneficiary State treatment more favourable than that extended to the third State, it does not exclude the possibility that the granting State might accord to the beneficiary State additional advantages beyond those conceded to the most-favoured

third State. In other words, while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary State by the granting State. Consequently, the treatment accorded to the beneficiary State and that accorded to the third State are not necessarily "equal". This argument was countered with the obvious truth that if the granting State accords preferential treatment to the beneficiary State, i.e., treatment beyond that granted to the third State, which it need not do on the strength of the clause, such treatment will be accorded independently of the operation of the clause. Ultimately, the Commission accepted the term "not less favourable" because it believed this to be the expression commonly used in most-favoured-nation clauses.

(5) Most-favoured-nation clauses may define exactly the conditions for the operation of the clause, namely, the kind of treatment accorded by the granting State to a third State which will give rise to the actual claim of the beneficiary State to similar, the same, equal or identical treatment. If, as is the usual case, the clause itself does not provide otherwise, the clause comes into operation, i.e., a claim can be raised under the clause, if the third State (or persons or things in the same relationship with the third State as the persons or things mentioned in the clause are with the beneficiary State) has actually been granted the favours which constitute the treatment. It is not necessary for the beginning of the operation of the clause that the treatment actually granted to the third State, with respect to itself or the persons and things concerned, be based on a former treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are patently due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause. The beginning and the termination of the operation of the clause will be dealt with in a separate article to be formulated later by the Special Rapporteur.

(6) According to article 5, "treatment" is that which is accorded by a State to other States (e.g., with respect to their embassies or consulates) or to persons or to things. The Commission considered whether it should not also include in the enumeration "activities". Indeed, activities such as the exercise of certain trades and professions, entry into port of ships, etc., can also be subjects of most-favoured-nation treatment.<sup>346</sup> After a

<sup>346</sup> An understanding was reached between Bolivia and Germany in 1936 to the effect that the operation of the most-favoured-nation clause included in article V of the Treaty of Friendship between the two countries should also cover marriages celebrated by consuls (see *Reichsgesetzblatt*, 1936, II, p. 216, quoted in L. Raape, *Internationales Privatrecht* (Berlin, Vahlen, 1961, p. 20).

brief discussion, however, it decided not to refer to activities in the article because activities are ultimately related to persons and things, so that an express reference was deemed not to be indispensable.

(7) Article 5 brings in the notion of third State. The term "third State" appears also in the Vienna Convention on the Law of Treaties and the reasons for not using the expression "third State" in the present articles in the same manner as in the Vienna Convention have been set out in connexion with article 2, paragraph (d).<sup>347</sup> In earlier history there was a practice whereby the States parties to the clause explicitly named the third State enjoying the treatment which might be claimed by the beneficiary State. Thus, the Treaty of 17 August 1417 concluded between Henry V of England and the Duke of Burgundy and Count of Flanders, specified that the masters of the ships of the contracting parties should enjoy in their respective ports the same favours as the "*François, Hollandois, Zellois, et Escohois*".<sup>348</sup>

(8) Similarly, in the Anglo-Spanish Treaty of Commerce of 1886, Spain accorded to England most-favoured-nation treatment in all matters of commerce, navigation, consular rights and privileges under the same terms and with the same advantages as were accorded to France and Germany by virtue of the Treaties of 6 February 1882 and 12 July 1883.<sup>349</sup> This way of drafting does not necessarily produce a "most-favoured" nation clause, because the States mentioned in the clause as *tertium comparationis* are not necessarily those most favoured by the granting State. In the instances quoted and in most similar cases, they were the "most favoured" and it was precisely because of their favoured position that they were selected and explicitly indicated in the clauses in question. In modern practice, most-favoured-nation clauses are usually drafted in such a way that they refer as *tertium comparationis* to "any State".

(9) What often happens is rather an indication or enumeration of determined third States which, under the operation of the most-favoured-nation clause, will remain in an exceptional position, i.e., the treatment granted to them will not be attracted by the operation of the clause. Members of the Commission pointed out in this connexion that special solidarities existing between members of various groups of States within the international community may induce States to except explicitly from their most-favoured-nation obligations the treatment granted to a certain group of States with which they feel more closely connected. The establishment of customs unions, free trade areas and other groupings may also result in conventional exceptions to most-favoured-nation pledges. Several members drew attention to the preferences to be granted in the field of international trade to developing countries in order

that the treatment given to them by developed countries should comply with the requirement of justice and should assist them in the acceleration of their development. It was pointed out that to apply the most-favoured-nation clause in the field of international trade to all countries regardless of their level of development would satisfy the conditions of formal equality but would in fact involve explicit discrimination against the weaker members of the international community. The Commission instructed the Special Rapporteur, when he came to the question of exceptions to the most-favoured-nation clause, to deal with it in a sufficiently detailed manner and take into account not only resolutions of UNCTAD (such as resolutions 21 (II) of 26 March 1968 and 62 (III) of 19 May 1972),<sup>350</sup> and resolutions of the General Assembly (such as resolution 2626 (XXV) of 24 October 1970 on an International Development Strategy for the Second United Nations Development Decade, and 3036 (XXVII) of 19 December 1972 on special measures in favour of the least developed among the developing countries), but also the arrangements concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential treatment to exports of developing countries drawn up in UNCTAD as well as in the framework of GATT, and any other material found relevant.

#### *Article 6. Legal basis of most-favoured-nation treatment*

**Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation.**

#### *Commentary*

(1) Article 6 states in negative form the obvious rule that no State is entitled to most-favoured-nation treatment by another State unless that State has a legal obligation to accord such treatment. This rule follows from the principle of the sovereignty of States and their liberty of action. This liberty includes the right of States to grant special favours to some States and not to be bound by customary law to extend the same favours to others. This right is not impaired by the general duty of non-discrimination. The general duty not to discriminate between States is not breached by treating another State, its nationals, ships, products, etc., in a particularly advantageous way. Other States do not have the right to challenge such behaviour and to demand for themselves, for their nationals, ships, products, etc., the same treatment as that granted by the State concerned to a particularly favoured State. Such a claim can rightfully be made only if its proved that the State in question has a legal obligation to extend to the claiming State the same treatment as that conferred upon the

<sup>347</sup> See commentary to article 2, para. (5).

<sup>348</sup> G. Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice", *The British Year Book of International Law*, 1945 (London), vol. 22, p. 97.

<sup>349</sup> Cited in B. Nolde, "Droit et technique des traités de commerce", *Recueil des cours de l'Académie de droit international de La Haye*, 1924-II (Paris, Hachette, 1925), vol. 3, p. 413.

<sup>350</sup> *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and 3, and Add.1-2, *Report and Annexes* (United Nations publications, Sales No. E.68.II.D.14), p. 38; and *ibid.*, *Third Session*, vol. I, *Report and Annexes* (United Nations publication, Sales No. E.73.II.D.4), p. 68.

particularly favoured State or on its nationals, ships, products, etc.

(2) In practice, such a legal obligation cannot normally be proved other than by means of a most-favoured-nation clause, i.e., a conventional undertaking by the granting State to this effect. Indeed, legal literature is practically unanimous that, while there is no most-favoured-nation clause without a promise of most-favoured-nation treatment (such a promise being the constitutive element of the former). States have no right to claim most-favoured-nation treatment without being entitled to it by a most-favoured-nation clause.<sup>351</sup>

(3) The question whether States can claim most-favoured-nation treatment from each other as a right was discussed in the Economic Committee of the League of Nations but only with respect to customs tariffs. The Economic Committee did not reach any agreement in the matter beyond declaring that "... the grant of most-favoured-nation treatment ought to be the normal ...".<sup>352</sup> Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.<sup>353</sup>

(4) The Commission briefly discussed the question whether or not it should adopt a simple rule stating that most-favoured-nation treatment cannot be claimed except on the basis of a most-favoured-nation clause, i.e., under a provision of a treaty (as defined in article 2, paragraph (a)), promising most-favoured-nation treatment. It found that, although a rigid statement to this effect would to a large extent satisfy all practical purposes, it nevertheless would not be in complete conformity with the legal situation as it exists and would not cover possible future development. While most-favoured-nation clauses, i.e., treaty provisions, constitute in most cases the basis for a claim to most-favoured-nation treatment, it is not impossible even at present that such claims might be based on oral agreements. Among other possible sources of such claims, members of the Commission mentioned binding resolutions of international organizations and legally binding unilateral

acts, and as a potential source, a possible evolution of regional customary law to this effect. The Commission therefore decided to adopt the rule in more general terms, that a State is not entitled to most-favoured-nation treatment by another State unless there exists a legal obligation of the latter to extend such treatment.

(5) The Commission further concluded that a rule stating directly that most-favoured-nation treatment cannot be claimed unless there exists a legal obligation to accord it would fall outside the scope of the articles on the most-favoured-nation clause. The purpose of such articles can only be to state the rules of the operation and application of such a clause if it exists. It is not for these articles to state the conditions under which States can claim most-favoured-nation treatment from each other. It is for these reasons that the Commission, while not wishing to omit the rule from the articles because of its theoretical and practical importance, decided to state it in negative form as a general saving clause.

(6) The proper place for this saving clause will be decided by the Commission after the adoption of all the articles constituting the final draft, and at that time an endeavour will be made to find a more appropriate title which will express the fact that the article is a saving clause.

(7) The question whether or not a State would violate its international obligations if it granted most-favoured-nation treatment to most of its partners in a certain field but refused to make similar agreements with others was briefly discussed. The Commission took the view that, while such behaviour could be considered by the States not granted most-favoured-nation treatment as an unfriendly act, the present articles could not establish a legal title to such claims which might perhaps be based on a general rule of non-discrimination. The answer to this question is thus clearly beyond the scope of the present articles.

#### *Article 7. The source and scope of most-favoured-nation treatment*

**The right of the beneficiary State to obtain from the granting State treatment extended by the latter to a third State or to persons or things in a determined relationship with a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State.**

**The treatment to which the beneficiary State is entitled under that clause is determined by the treatment extended by the granting State to the third State or to persons or things in the determined relationship with the latter State.**

#### *Commentary*

(1) This article sets out the basic structure of the operation of the most-favoured-nation clause. It states that the right of the beneficiary State to receive from the granting State most-favoured-nation treatment is

<sup>351</sup> See, *inter alia*, E. Usenko, "Formy regulirovaniya sotsialisticheskogo mezhdunarodnogo razdeleniya truda" [Forms of the regulation of the Socialist International Division of Labour], *Mezhdunarodnye otnosheniya* [International relations] (Moscow, 1965), p. 238 (German edition, *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung* (Berlin, Staatsverlag der Deutschen Demokratischen Republik), 1966, p. 200); D. Vignes, "La clause de la nation la plus favorisée . . .", *Recueil des cours* . . . (*loc. cit.*), p. 224; E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses universitaires de Grenoble, 1972), p. 7; K. Hasan, *Equality of treatment and Trade Discrimination in International Law* (The Hague, Nijhoff, 1968), p. 33.

<sup>352</sup> League of Nations, "Recommendations of the Economic Committee relating to Tariff Policy and the Most-Favoured-Nation Clause" (document E.805.1933.II.B.1), quoted in *Yearbook* . . . 1969, vol. II, p. 175, document A/CN.4/213, annex I.

<sup>353</sup> Cf. G. Schwarzenberger, "The principles and standards of international economic law", *Recueil des cours de l'Académie de droit international de La Haye, 1966-I* (Leyden, Sijthoff, 1967), vol. 117, p. 74.

anchored in the most-favoured-nation clause, in other words, that the clause is the exclusive source of the beneficiary State's rights. It also states that the treatment, i.e., the extent of benefits to which the beneficiary State may lay claim for itself or for persons or things in a determined relationship with it, depends upon the treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State. The rule is important and its validity is not dependent on whether the treatment accorded by the granting State to a third State, or to persons or things in a determined relationship with the latter, is based upon a treaty, other agreement, unilateral, legislative, or other act, or mere practice.

(2) When two treaties exist, one between the granting and the beneficiary State containing the most-favoured-nation clause and the other between the granting State and a third State entitling the latter to certain favours, the question arises as to which one is the basic treaty. That question was thoroughly discussed in the *Anglo-Iranian Oil Company* case before the International Court of Justice. It was contended before the Court that:

... A most-favoured-nation clause is in essence by itself a clause without content; it is a contingent clause. If the country granting most-favoured-nation treatment has no treaty relations at all with any third State, the most-favoured-nation clause remains without content. It acquires its content only when the grantor State enters into relations with a third State, and its content increases whenever fresh favours are granted to third States. ...<sup>354</sup>

Against this argument it was maintained that the most-favoured-nation clause:

... involves a commitment whose object is real. True, it is not determined and is liable to vary in extent according to the treaties concluded later, but that is enough to make it determinable. Thus the role of later treaties is not to give rise to new obligations towards the State beneficiary of the clause but to alter the scope of the former obligation. The latter nevertheless remains the root of the law, the source of the law, the origin of the law, on which the United Kingdom Government is relying in this case. [*Translation from French.*]<sup>355</sup>

The majority of the Court held that:

The treaty containing the most-favoured-nation clause is the basic treaty. ... It is this treaty which establishes the juridical link between the United Kingdom [the beneficiary State] and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom [the beneficiary State] and Iran [the granting State]: it is *res inter alios acta*.<sup>356</sup>

The decision of the Court contributed, to a great extent, to the clarification of legal theory. Before the Court's decision there was no lack of legal writers who presented the operation of the most-favoured-nation clause (or more precisely that of the third-party treaty) as an exception to the rule *pacta tertiis nec nocent nec prosunt*; i.e., that treaties only produce effects as between the

contracting parties.<sup>357</sup> Legal theory seems now unanimous in endorsing the findings of the majority of the Court.<sup>358</sup>

(3) The solution adopted by the Court is in accordance with the rules of the law of treaties relating to the effect of treaties on States not parties to a particular treaty. The view that the third-party treaty (the treaty by which the granting State accords favours to a third State) is the origin of the rights of the beneficiary State (a State not party to the third-party treaty) runs counter to the rule embodied in article 36, paragraph 1, of the Vienna Convention on the Law of Treaties. As explained in the commentary of the Commission to the 1966 draft (which, with insignificant drafting changes, has become article 36 of the Convention):

*Paragraph 1* lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States generally. *The intention to accord the right is of cardinal importance*, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision. ...<sup>359</sup>

It seems evident that the parties to a third party treaty do not have such an intention. They may be aware that their agreement can have an indirect effect through the operation of the most-favoured-nation clause (to the advantage of the State beneficiary of the clause), but any such indirect effect is unintentional. It follows that the right of the beneficiary State to a certain advantageous treatment does not derive from the treaty concluded between the granting State and the third State and that the provision of article 36 of the Vienna Convention is not applicable to that treaty.

(4) The United Nations Conference on the Law of Treaties upheld this view. At the fourteenth plenary meeting, held on 7 May 1969, the President of the Conference stated that article 32, paragraph 1 (of the 1966 draft of the International Law Commission), "did not affect the interests of States under the most-favoured-nation system".<sup>360</sup>

(5) By the adoption of article 7, the Commission maintained its previous position. Article 7 reflects the view that the basic act (*acte règle*) is the agreement

<sup>357</sup> See e.g., P. Fauchille, *Traité de droit international* (Paris, Rousseau, 1926), vol. I, 3rd part, p. 359; and L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, para. 522. See, however, the contrary views of H. Accioli, *Traité de droit international public* (Paris, Recueil Sirey, 1941), vol. II, p. 479; and M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. II, p. 255.

<sup>358</sup> G. Schwarzenberger, *International Law as Applied by International Courts and Tribunal*, 3rd ed. (London, Stevens, 1957), p. 243; P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1967), vol. I, pp. 208-209; and E. Sauvignon, *op. cit.*, p. 78.

<sup>359</sup> *Yearbook* ... 1966, vol. II, p. 229, document A/6309/Rev.1, part II, para. 7 of the commentary to article 32 of the draft articles on the law of treaties) (italics in the third sentence added).

<sup>360</sup> *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 63, fourteenth plenary meeting, para. 36.

<sup>354</sup> *I.C.J. Pleadings*, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (1952), p. 533.

<sup>355</sup> *Ibid.*, p. 616.

<sup>356</sup> Anglo-Iranian Oil Company Case (Jurisdiction), Judgement of 22 July 1952 (*I.C.J. Reports* 1952, p. 109).

between the granting State and the beneficiary State. Under this agreement, i.e., under the most-favoured-nation clause, the beneficiary State will benefit from the favours granted by the granting State to the third State but only because this is the common wish of the granting State and the beneficiary State. The agreement between the granting State and a third State creating obligations in their mutual relations does not create obligations in the relations between the granting State and the beneficiary State. This is nothing more than an act creating a condition (*acte condition*).

(6) The relationship between the treaty containing the most-favoured-nation clause and the subsequent, third party treaty was characterized by Fitzmaurice as follows:

If the later treaty can be compared to the hands of a clock that point to the particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands round.<sup>361</sup>

(7) If there is no treaty or other agreement between the granting State and the third State, the rule stated in the article is even more evident. The root of the right of the beneficiary State is obviously the treaty containing the most-favoured-nation clause. The extent

<sup>361</sup> Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II", *The British Year Book of International Law, 1955-56* (London, 1957), vol. 32, p. 88.

of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.

(8) The parties stipulating the most-favoured-nation clause, the granting State and the beneficiary State, can, however, restrict in the treaty itself the extent of the favours which can be claimed by the beneficiary State. For example, this restriction can consist of the imposition of a condition, a matter which will be dealt with by the Commission when it comes to consider the so-called conditional most-favoured-nation clauses in connexion with the relevant article contained in the Special Rapporteur's fourth report. If the clause contains a restriction, the beneficiary State cannot claim any favours beyond the limits set by the clause, even if this extent does not reach the level of the favours accorded by the granting State to the third State. In other words, the treatment granted to the third State by the granting State is applicable only within the framework set by the clause. This is the reason for the wording of the second sentence of article 7 which expressly states that the treatment to which the beneficiary State or the persons or things being in a determined relationship with it are entitled *under the most-favoured-nation clause*, is determined by the treatment extended by the granting State to the third State or to persons or things in the determined relationship with the latter State.

## Chapter V

### QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

124. At its twenty-third session, in 1971, the Commission confirmed the request it had addressed to the Secretary-General at its twenty-second session that he prepare a number of documents on the subject for the use of members of the Commission,<sup>362</sup> it being understood that he would, in consultation with the Special Rapporteur, Mr. Paul Reuter, phase and select the studies required for the preparation of those documents, which would include, in addition to as full as bibliography as possible, an account of the relevant practice of the United Nations and the principal international organizations.<sup>363</sup>

125. In pursuance of the decision referred to in the previous paragraph, the Special Rapporteur, through the Secretary-General, addressed a questionnaire to the principal international organizations for the purpose of obtaining information on their practice in the matter. Pending the receipt of the replies of the organizations, he submitted to the Commission at its twenty-fourth

session a first report<sup>364</sup> which was also communicated to the organizations concerned. That report contains a survey of the development of the subject, based on the discussions in the Commission during its consideration of the question of the law of treaties from 1950 to 1966 and in the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969. In the light of that survey, the report makes a preliminary examination of several essential problems such as the form in which international organizations express their consent to be bound by a treaty, their capacity to conclude treaties, the question of representation, the effect of treaties concluded by international organizations, and the precise meaning of the reservation concerning "any relevant rules of the organization" which appears in article 5 of the Vienna Convention on the Law of Treaties.<sup>365</sup>

126. At the present session, the Special Rapporteur submitted a second report (A/CN.4/271)<sup>366</sup> designed to supplement the preceding one by taking account of new

<sup>362</sup> *Yearbook . . . 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

<sup>363</sup> *Yearbook . . . 1971*, vol. II (Part One), p. 348, document A/8410/Rev.1, para. 119 (b).

<sup>364</sup> *Yearbook . . . 1972*, vol. II, p. 171, document A/CN.4/258.

<sup>365</sup> *Ibid.*, p. 324, document A/8710/Rev.1, para. 76.

<sup>366</sup> See p. 75 above.

elements—primarily the substantial information received from international organizations. The report deals first with questions of method under the following four headings: the preparation of a set of draft articles as the final objective; adherence to the framework of the Vienna Convention on the Law of Treaties; the scope of the first questionnaire addressed to international organizations; and the difficulty of principle, linked with the question to what extent the codification envisaged, by introducing two new features—stability and generality—into the régime of the agreements of international organizations, might affect the spontaneous elaboration by international organizations of a corpus of solutions adapted to the individual needs and character of each of them. The report goes on to consider some problems of substance relating to the law of treaties, presented by reference to the various parts of the Vienna Convention under the following headings: Part I of the Vienna Convention entitled “Introduction” and the concept of “party”; Part II of the Vienna Convention entitled “Conclusion and entry into force of treaties”: the form of agreements, the capacity of international organizations to conclude treaties, representation, the last question consisting of the following three points: the determination and proof of capacity to represent an international organization in any stage of the conclusion of a treaty; agreements concluded by subsidiary organs, and participation of an international organization in a treaty on behalf of a territory it represents; Part III of the Vienna Convention, entitled “Observance, application and interpretation of treaties”: agreements concluded with a view to applying other agreements, “internal agreements” with respect to an international organization, and the effects of agreements with respect to third parties—this last question seen from a dual standpoint: is the international organization a third party in relation to certain treaties between States? and are States members of an international organization third parties in relation to agreements concluded by that organization?

127. The Commission considered the first and second reports submitted by Mr. Paul Reuter, Special Rapporteur, at its 1238th and 1241st to 1243rd meetings.

128. The Commission approved the general lines of the method followed hitherto by the Special Rapporteur, particularly in regard to the collection of information from international organizations, and agreed that the enquiry from that source should be continued until the Commission’s next session. Some members of the Commission expressed the wish that the information obtained should be circulated as soon as possible and that the organizations should in due course be associated more directly with the Commission’s work on this topic.

129. The Commission confirmed the instructions previously given to the Special Rapporteur regarding the character and general outline of a set of draft articles on the subject.

130. Although, generally speaking, the essential aim must be to adapt and transpose the provisions of the

Vienna Convention, various shades are discernible in the opinions expressed on this subject. Some members feel that the Special Rapporteur should enjoy a certain liberty in regard to the provisions of the Vienna Convention, others feel that the framework of the Convention should be fairly strictly adhered to.

131. With regard to the subject of the report, it was agreed unanimously that the draft should start from a definition of “international organization” identical with the one given in the Vienna Convention. It was generally accepted that the subject of the report should be the agreements of international organizations and that there should be no encroachment on questions governed by the law peculiar to each organization. In many cases, no solution sufficiently precise or general to provide a basis for rules common to all organizations has been found for certain problems; this would seem to be the case, for example, with problems relating to agreements concluded by subsidiary organs, to the representation of certain territories by international organizations, and to most aspects of the representation of international organizations in the conclusion of treaties. On certain questions, widely differing views were expressed. For example, on the question of the capacity of international organizations to conclude international agreements, some members of the Commission consider that this capacity is inherent in an international organization, others that it does not come within the subject of the report, while others, though anxious that the draft should include one or more provisions on the matter, consider that the question is governed essentially by the law peculiar to each organization. The Special Rapporteur indicated that he would try to prepare one or more draft articles on the subject of capacity.

132. A fairly substantial exchange of views was also held on the fundamental and difficult problem of the effects of certain treaties between States with respect to an organization which is not a party to them, and its converse, the effects of an agreement to which an organization is a party with respect to the States members of the organization concerned. This problem involves the question of the effects of treaties and agreements with respect to third parties. To what extent are the principles laid down in the Vienna Convention adequate for solving this problem? To what extent is it enough merely to introduce an element of flexibility into some of the rules laid down in this Convention, particularly those regarding formalities in articles 35 and 37? Several different suggestions were made, but the Commission as a whole requested the Special Rapporteur to undertake a detailed study of this problem.

133. In conclusion, the Commission approved the general lines of the reports which had been submitted to it and decided to continue, for the time being by the same methods as last year, the collection of information from international organizations, with special emphasis on certain particular points. It requested the Special Rapporteur to continue his work and to begin the preparation of a set of draft articles on the basis of the reports and the comments made during the discussion.

## Chapter VI

## REVIEW OF THE COMMISSION'S PROGRAMME OF WORK

134. As already mentioned,<sup>367</sup> the Commission adopted as item 5 of its agenda for the twenty-fifth session the following item:

5. (a) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245);
- (b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolutions 2780 (XXVI) and 2926 (XXVII)).

135. The present chapter contains a summary of the Commission's proceedings at earlier sessions with respect to each of the two aspects of the item, together with a summary of the Commission's discussion on the item at the present session, preceded by a commentary on the Commission's work during its first twenty-five sessions.

#### A. Summary of the Commission's proceedings prior to the present session

##### 1. REVIEW OF THE COMMISSION'S LONG-TERM PROGRAMME OF WORK

136. At its nineteenth session, held in 1967, the International Law Commission, having in mind that the following year it was due to hold its twentieth session, considered that that would be an appropriate time for a general review of the topics which had been suggested for codification and progressive development, of the relation between its work and that of other United Nations organs engaged in development of the law, and of its procedures and methods of work under its Statute. It therefore unanimously decided to place on the provisional agenda for its twentieth session an item on review of the Commission's programme and methods of work.<sup>368</sup>

137. At its twentieth session, held in 1968, the Commission had before it two working papers prepared by the Secretariat on the Commission's programme and methods of work, which it decided to include as an annex to its report to the General Assembly on the work of the session.<sup>369</sup> The Commission discussed the item both at public and private meetings and reached a number of conclusions and decisions thereon.<sup>370</sup> *Inter alia*, it agreed that it should give attention to its long-term programme of work and for that purpose decided to ask the Secretary-General to prepare a new survey

of the whole field of international law on the lines of the memorandum entitled *Survey of international law in relation to the work of codification of the International Law Commission*<sup>371</sup> submitted at the Commission's first session in 1949. On the basis of such a new survey, the Commission could then draw up a list of topics that were ripe for codification, taking into account General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment.<sup>372</sup>

138. At its twenty-first session, held in 1969, the Commission confirmed its intention of bringing up to date its long-term programme of work by again surveying the topics suitable for codification in the whole field of international law, in accordance with article 18 of its Statute. With a view to facilitating this task, the Commission asked the Secretary-General to submit a preparatory working paper.<sup>373</sup>

139. Pursuant to this request, the Secretariat submitted, at the twenty-second session of the Commission, held in 1970, a preparatory working paper concerning the review of the Commission's programme of work.<sup>374</sup> Confirming again its intention of bringing up to date its long-term programme of work, the Commission asked the Secretary-General to submit at its twenty-third session a new working paper as a basis for the Commission's selection of a list of topics which might be included in its long-term programme of work.<sup>375</sup>

140. At its twenty-third session in 1971, the Commission had before it a working paper entitled "Survey of Inter-

<sup>371</sup> United Nations publication, Sales No. 1948.V.1(1).

<sup>372</sup> *Ibid.*, p. 57, para. 99. Chapter II, para. 16 of the report of the Commission on the work of its first session (*Yearbook . . . 1949*, p. 281, document A/925), contains the following list of topics selected by the Commission for codification:

1. Recognition of States and Governments;
2. Succession of States and Governments;
3. Jurisdictional immunities of States and their property;
4. Jurisdiction with regard to crimes committed outside national territory;
5. Régime of the high seas;
6. Régime of territorial waters;
7. Nationality, including statelessness;
8. Treatment of aliens;
9. Right of asylum;
10. Law of treaties;
11. Diplomatic intercourse and immunities;
12. Consular intercourse and immunities;
13. State responsibility;
14. Arbitral procedure.

<sup>373</sup> *Yearbook . . . 1969*, vol. II, p. 235, document A/7610/Rev.1, para.91.

<sup>374</sup> *Yearbook . . . 1970*, vol. II, p. 247, document A/CN.4/230.

<sup>375</sup> *Yearbook . . . 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

<sup>367</sup> See chap. I, para. 9 above.

<sup>368</sup> *Yearbook . . . 1967*, vol. II, p. 369, document A/6709/Rev.1 and Rev.1/Corr.1, para. 49.

<sup>369</sup> *Yearbook . . . 1968*, vol. II, p. 226, document A/7209/Rev.1, annex.

<sup>370</sup> *Ibid.*, pp. 223-224, paras. 95-101.

national Law",<sup>376</sup> prepared by the Secretary-General in response to the Commission's request referred to in the preceding paragraph. The "Survey" was introduced in the Commission by Mr. Constantin A. Stavropoulos, Legal Counsel of the United Nations, on behalf of the Secretary-General.

141. The Commission held a preliminary discussion on the review of its long-term programme of work, during which several members made general observations on the "Survey" as well as detailed comments on particular points or subjects referred to in it. Being conscious of the need for further reflection on a question which might influence the codification and progressive development of international law in the years to come, and in view of the fact that members were at the end of their term of office, the Commission concluded that the definitive task of reviewing its long-term programme of work should be left to the Commission in its new composition. With these considerations in mind, the Commission decided, *inter alia*, (a) to place on the provisional agenda of its twenty-fourth session an item entitled "Review of the Commission's long-term programme of work: 'Survey of International Law' prepared by the Secretary-General (A/CN.4/245)", and (b) to invite members of the Commission to submit written statements on the review of the Commission's long-term programme of work to be circulated at the beginning of the twenty-fourth session of the Commission.<sup>377</sup>

142. At its twenty-fourth session, held in 1972, the Commission had before it the observations submitted by some members on the Commission's long-term programme of work. In view of the great difficulties of completing, in the course of a ten-week session, the two sets of draft articles on other topics which it actually prepared, the Commission did not, however, consider the item at that session.

143. The General Assembly, by resolutions 2272 (XXII) of 1 December 1967, 2400 (XXIII) of 11 December 1968, 2501 (XXIV) of 12 November 1969, 2634 (XXV) of 12 November 1970, 2780 (XXVI), section I, of 3 December 1971 and 2926 (XXVII), section I, of 28 November 1972, endorsed the decisions of the Commission regarding the review of its long-term programme of work.

<sup>376</sup> The "Survey" contains a preface, an introduction and seven chapters, subdivided in some cases into sections. The chapters are entitled: I. The position of States in international law; II. The law relating to international peace and security; III. The law relating to economic development; IV. State responsibility; V. Succession of States and Governments; VI. Diplomatic and consular law; VII. The law of treaties; VIII. Unilateral acts; IX. The law relating to international watercourses; X. The law of the sea; XI. The law of the air; XII. The law of outer space; XIII. The law relating to the environment; XIV. The law relating to international organizations; XV. International law relating to individuals; XVI. The law relating to armed conflicts; XVII. International criminal law. (See *Yearbook... 1971*, vol. II (Part Two) document A/CN.4/245.)

<sup>377</sup> *Yearbook... 1971*, vol. II (Part One), p. 351, document A/8410/Rev.1, paras. 127 and 128.

## 2. PRIORITY TO BE GIVEN TO THE TOPIC OF THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

144. In paragraph 1 of resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended that the International Law Commission should as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deemed it appropriate.

145. In the light of the General Assembly's recommendation quoted in the preceding paragraph, the Commission, at its twenty-third session, held in 1971, decided to include a question entitled "Non-navigational uses of international watercourses" in its general programme of work without prejudging the priority to be given to its study. It would be for the Commission in its new composition to decide what priority the topic should be given and what other action should be taken, bearing in mind the current programme of work of the Commission as well as its revised long-term programme.<sup>378</sup>

146. The Commission agreed that for undertaking the substantive study of the rules of international law relating to non-navigational uses of international watercourses with a view to their progressive development and codification on a world-wide basis, all relevant materials on State practice should be compiled and analysed. The Commission noted that a considerable amount of such material had already been published in the Secretary-General's report on "Legal problems relating to the utilization and use of international rivers"<sup>379</sup> prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the *United Nations Legislative Series*.<sup>380</sup> On the other hand, paragraph 2 of General Assembly resolution 2669 (XXV) requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal problems relating to the question, "taking into account the recent application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies of this matter".<sup>381</sup>

147. In paragraph 5, section I, of resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that "the International Law Commission, in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses".

148. At its twenty-fourth session, held in 1972, the Commission indicated its intention to take up the fore-

<sup>378</sup> *Ibid.*, p. 350, para. 120.

<sup>379</sup> A/5409 (to be printed in *Yearbook... 1974*, vol. II (Part Two)).

<sup>380</sup> United Nations, *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation* (United Nations publication, Sales No. 63.V.4).

<sup>381</sup> *Yearbook... 1971*, vol. II, p. 350, document A/8410/Rev.1, para. 121.

going recommendation of the General Assembly when it came to discuss its long-term programme of work. At that session, the Commission reached the conclusion that the problem of pollution of international waterways was one of both substantial urgency and complexity and accordingly requested the Secretariat to continue compiling the material relating to the topic with special reference to the problems of the pollution of international watercourses.<sup>382</sup>

149. In paragraph 5, section I, of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission's intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic. Also by the same resolution (paragraph 6 of section I) the General Assembly requested the Secretary-General to submit, as soon as possible, the study on the legal problems relating to the non-navigational uses of international watercourses requested by the Assembly in resolution 2669 (XXV), and to present an advance report on the study to the International Law Commission at its twenty-fifth session.

150. Pursuant to the foregoing decision of the General Assembly, the Secretary-General submitted to the Commission, at its present session, an advance report (A/CN.4/270)<sup>383</sup> on the progress of work in the preparation of the supplementary report requested by the Assembly.

#### B. The work of the Commission during its first twenty-five sessions

151. On the occasion of its tenth session, in 1958, the International Law Commission included in its report to the General Assembly on the work of that session a brief review of the work accomplished during the first ten years of its existence.<sup>384</sup> That review had a bearing on the planning and possible speeding up of the work of the Commission, a matter that was then under discussion. The question of the methods of work of the Commission is one that merits continuous attention; nevertheless, in view of the fact that now, at the close of a quarter of a century, a far greater volume of codification of international law is available than existed at the end of the first decade, it is appropriate to look back, and ahead, from a somewhat wider angle. This can be done both concisely and comprehensively, since the General Assembly has in recent years had access to three documents which give a fairly complete picture of the Commission's work and achievements. Two of those documents have already been referred to; they are the working papers prepared by the Secretariat on the review of the Commission's programme and methods of work,<sup>385</sup> and the "Survey of International Law" prepared by the

Secretary-General.<sup>386</sup> The third document is a revised edition of the booklet entitled *The Work of the International Law Commission*, issued by the Office of Public Information of the United Nations.<sup>387</sup>

152. When the International Law Commission held its first session, in 1949, it had before it the first *Survey of International Law* submitted by the Secretary-General as a guide to the Commission in its initial task under article 18 of its Statute.<sup>388</sup> As provided for in that article, the Secretariat's memorandum surveyed "the whole field of international law with a view to selecting topics for codification". The document covered the whole of international law, as it then existed, in such a systematic manner that no topic for future work could possibly be overlooked. It was inspired by a confident optimism that reflected the codification ideals of an earlier period, rather than the practical difficulties experienced under the League of Nations. Thus it stated,

if it is realized . . . that the eventual codification of the entirety of international law must properly be regarded as the ultimate object of the International Law Commission—then the question of selection of topics no longer presents an insoluble or perplexing problem. If we bear that in mind, then the question of selection of topics is no longer one of haphazard and, possibly, arbitrary choice, but one of fitting the work of the Commission at any particular time into the orbit of a comprehensive plan.<sup>389</sup>

153. It may be pointed out in this connexion that, in a way, the Commission inherited at its birth certain ideas and experience with respect to the codification of international law which in part went far back into the nineteenth century and even beyond. From the French Revolution up to the period before the First World War, philosophers and jurists in different parts of the world had attempted to embrace the entirety of the law of nations in codes of increasing complexity, from the very concise draft, still worth reading, which the Abbé Grégoire submitted to the French Convention, to elaborate projects comprising thousands of articles.

154. The Commission, on the other hand, in accordance with its Statute, had to take a more pragmatic approach and to select particular topics, a process for which the survey of the whole field of international law was the logical means. With respect to the question of establishing a general plan of codification, the report of the Commission covering the work of its first session stated:

The Commission discussed the question whether a general plan of codification, embracing the entirety of international law, should be drawn up. Those who favoured this course had in view the preparation at the outset of a plan of a complete code of public international law, into the framework of which topics would be inserted as they were codified. The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to

<sup>382</sup> *Yearbook . . . 1972*, vol. II, p. 324, document A/8710/Rev.1, para. 77.

<sup>383</sup> See p. 95 above.

<sup>384</sup> *Yearbook . . . 1958*, vol. II, pp. 109-110, document A/3859, paras. 68-69.

<sup>385</sup> See para. 137 above.

<sup>386</sup> See para. 140 above.

<sup>387</sup> United Nations publication, Sales No. E.72.I.17.

<sup>388</sup> *Survey of International Law in relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No. 48.V.1(1)).

<sup>389</sup> *Ibid.*, para. 19.

discuss a general systematic plan which might be left to later elaboration.<sup>390</sup>

This initial statement marked the transfer from ultimate objectives to what were later to be called "the current needs of the international community".

155. In this spirit the Commission, at its first session, reviewed 25 topics which represented most of the concrete matters on which the development of international law had focused until that moment. It dropped certain topics of a generic nature, such as "subjects of international law" and "sources of international law". It also dropped the "laws of war", a subject which only came back to the Commission, at any rate in certain of its aspects, when the formulation of the Nürnberg Principles and some related questions were referred to the Commission by the General Assembly in resolution 177 (II) of 21 November 1947. Ever since, the Commission has kept within the limits of the international law of peace and made its drafts strictly applicable to peaceful conditions only.

156. Looking back, in the perspective of time, from the twenty-fifth to the first session, what may seem striking is not so much the fact that the Commission renounced the codification of the whole of international law, but the degree to which an approximation to that ultimate aim has taken place under the original long-term programme. Most of the fourteen topics selected at the time have materialized, or will do in due course, into final drafts, including all the great chapters that were inherited from traditional international law. The law of treaties, the law of the sea, State succession, nationality, State responsibility, diplomatic and consular intercourse have been dealt with or are being studied. Perhaps the one single subject found on the 1949 list which was always considered to be a major one and on which the Commission did only initial work is the "treatment of aliens". That subject was studied on the basis of the first reports submitted on State responsibility but it was decided later not to proceed, in such a context, with the development of any substantive rules the breach of which would entail State responsibility.

157. Nevertheless, the fact that a considerable part of the original programme could be realized, or is well under way, is somewhat overshadowed by important events which occurred after the Commission started its work, and which led to an increasing law-making activity.

158. A most far-reaching development, whose full impact on the work of the Commission could only be felt in the course of time, was the advent of the decolonization process. In the space of a few years, that process multiplied the number of sovereign States, thereby giving to an increasing part of mankind the opportunity to make its own contribution to the codification and progressive development of international law. As far as the Commission was concerned, the process made itself felt particularly in the field of State succession, where adaptations were made to meet the specific needs of new States.

159. Decolonization also had vast consequences for law-making activities outside the Commission. The new chapter of international law relating to economic development and economic and technical assistance draws its essential significance from those economic and social inequalities which only became fully manifest in the process of decolonization. The new law of economic development appeals to a very old and inherent concept of all law, namely, the concept of justice calling for equality of treatment of equals and, if need be, inequality of treatment of unequals in such a manner that justice may emerge in the final result. As the Secretary-General of the United Nations expressed it in a recent note, when defining "equity" as the main objective of collective economic security, "equal treatment is equitable only among equals".<sup>391</sup> In the sphere of the Commission's activities, the study of the most-favoured-nation clause, recently undertaken by the Commission, is perhaps the one most immediately related to these ideas, even though from a technical point of view that subject is a specialized part of the law of treaties.

160. A law-making activity which had remained from the beginning outside the domain of the Commission emerged in the field of human rights. This was not entirely unexpected since the seed of this new international law was already planted in the Charter of the United Nations, and the Commission on Human Rights was established well before the International Law Commission. On the very day of its establishment the Commission was directed by the General Assembly, as has already been mentioned,<sup>392</sup> to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal. Within the purview of the same subject-matter, the Commission was also directed by the General Assembly to study the question of international criminal jurisdiction and to prepare a draft code of offences against the peace and security of mankind. As most of the other early studies and drafts that were assigned to the Commission by the General Assembly, such as the draft declaration on rights and duties of States and the question of defining aggression, the draft code of offences, completed in 1951 and modified at later sessions,<sup>393</sup> has more or less receded into the background of the Commission's achievements, but read again in the light of the subsequent evolution of international relations, it might well provide a framework for re-thinking the whole subject-matter of individual offences of international concern.

161. Another phenomenon which manifested itself on a scale unknown to pre-war international law and which constituted an important contribution to the elaboration of international texts of a legal nature, was the institutionalization of the international community through an increasing number of international organizations, each with its own legal system and methods. This

<sup>390</sup> *Yearbook* . . . 1949, p. 290, document A/925, para. 14.

<sup>391</sup> E/5263, section 3, second paragraph.

<sup>392</sup> See para. 155 above.

<sup>393</sup> *Yearbook* . . . 1951, vol. II, p. 134, document A/1858, para. 59. See also General Assembly resolution 1186 (XII) of 11 December 1957.

development was brought before the Commission as an aspect of the law of treaties, pursuant to a resolution of the United Nations Conference on the Law of Treaties recommending the study of agreements concluded by international organizations.<sup>394</sup> The work being undertaken in this area will provide an opportunity to examine, apart from the much discussed relationship between international law and national law systems, the interaction of international law systems as represented by general international law on the one hand and organizational systems on the other. Previously the rapid progression of the institutionalization of the international community has led the Commission to review the legal relations between States and international organizations as laid down, at the time the Commission was established, in conventions on privileges and immunities and headquarters agreements within the framework of the United Nations system.

162. The technological revolution was the last external event whose international legal consequences were not foreseen in the long-term programme of work of the Commission. Certain law-making activities following from technological innovations, particularly with regard to the law of the sea, outer space and the human environment, have taken place outside the Commission. There is one significant exception, however; the fact that exploitation of the continental shelf suddenly came within the range of practical possibility induced the Commission to add a draft on that subject to the others it had prepared on the law of the sea. There are indications that old legal concepts now being further developed in the fields just mentioned will eventually have to be examined in a new light, either in the context of the Commission's current work, or as separate topics.

163. Compared to the wide possibilities that seemed to be within reach in the late 1940s, a different situation presents itself at the opening of a new era in the Commission's existence. The new trends in the development of international law which manifested themselves at an early date have in the meantime generated a mass of authoritative statements of a legal nature. There is no reason to assume that this process will slow down in the years to come, nor that the present specialization in law-making functions will diminish. The formulation of aims and principles of economic development is a field of continuous study; the interdependence of the component parts of the international community is reflected in the continuous growth of international institutions, each with its own practice contributing to international law. The position of the individual in the international legal system remains an inexhaustible source of legal study. The aspect of human duties and responsibilities under international law is due to become more prominent the more it becomes a fact of international concern that private persons, individual as well as corporate, in certain parts of the world are able to control an increasing amount of physical and economic

power. The rapid development of science and technology in such fields as nuclear energy, the conquest of outer space and the exploitation of the sea-bed, makes any prediction very difficult. But it may be predicted with some confidence that in the aftermath of such events as the United Nations Conference on the Human Environment held at Stockholm in 1972 and the future conferences on the law of the sea there will be a series of new rules, and a development of old rules, on such matters as responsibility, co-operation and protection.

164. The Charter of the United Nations has been a stabilizing and consolidating factor. Its formulations were wide enough to be adapted by practice and judicial decision to needs that could not be foreseen in every detail at the time of their drafting. Actually, special organs were established to provide an authoritative interpretation of parts of the Charter, such as the Special Committee on the Definition of Aggression, which relieved the International Law Commission of one of the tasks assigned to it earlier. Of particular importance was the work of the Special Committee which drafted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by the General Assembly by resolution 2625 (XXV) of 24 October 1970, which is essentially an extensive interpretation of principles laid down in Chapter I of the Charter. The Commission in its discussions has often referred to that important Declaration which was adopted solemnly and unanimously. The more nearly the goal of universal membership in the world Organization is attained, the more the Charter, enriched by the practice of its application, will provide the framework into which, having regard to Article 103, the creation of all international law has to fit.

165. Among the different bodies that work or have worked within the United Nations system on the definition of the principles of international law, the International Law Commission has very distinctive features. As a permanent organ the Commission has in its life-time garnered a rich experience. Thanks to the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, it has at its disposal for any new undertaking a full scientific documentation. In the successive phases of the preparation of a draft, it profits from an exchange of views through government comments and annual debates in the Sixth Committee of the General Assembly. It maintains consultative and co-operative relations with organizations belonging to the United Nations family and with regional bodies engaged in legal work similar to its own.

166. One advantage of machinery such as the Commission is the continuous interaction, throughout the development of a codification draft, between professional expertise and governmental responsibility, between independent vision and the realities of international life. This element, so often absent from earlier attempts at codification, has proved to be the condition which offers the best prospects for the success of the codification conference to which a draft is finally submitted, and of the entry into force of any convention that eventually results. One obvious disadvantage is that such a safe

<sup>394</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

and solid method is also time-consuming; in effect the preparation by special rapporteurs of their reports, the time allowed for government comments, the consideration of those comments in the course of a second reading of a draft, and the fact that the General Assembly, like the Commission itself, is not a continuously functioning body, entails a process that often takes years. Whatever improvements it may be possible to make in the methods of work of the Commission, it is clear that there is an inbuilt periodicity at work that places certain limits on the Commission's ability to respond promptly to urgent requests.

167. Taking into account these inherent limitations, there are no statutory restraints on the future tasks of the Commission, subject to the decision of the General Assembly. As was already stated in the first *Survey of International Law*: "the task of the Commission in deciding upon its plan of work is simplified by the deliberate elasticity of its Statute".<sup>395</sup> The distinction in the Statute between progressive development of international law and its codification has proved in practice not to require different methodological approaches. Where a distinction has appeared is rather between modes of progressive development. There are the entirely new areas, undiscovered by pre-war international law, of which several examples have been given in the preceding paragraphs. Besides subjects in regard to which, as defined in the Statute "the law has not yet been sufficiently developed in the practice of States",<sup>396</sup> there are areas where such practice does exist but is insufficiently explored, as has become clear in connexion with the study of the law of succession. Finally, it may be recalled that the Commission has from time to time proposed certain specific innovations, independently of the more or less progressive nature of the context in which the innovations appeared.

168. With regard to the nature of the future tasks of the Commission, it is planned to proceed to the full completion of the structural projects that are already on its programme, that is to say, State responsibility and succession of States. The more comprehensive their scope appears to be, the more a certain overlap and interrelation will make themselves felt, as has been already shown on the borderline between the law of treaties and the law of succession, and between the latter and the law of responsibility. Sometimes it appears necessary, when a subject becomes too extensive, to split off an autonomous part so that in that way a topic of codification generates new topics, but the original connexion will remain as a link in the structural coherence of international law. It is not sufficient to consider the systematic unity of international law as mainly a theoretical question; actually this was not the purpose of the first *Survey*. The unity and the interconnexion of all international law may well be seen as a practical contribution to its stability and credibility. The Commission is well equipped to watch over that particular aspect of codification.

<sup>395</sup> *Survey of International Law . . . (op. cit.)*, para. 20.

<sup>396</sup> Article 15.

169. With regard to the instruments of codification, it is to be expected that in the years ahead the codification convention will continue to be considered as the most effective means of carrying on the work of codification. Its preciseness, its binding character, the fact that it has gone through the negotiating stage of collective diplomacy at an international conference, the publication and wide dissemination of the conventions, all these are assets that will not lightly be abandoned. In the interests of the effectiveness of the codification process, the Commission would consider it desirable for the conventions adopted at codification conferences to receive as soon as possible the formal consent (ratification or accession) of States.

### C. Consideration of the item by the Commission at its present session

170. At its present session, the Commission considered the item on the review of the Commission's long-term programme of work at its 1233rd to 1237th meetings.

171. It was noted that, in accordance with previous decisions of the Commission, endorsed by the General Assembly, the Commission will, for some years, have ample work to do to complete consideration of the five topics upon which it is at present actively engaged,<sup>397</sup> namely:

1. Succession of States in respect of treaties;
2. State responsibility;
3. Succession of States in respect of matters other than treaties;
4. The most-favoured-nation clause;
5. The question of treaties concluded between States and international organizations or between two or more international organizations.

172. It was also noted that, in addition to the topics listed in the preceding paragraph, other topics remain in the Commission's long-term programme of work as constituted by the list originally adopted in 1949<sup>398</sup> and the topics later added to it pursuant to recommendations of the General Assembly.

173. In the course of consideration of the long-term programme of work, apart from the topic of the law of the non-navigational uses of international water-courses,<sup>399</sup> among the topics repeatedly mentioned were the jurisdictional immunities of foreign States and of their organs, agencies and property; unilateral acts; treatment of aliens; and liability for possible injurious consequences arising out of the performance of certain lawful activities. Frequent reference was also made to the law relating to the environment and the law relating to economic development. Other topics on which one or more members thought that the Commission might envisage undertaking work included extradition, the law

<sup>397</sup> An account of the consideration by the Commission, at its twenty-fifth session, of the last four of those topics appears in chapters II to V above.

<sup>398</sup> See foot-note 372 above.

<sup>399</sup> See para. 175 below.

relating to international organizations, succession of Governments, peaceful settlement of disputes, recognition of States and Governments, and the right of asylum.

174. The Commission decided that it would give further consideration to the foregoing proposals or suggestions in the course of future sessions.

175. The Commission, pursuant to General Assembly resolution 2780 (XXVI) of 3 December 1971, gave special attention to the question of the priority to be given to the topic of the law of the non-navigational uses of international watercourses. In the discussions regarding this topic, most members supported the view that it was desirable to proceed promptly with the consideration of that topic. A number emphasized the urgency of taking up the legal aspects of the problem of pollution of international watercourses and proposed that this should be the first problem to be studied. The Commission also took into account the fact that the supplementary report on international watercourses<sup>400</sup> would be submitted

<sup>400</sup> See paras. 149-150 above.

to members by the Secretariat in the near future. It accordingly considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report.

176. In connexion with the discussion regarding the Commission's future programme of work, reference was made by several members to the need to improve the current methods of work with a view to meeting the requirements of such a programme. The Commission also reiterated the recommendation it had made at its twentieth session, held in 1968, regarding the pressing need to increase the staff of the Codification Division of the Office of Legal Affairs<sup>401</sup> so as to enable it to give to the Commission and to its special rapporteurs all the assistance required by the increasing demands of its work, especially in the area of research projects and studies.

<sup>401</sup> *Yearbook . . . 1968*, vol. II, p. 223, document A/7209/Rev.1, para. 98 (c).

## Chapter VII

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Succession of States in respect of treaties

177. As the former Special Rapporteur for this topic, Sir Humphrey Waldock, resigned from membership of the Commission upon being elected to the International Court of Justice during the twenty-seventh session of the General Assembly, the Commission decided to appoint Sir Francis Vallat as the new Special Rapporteur for the topic of succession of States in respect of treaties.

#### B. Organization of future work

178. At its twenty-sixth session the Commission intends to concentrate on two of the topics in its current programme of work, namely, succession of States in respect of treaties and State responsibility. This is without prejudice to the possibility, time permitting, of giving some time to the consideration of the remaining topics in its current programme of work, namely: succession of States in respect of matters other than treaties, the most-favoured-nation clause, and the question of treaties concluded between States and international organizations or between two or more international organizations. The Commission's intention is, in accordance with the practice as regards its provisional drafts, to complete at the next session the second reading of the whole of the draft articles on the topic of succession of States in respect of treaties. The Commission intends also to make substantial progress in the study of State responsi-

bility, with a view to the preparation of a first set of draft articles on that topic as repeatedly requested by the General Assembly. In order to accomplish satisfactorily its intended programme, bearing in mind the complexity of the topics, the large number of draft articles involved and the need to achieve rapid progress in the study of State responsibility, members of the Commission deemed it indispensable to request a fourteen-week session for 1974.

#### C. Co-operation with other bodies

##### 1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

179. Mr. Abdul Hakim Tabibi submitted a report (A/CN.4/272)<sup>402</sup> on the fourteenth session of the Asian-African Legal Consultative Committee held at New Delhi, India, from 10 to 18 January 1973, which he had attended as an observer for the Commission.

180. The Asian-African Legal Consultative Committee was represented at the twenty-fifth session of the Commission by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 1235th meeting.

181. Mr. Sen noted the close ties and co-operation which existed between the Commission and the Committee which he represented. He conveyed to the Com-

<sup>402</sup> See p. 155 above.

mission the admiration which the Asian-African community felt for the Commission's work, together with the hope that its recommendations would be even more widely followed in the future.

182. He also remarked that at its fourteenth session the Committee had had the satisfaction of welcoming 40 delegations of observers from States in the Americas and Europe. He emphasized that the Committee had extended its assistance during the past three years to non-member States in Asia and Africa, many of which participated in its sessions and other meetings through observers and regularly received the Committee's documentation. Although the Committee worked mainly in English, its more important documents were now being translated into French, and simultaneous English-French interpretation was provided at all meetings. The secretariat of the Committee had arranged for the issue of a publication on the constitutions of African States, which gave a brief account of constitutional developments in those countries. The Committee hoped thereby to arouse greater interest in African affairs and to focus attention on the process of constitutional development on that continent.

183. Turning to the topic of the law of the sea, to which the Committee had focused much of its attention at its fourteenth session, Mr. Sen said that extensive documentation had been prepared, abundant material had been collected, and an analysis had been made of the proposals before the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction in order to help the Governments of Asian and African States to prepare for the 1974 conference on the law of the sea. Of particular interest was the work of the Committee's Special Study Group on Landlocked States which had put forward tentative draft proposals on some matters affecting such States.

184. In addition to the topic of the law of the sea, Mr. Sen informed the Commission that the Committee had held a useful exchange of views on the organization of legal advisory services in Foreign Offices—a subject of great interest to developing countries in the region. The Committee had decided to organize, at the appropriate stage, a meeting of Foreign Office legal advisers to exchange views and information.

185. Mr. Sen noted the contributions made by the Committee's sub-committees. One sub-committee had dealt with the question of the use of waters of international rivers for agricultural purposes while another sub-committee had considered the question of prescription in international sales.

186. Other topics on the agenda of the Committee's fourteenth session and which related to the work of the Commission included State succession, State responsibility and the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. In addition, the Committee's agenda included the question of pollution of international rivers.

187. Finally, Mr. Sen expressed great interest in the Commission's discussion of its long-term programme of work and said he could assure the Commission that, whatever its final decisions on that subject, its work would always command the same degree of respect as had the draft articles produced by the Commission on various topics.

188. The Commission was informed that the fifteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Tokyo, Japan, in January 1974. The Commission requested its Chairman, Mr. Jorge Castañeda, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

## 2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

189. Mr. Richard D. Kearney attended the seventeenth session of the European Committee on Legal Co-operation held at Strasbourg, France, in November 1972, as an observer for the Commission and made a statement before the Committee.

190. The European Committee on Legal Co-operation was represented at the twenty-fifth session of the Commission by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1236th meeting.

191. Mr. Golsong said that the Commission's relations with the European Committee on Legal Co-operation, the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee, as well as the relations between the last-named three bodies, were very important to the synchronized development of international law.

192. Turning to aspects of the Committee's activities which had a bearing on the Commission's long-term programme of work as it might be deduced from the "Survey of International Law" prepared by the Secretary-General of the United Nations,<sup>403</sup> Mr. Golsong first mentioned the fulfilment in good faith of the obligations of international law assumed by States. With regard to the relations between those obligations and obligations created by municipal law, he brought to the attention of the Commission a recently adopted decision of the European Court of Human Rights concerning the application of article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>404</sup> That article provided that, if an international court found that an international obligation towards a private person had been violated, it might subsequently grant just satisfaction if internal law alone could not eliminate the consequences of the breach of an international obligation. The judgement of the European Court had a number of interesting aspects, particularly with regard to the implicit power of an international

<sup>403</sup> *Yearbook* . . . 1971, vol. II (Part Two), p. 1, document A/CN.4/245.

<sup>404</sup> United Nations, *Treaty Series*, vol. 213, p. 221.

court to construe its own judgements and to the concept of good faith.

193. As regards the jurisdictional immunities of States, Mr. Golsong stated that the European Convention recently concluded on the subject would probably enter into force in 1974. Although its application was limited geographically, the Convention had the merit of bridging the gap between the different conceptions held in common-law countries and the countries of the European continent with regard to the jurisdictional immunities of States.

194. With regard to extra-territorial questions involved in the exercise of jurisdiction by States, Mr. Golsong indicated that the Committee he represented was endeavouring to bring national systems of criminal law into line, by expanding the competence of courts in certain States members of the Council of Europe to deal with acts committed abroad.

195. On the question of State responsibility, Mr. Golsong noted that the European Committee on Legal Co-operation was particularly interested in that question because it had been obliged on several occasions to take up that problem without being able to define its position.

196. Mr. Golsong informed the Commission in detail of the activities of the Council of Europe concerning the protection of international watercourses against pollution. He stated that a draft European convention had been drawn up on the subject, which concerned both the law of international watercourses and the law relating to the environment. He explained that that text had been intended to settle a number of problems, the first of which was that of the balance to be struck between uniform rules for all the future contracting parties—the seventeen States members of the Council of Europe—and the particular obligations to be laid down for the riparian States of a particular watercourse. The second was the settlement of disputes regarding the interpretation or application of the future convention, of co-operation agreements and of any instruments drawn up pursuant to such agreements. The third was that of balancing the charges to be borne by the contracting parties. The last problem was that of the relationship between the pollution of fresh water and the telluric pollution of coastal waters.

197. On the question of treaties concluded between States and international organizations or between two or more international organizations, he said that the Committee was looking for ways to speed up procedures for the ratification of multilateral conventions and to reduce the number of reservations. In addition, an exchange of views on the techniques of international codification was to be held shortly, with a view to general application of the rules laid down.

198. The Commission was informed that the eighteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Jorge Castañeda, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

### 3. INTER-AMERICAN JURIDICAL COMMITTEE

199. Mr. Richard D. Kearney attended the last session of the Inter-American Juridical Committee, held at Rio de Janeiro, Brazil, in January and February 1973, as observer for the Commission and made a statement before the Committee.

200. The Inter-American Juridical Committee was represented at the twenty-fifth session of the Commission by Mr. E. Vargas Carreño, who addressed the Commission at its 1227th and 1228th meetings.

201. He said he first wished to congratulate the Commission on the important contribution which it had been making to the codification and progressive development of international law. The Committee which he represented attached great importance to its collaboration with the Commission. It was impossible to formulate regional principles and rules of law without taking into account the rules and principles which were of universal application. The interdependence of States brought about by the multiplication of international relations had facilitated the universalization of international law. He expressed the view that, although there should not be any conflict between general international law and regional legal systems on the same subject-matter, the latter might nevertheless have their own legal institutions, such as the right of diplomatic asylum, in Latin America, or other questions which were not settled by general international law. On the other hand, in its work of codifying and progressively developing international law, the Commission should take account of the practices and doctrinal formulations of the various regions and legal systems of the world, especially when those practices and formulations came from inter-State juridical bodies.

202. Mr. Vargas Carreño went on to say that, following the revision of the Charter of OAS, the Committee had become one of the central organs of that organization. It was now carrying out its work mainly by means of resolutions and draft conventions, which it either prepared on its own initiative or at the request of the main organs of OAS, namely, the General Assembly and the Meeting of Consultation of Ministers for Foreign Affairs.

203. Turning to the work of the Committee at its last session, he said that the Committee had adopted a resolution concerning the law of the sea which attempted to reconcile contradictory positions in an effort to produce a document representing the points of agreement of the Latin American countries. He explained that the debates had centred on the legal character to be ascribed to that area of the sea extending 200 miles from the coast line. Some had favoured full sovereignty of the coastal State over a distance of 200 nautical miles, while others favoured a territorial sea of a breadth of not more than twelve miles, with a second zone, termed "patrimonial sea" or "economic zone", extending up to 200 miles. With regard to the second zone, questions arose regarding the necessity to respect the freedoms of navigation and overflight, and freedom to lay submarine cables and pipelines. The

Committee's resolution reflected the various opinions brought out in the debates. In addition, the resolution indicated that there existed three areas of the sea-bed and ocean floor, a fact which implied a modification of the international law of the sea. In the first area, up to a distance of 200 miles, the coastal State exercised sovereignty and jurisdiction over the sea-bed and subsoil of the sea. The second area, beyond the 200-mile limit and up to the edge of the continental slope, was legally termed the "continental shelf"; in it, the coastal State exercised sovereignty for purposes of exploration and exploitation of natural resources. Lastly, beyond those two areas, which were subject to State jurisdiction, the sea-bed and ocean floor and the resources thereof constituted the "common heritage of mankind", as acknowledged by General Assembly resolution 2749 (XXV) of 17 December 1970.

204. Regarding another subject on which the Committee had focused much of its attention at its last session, Mr. Vargas Carreño stated that the Committee had approved a draft inter-American convention on extradition. He explained that the draft convention, *inter alia*, specified the obligation of each contracting State to extradite, to another contracting State which made the request, any persons charged, prosecuted or sentenced by the judicial authorities of the requesting State. It was necessary that the alleged offence should have been committed in the territory of the requesting State; if it had been committed elsewhere, the requesting State must have had, at the time, jurisdiction under its own laws to try a person for such an offence committed abroad. For the purposes of determining what offences were extraditable, the draft offered contracting States to the future convention the choice between two criteria. The first was the penalty legally applicable for the alleged offence, irrespective of the denomination of the offence and of the existence or non-existence of extenuating or aggravating circumstances. Only offences punishable at the time of their commission by imprisonment for a minimum of one year under the law of both the requesting and the requested State, would constitute extraditable offences. The second criterion consisted of lists of offences which each contracting State might attach as an annex to the future convention at the time of signature or ratification. Under the draft, there would be no extradition in the following cases: first, where the person concerned had already served a sentence equivalent to the prescribed penalty or had been pardoned, amnestied, acquitted, or discharged in respect of the alleged offence; secondly, where the statutory time-limit for prosecution or for the execution of the penalty under the laws of either the requesting State or the requested State had expired before extradition; thirdly, where the person concerned was due to be tried by a special court in the requesting State; fourthly, where, under the laws of the requested State, the alleged offence was classed as a political offence or was connected with such an offence. Mr. Vargas Carreño pointed out that the last exception mentioned was particularly important because it embodied a well-established Latin American practice according to which a State called upon to decide whether to extradite or grant asylum

was competent to rule unilaterally on whether the alleged offence constituted a political or an ordinary offence. The draft specified, however, that none of its provisions should preclude extradition for the crime of genocide or any other offence which was extraditable under a treaty in force between the requesting and the requested States. The final clauses of the draft specified that the future convention should be open for signature not only by States members of OAS but also by any other State which so requested. It was possible that the forthcoming Assembly of OAS would convene a specialized conference of plenipotentiaries to examine the draft convention.

205. Finally, he wished to draw attention to the fact that the Inter-American Juridical Committee's agenda for its forthcoming sessions contained a number of items that were closely connected with topics under consideration by the Commission or listed in its programme of work. That was an additional reason for the keen interest with which he and the other members of the Committee followed the Commission's work. In the near future the Committee would be examining the questions of the immunity of the State from jurisdiction and of the nationalization of foreign property and international law.

206. The Commission was informed that the next session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Jorge Castañeda, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

#### **D. Date and place of the twenty-sixth session**

207. The Commission decided to hold its next session at the United Nations Office at Geneva starting on 6 May 1974.

#### **E. Representation at the twenty-eighth session of the General Assembly**

208. The Commission decided that it should be represented at the twenty-eighth session of the General Assembly by its Chairman, Mr. Jorge Castañeda. It decided that Mr. Castañeda should also represent the Commission at the observance of the twenty-fifth anniversary of the International Law Commission by the General Assembly to be held during its twenty-eighth session in accordance with resolution 2927 (XXVII) of 28 November 1972.

#### **F. Commemoration of the twenty-fifth anniversary of the opening of the Commission's first session**

209. The Commission decided to commemorate at its next session, in 1974, the twenty-fifth anniversary of the opening of its first session.

### G. Gilberto Amado Memorial Lecture

210. In accordance with a decision taken by the Commission at its twenty-third session<sup>405</sup> and thanks to another generous grant by the Brazilian Government, the second Gilberto Amado Memorial Lecture was given at the Palais des Nations on 11 July 1973. The lecture was delivered by Professor Constantin Eustathiades, a former member of the Commission, who spoke on "Unratified Codification Conventions". It was attended by members of the Commission, the Legal Counsel of the United Nations, the Secretary and members of the secretariat of the Commission, the Director of the International Law Seminar and distinguished jurists. The lecture was followed by a dinner. The Commission expressed the opinion that it was desirable to print the above-mentioned lecture, at least in English and French, with a view to bringing it to the attention of the largest possible number of specialists in the field of international law.

211. The Commission expressed its gratitude to the Brazilian Government for its renewed gesture, which had made the second Gilberto Amado Memorial Lecture possible, and hoped that that Government would find it possible to renew its financial assistance so as to make possible the continuation of the series of lectures as a tribute to the memory of this illustrious Brazilian jurist who had been for so many years a member of the International Law Commission. The Commission asked Mr. Sette Câmara to convey its views to the Brazilian Government.

### H. International Law Seminar

212. Pursuant to General Assembly resolution 2926 (XXVII) of 28 November 1972, the United Nations Office at Geneva organized during the Commission's twenty-fifth session a ninth session of the International Law Seminar intended for advanced students of that discipline and young officials of government departments, mainly Ministries of Foreign Affairs, whose functions habitually include consideration of questions of international law.

213. Between 21 May and 8 June 1973 the Seminar held twelve meetings devoted to lectures followed by discussion; the last meeting was set aside for the evaluation of the Seminar by the participants.

214. Twenty-two students from 21 different countries participated in the Seminar; they also attended meetings of the Commission during that period, had access to the facilities of the Palais des Nations Library and had the opportunity to attend a film show given by the United Nations Information Service.

215. Seven members of the Commission generously gave their services as lecturers. The lectures dealt with various subjects, some connected with the past, present

and future work of the Commission, namely, special missions (Mr. Bartoš), the most-favoured-nation clause (Mr. Ustor) and the future work of the Commission (Mr. Kearney). Two lectures were given on the International Court of Justice: one dealing with the Court and judicial review (Mr. Elias) the other with the problem of intervention in the proceedings of the Court (Mr. Hambro). One lecture dealt with the question of new trends in the law of the sea (Mr. Castañeda), another with the General Assembly agenda item on the need to consider suggestions regarding the review of the United Nations Charter (Mr. Yasseen), while one lecture was devoted to the pacific settlement of disputes in Africa (Mr. Bedjaoui).

216. In addition, the Legal Adviser of the International Labour Office (Mr. Wolf), spoke on the subject of the ILO and the International Labour Conventions, while the Director of the Department of Principles and Law of the International Committee of the Red Cross (Mr. Pilon) spoke on the international humanitarian law applicable in armed conflicts. The last-named lecture was held in connexion with General Assembly resolution 3032 (XXVII) of 18 December 1972 calling for the study and teaching of principles of respect for international humanitarian rules applicable in armed conflicts. Ambassador J. Humbert, the High Commissioner of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, to be held in Geneva early in 1974, was present. Mr. Raton, Director of the Seminar, gave an introductory talk on the International Law Commission.

217. The Seminar was held without cost to the United Nations, which did not contribute to the travel or living expenses of the participants. As at previous sessions, the Governments of Denmark, the Federal Republic of Germany, Finland, Israel, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. Twelve candidates were awarded such fellowships. Two holders of UNITAR scholarships were also admitted to the Seminar, and in addition one candidate received a combined fellowship from the seminar and UNITAR. The award of fellowships is making it possible to achieve a much better geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending the session solely by lack of funds. It is therefore to be hoped that the above-mentioned Governments will continue to be generous and even that, if possible, one or two additional fellowships will be granted to offset the reduced real value of fellowships following changes made in the parities of certain currencies since 1971. It is especially gratifying to note that several of the above-mentioned Governments have taken this situation into account and accordingly increased or promised to increase the amount of the fellowships. It should be noted that the names of those to be awarded fellowships are made known to the donor Governments and that the recipients are likewise informed of the source of their fellowships.

<sup>405</sup> *Yearbook . . . 1971*, vol. II (Part One), pp. 354-355, document A/8410/Rev.1, paras. 164-169.