

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1976

Volume II
Part Two

*Report of the Commission
to the General Assembly
on the work
of its twenty-eighth session*

UNITED NATIONS



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New York, 1977



NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook... 1970*) indicates a reference to the *Yearbook of the International Law Commission*.

Part One of volume II contains the documents of the session, except for the report of the Commission to the General Assembly, which forms the subject of Part Two of this volume.

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DOCUMENT A/31/10*

Report of the International Law Commission
on the work of its twenty-eighth session
3 May–23 July 1976

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ABBREVIATIONS

BENELUX	Customs and economic union between Belgium, Netherlands and Luxembourg
CMEA	Council for Mutual Economic Assistance
EEC	European Economic Community
EFTA	European Free Trade Association
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade (also the Contracting Parties and the Secretariat)
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
I.L.C.	International Law Commission
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
ITU	International Telecommunication Union
LAFTA	Latin American Free Trade Association
OAS	Organization of American States
OAU	Organization of African Unity
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i>
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series B</i>	<i>P.C.I.J., Collection of Advisory Opinions</i>
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization

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* *

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Commission.

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-eighth session at the United Nations Office at Geneva from 3 May to 23 July 1976. The work of the Commission during this session is described in the present report. Chapter II of the report, on the most-favoured-nation clause, contains a description of the Commission's work on that topic, together with a set of twenty-seven draft articles and commentaries thereon, as provisionally adopted by the Commission on first reading. Chapter III, on State responsibility, contains a description of the Commission's work on that topic, together with nineteen draft articles provisionally adopted so far, as well as commentaries to four of those articles, provisionally adopted at the twenty-eighth session. Chapter IV, on succession of States in respect of matters other than treaties, contains a description of the Commission's work on that topic, together with sixteen draft articles provisionally adopted so far, as well as commentaries to five of those articles and the additional subparagraph to the article concerning use of terms, which were provisionally adopted at the twenty-eighth session. Chapter V is concerned with the law of the non-navigational uses of international water-courses. Finally, chapter VI is concerned with the question of treaties concluded between States and international organizations or between two or more international organizations, the programme and organization of work of the Commission, 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. Mohammed Bedjaoui (Algeria);
 Mr. Ali Suat Bilge (Turkey);
 Mr. Juan José Calle y Calle (Peru);
 Mr. Jorge Castañeda (Mexico);
 Mr. Abdullah El-Erian (Egypt);
 Mr. Edvard Hambro (Norway);
 Mr. Richard D. Kearney (United States of America);
 Mr. Alfredo Martínez Moreno (El Salvador);
 Mr. Frank X. J. C. Njenga (Kenya);
 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. Milan Šahović (Yugoslavia);
 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. On 20 May 1976 (1373rd meeting), the Commission elected Mr. Frank X. J. C. Njenga (Kenya) to fill the vacancy caused by the resignation of Mr. Taslim O. Elias upon his election to the International Court of Justice.

4. All members attended meetings during the twenty-eighth session of the Commission.

B. Officers

5. At its 1360th meeting, held on 3 May 1976, the Commission elected the following officers:

Chairman: Mr. Abdullah El-Erian;
First Vice-Chairman: Mr. Paul Reuter;
Second Vice-Chairman: Mr. Juan José Calle y Calle;
Chairman of the Drafting Committee: Mr. Milan Šahović;
Rapporteur: Mr. Senjin Tsuruoka.

C. Drafting Committee

6. At its 1374th meeting, on 21 May 1976, the Commission appointed a Drafting Committee composed of the following members: Mr. Roberto Ago, Mr. Juan José Calle y Calle, Mr. Richard D. Kearney, Mr. Alfredo Martínez Moreno, Mr. R. Q. Quentin-Baxter, Mr. Alfred Ramangasoavina, Mr. Paul Reuter, Mr. Zenon Rossides, Mr. N. A. Ushakov and Sir Francis Vallat. Mr. Milan Šahović was elected by the Commission to serve as Chairman of the Drafting Committee. Mr. Senjin Tsuruoka also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Secretariat

7. Mr. Erik Suy, Legal Counsel, attended the 1380th, 1381st, 1383rd and 1384th meetings, held on 31 May and 1, 3 and 4 June 1976, respectively, and represented the Secretary-General on those occasions. 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. Santiago Torres-Bernárdez acted as Deputy

Secretary to the Commission and Mr. Eduardo Valencia-Ospina, Mr. Moritaka Hayashi and Mr. Larry D. Johnson served as Assistant Secretaries to the Commission.

E. Agenda

8. The Commission adopted an agenda for the twenty-eighth 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. Most-favoured-nation clause.
5. Question of treaties concluded between States and international organizations or between two or more international organizations.
6. The law of the non-navigational uses of international water-courses.

7. Long-term programme of work.
8. Organization of future work.
9. Co-operation with other bodies.
10. Date and place of the twenty-ninth session.
11. Other business.

9. In the course of the session, the Commission held fifty-four public meetings (1360th to 1413th meetings) and one private meeting (on 20 May 1976). In addition, the Drafting Committee held nineteen meetings and the Enlarged Bureau of the Commission, and a sub-group thereof on planning, six meetings. The Commission considered all the items on its agenda, with the exception of item 5 (Question of treaties concluded between States and international organizations or between two or more international organizations) as explained below.¹

¹ See chap. VI, sect. A.

Chapter II

THE MOST-FAVOURLED-NATION CLAUSE

A. Introduction

1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

10. At its sixteenth session, in 1964, the Commission considered a proposal by one of its members, Mr. Jiménez de Aréchaga, to include in its draft articles on the law of treaties a provision on the most-favoured-nation clause.² 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. 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.³ The Commission main-

tained this position at its eighteenth session, in 1966.⁴

11. At its nineteenth session, in 1967, the Commission noted that several representatives 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 of work the topic of "most-favoured-nation clauses in the law of treaties" and appointed Mr. Endre Usator as Special Rapporteur on that topic.⁵

12. At the twentieth session of the Commission, 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.⁶ 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

⁴ *Yearbook... 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 32.

⁵ *Yearbook... 1967*, vol. II, p. 369, document A/6709/Rev.1, para. 48.

⁶ *Yearbook... 1968*, vol. II, p. 165, document A/CN.4/L.127.

² *Yearbook... 1964*, vol. I, p. 184, 752nd meeting, para. 2.

³ *Ibid.*, vol. II, p. 176, document A/5809, para. 21.

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 further 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.

13. The Commission decided at the same session to shorten the title of the topic to "The most-favoured-nation clause".⁷

14. 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 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.

15. At the twenty-first session of the Commission, in 1969, the Special Rapporteur submitted his first report,⁸ 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 suggestions 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.⁹

16. Following the instructions of the Commission, the Special Rapporteur submitted his second report¹⁰ at the Commission's twenty-second session, in 1970. In part I of this report, he presented an analytical survey of the views concerning the nature and function of the clause held by the parties and the judges in the three cases dealt with by the International Court of Justice pertaining to the clause: the *Anglo-Iranian Oil Company Case (jurisdiction)* [1952],¹¹ the *Case concerning the rights of nationals of the United States of America in Morocco (Judgment)* [1952]¹² and the *Ambatielos Case (merits: obligation to arbitrate)* [1953].¹³ 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.¹⁴

17. In part II of his second report the Special Rapporteur 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 and agencies 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 and interested agencies gave a detailed answer to the circular letter and those answers served as a basis for part II of the Special Rapporteur's second report.

18. The Commission was unable to consider the topic at its twenty-second (1970) and twenty-third (1971) sessions.

19. 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".¹⁵

20. At the twenty-fourth session of the Commission in 1972, the Special Rapporteur submitted his third report,¹⁶ 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" (article 2) and "most-favoured-nation treatment" (article 3) and dealt with the legal basis of most-favoured-nation treatment (article 4) and the source of the right of the beneficiary State (article 5).

21. 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 in 1972.

⁷ *Ibid.*, vol. I, p. 250, 987th meeting, paras. 7-12.

⁸ *Yearbook... 1969*, vol. II, p. 157, document A/CN.4/213.

⁹ *Ibid.*, p. 234, document A/7610/Rev. 1, para. 89.

¹⁰ *Yearbook... 1970*, vol. II, p. 199, document A/CN.4/228 and Add. 1.

¹¹ *I.C.J. Reports 1952*, p. 93

¹² *Ibid.*, p. 176.

¹³ *I.C.J. Reports 1953*, p. 10.

¹⁴ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 91.

¹⁵ *Yearbook... 1971*, vol. II (Part One), p. 347, document A/8410/Rev.1, para. 113.

¹⁶ *Yearbook... 1972*, vol. II, p. 161, document A/CN.4/257 and Add.1.

22. At that session, however, at the suggestion of the Special Rapporteur, the Commission requested the Secretariat to undertake research on the most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series*, which would include a survey of the fields of application of the clauses in question and 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.¹⁷

23. At the twenty-fifth session of the Commission, in 1973, the Special Rapporteur submitted his fourth report¹⁸ containing three more draft articles, with commentaries, dealing with the presumption of unconditional character of the clause (article 6), the *ejusdem generis* rule (article 7) and the acquired rights of the beneficiary State (article 8).

24. Also at the twenty-fifth session, 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.

25. The Commission, in its report on the work of the twenty-fifth session, reproduced for the information of the General Assembly the text of those draft articles and the commentaries thereto as adopted by the Commission. In doing so, it drew the attention of the Assembly to the fact that the adoption of the seven draft articles constituted only the initial stage of its work in the preparation of draft articles on the topic.¹⁹

26. By resolution 3071 (XXVIII) of 30 November 1973, the General Assembly recommended that the Commission, *inter alia*, proceed with the preparation of draft articles on the most-favoured-nation clause. Subsequently, the General Assembly made the same recommendation in its resolution 3315 (XXIX) of 14 December 1974.

27. At the twenty-sixth session of the Commission, in 1974, the Special Rapporteur submitted his fifth report,²⁰ containing thirteen additional draft articles with commentaries. The articles dealt with the effect of an unconditional most-favoured-nation clause (article 6 *bis*) and of a most-favoured-nation clause conditional on material reciprocity (article 6 *ter*); the observance of the laws and regulations of the granting State (article 6 *quater*); the scope of the most-favoured-nation clause regarding persons and things (article 7 *bis*); the national treatment clause (article 9); national treatment (article 10) and national treatment

in federal States (article 10 *bis*); the effect of an unconditional national treatment clause (article 11) and of a national treatment clause conditional on material reciprocity (article 12); the right of the beneficiary State under a most-favoured-nation clause to national treatment (article 13); the cumulation of national treatment and most-favoured-nation treatment (article 14); and the commencement and the termination or suspension of the functioning of a most-favoured-nation clause (articles 15 and 16, respectively).

28. The Commission was unable to resume consideration of the topic at its twenty-sixth session since it had to devote most of the time at that session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of draft articles on State responsibility.

29. At the twenty-seventh session, in 1975, the Special Rapporteur submitted his sixth report.²¹ That report contained proposals for the revision of some of the draft articles on the most-favoured-nation clause adopted by the Commission at its twenty-fifth session and some of the draft articles presented by him in his two previous reports, with additional commentaries, together with additional draft articles on the source and scope of national treatment (article X); presumption of unconditional character of the national treatment clause (article Y); and the most-favoured-nation clause and multilateral agreements (article 8 *bis*), with commentaries. The report also dealt with the case of customs unions and similar associations of States, and with the most-favoured-nation clause and the different levels of States' economic development.

30. The Commission, at the same session, considered the fourth, fifth and sixth reports submitted by the Special Rapporteur, at its 1330th to 1343rd meetings, and referred draft articles 6, 6 *bis*, 6 *ter*, 6 *quater*, 7, 7 *bis*, 8, 8 *bis*, 13, 14, 15 and 16 contained therein to the Drafting Committee. The Commission also referred to the Drafting Committee the text of an article submitted by the Special Rapporteur in the course of the session, providing for an exception to the operation of the most-favoured-nation clause in the case of a generalized system of preferences granted to developing States.²² At its 1352nd and 1353rd meetings, the Commission considered the report of the Drafting Committee and adopted on first reading articles 8 to 21.

31. In its resolution 3495 (XXX) of 15 December 1975, the General Assembly recommended that the Commission should, *inter alia*, complete at its twenty-eighth session the first reading of draft articles on the most-favoured-nation clause.

32. At the present session, the Special Rapporteur submitted his seventh report (A/CN.4/293 and

¹⁷ *Ibid.*, p. 324, document A/8710/Rev.1, para. 75.

¹⁸ *Yearbook...* 1973, vol. II, p. 97, document A/CN.4/266.

¹⁹ *Ibid.*, (p. 211, document A/9010/Rev.1, paras. 107-108.

²⁰ *Yearbook...* 1974, vol. II (Part One), p. 117, document A/CN.4/280.

²¹ *Yearbook...* 1975, vol. II, p. 1, document A/CN.4/286.

²² *Ibid.*, vol. I, p. 195, 1342nd meeting, para. 1.

Add.1),²³ containing proposals concerning certain articles previously adopted (including a suggested new sub-paragraph (e) on "material reciprocity" in article 2 (Use of terms), a suggested new sentence (4) in article 3, and five additional draft articles, with commentaries, dealing with the relationship of the present articles to the Vienna Convention on the Law of Treaties (article A); cases of State succession, State responsibility and outbreak of hostilities (article B); the non-retroactivity of the present draft articles (article C); the freedom of the parties to draft the clause and restrict its operation (article D); and most-favoured-nation clauses in relation to treatment extended to land-locked States (article E)). The report also contained a chapter entitled "Provisions in favour of developing States" and one entitled "Settlement of disputes".

33. The Commission considered the seventh report submitted by the Special Rapporteur at its 1377th to 1389th meetings and referred to the Drafting Committee the suggested new sub-paragraph (e) of article 2, the suggested new sentence (4) of article 3 and draft articles A, B, C, D and E contained therein. The Commission also referred to the Drafting Committee section 10 ("Exceptions to the operation of the clause—Frontier traffic") and 11 ("The customs-union issue") of chapter I of the seventh report and section 4 ("Most-favoured-nation clauses in relation to trade among developing countries") of chapter II of that report, as well as article 21 which had been provisionally adopted at the twenty-seventh session. At its 1404th meeting, the Commission considered the report of the Drafting Committee and adopted on first reading articles 21 to 27, as well as sub-paragraph (e) of article 2. At the same meeting, it decided to adopt certain changes made by the Drafting Committee for the sake of terminological consistency in the articles previously adopted, and it took decisions on certain pending matters relating to texts which had previously appeared in square brackets in articles 16 and 17, as explained below in the commentaries to those articles.²⁴

34. As recommended in General Assembly resolution 3495 (XXX), the Commission completed at its present session the first reading of the draft articles on the most-favoured-nation clause. Those draft articles, with commentaries,²⁵ as adopted at the twenty-fifth, twenty-seventh and twenty-eighth sessions of the Commission, are reproduced below in section C of the present report.

35. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft articles, through the Secretary-General, to Governments of Member States for their observations.

36. At the twenty-fifth session of the Commission, the Secretariat distributed the document entitled "Digest of decisions of national courts relating to the most-favoured-nation clause"²⁶ prepared in accordance with the Commission's request.²⁷

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

37. 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.

38. The Commission recognized several years ago that the rule of non-discrimination "is a general rule which follows from the equality of States"²⁸ and that non-discrimination is "a general rule inherent in the sovereign equality of States"²⁹ 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...

39. 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"³⁰

40. 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 Diplo-

²³ Printed in *Yearbook... 1976*, vol II (Part One).

²⁴ For the recommendations made by the Drafting Committee in this connexion, see A/CN.4/L.244.

²⁵ The commentaries to certain articles adopted at the twenty-fifth and twenty-seventh sessions of the Commission have been condensed for the sake of economy and conciseness. The original, somewhat more detailed commentaries may be found in the Commission's reports on the work of those sessions (for the twenty-fifth session: *Yearbook... 1973*, vol. II, p. 161, document A/9010/Rev.1; for the twenty-seventh session: *Yearbook... 1975*, vol. II, p. 47, document A/10010,Rev.1).

²⁶ *Yearbook... 1973*, vol. II, p. 117, document A/CN.4/269, referred to hereafter as "Secretariat Digest".

²⁷ See above, para. 19.

²⁸ *Yearbook... 1958*, vol. II, p. 105, document A/3859, chap. III, sect. II, para. (1) of the commentary to article 44.

²⁹ *Yearbook... 1961*, vol II, p. 128, document A/4843, chap. II, sect. IV, para. (1) of the commentary to article 70.

³⁰ *Case concerning Rights of Nationals of the United States of America in Morocco (Judgment)* (i. C.J. Reports 1952, p. 192).

matic Relations³¹ and on Consular Relations³² and in the Convention on Special Missions.³³ The first two Conventions contain an article reading, in part, as follows:

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.³⁴

The last Convention contains an article which reads, in part, as follows:

Non-discrimination

1. In the application of the provisions of the present Convention, no discrimination shall be made as between States.

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

...

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their special missions, ...³⁵

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 has itself received the general non-discriminatory treatment on a par with other States. The claim to be assimilated to a State which is placed 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.

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

41. The Commission, from the early stages of its work, has taken cognizance of the problem which the application of the most-favoured-nation clause

creates in the field of economic relations when a striking inequality exists between the development of the States concerned. It noted that the report on "International trade and the most-favoured-nation clause" prepared by the secretariat of UNCTAD (the "UNCTAD memorandum") 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.³⁶

42. The Commission also noted that General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session states, *inter alia*:

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.³⁷

43. In discussing 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 economic relations with particular reference to the developing countries posed serious problems, some of which related to the Commission's work on the topic. The Commission examined, on the basis of the Special Rapporteur's sixth³⁸ and seventh (A/CN.4/293 and Add.1)³⁹ reports, the question of exceptions to the operation of the clause

³⁶ See *Yearbook... 1970*, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188.

One member of the Commission mentioned 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 shares, that quarrels and complaints arise."³

³ Aristotle *Nicomachean Ethics*, V, iii, 6. (*Yearbook 1968*, vol. I, p. 186, 976th meeting, para. 6).

³⁷ 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.

³⁸ *Yearbook... 1975*, vol. II, p. 1, document A/CN.4/286.

³⁹ Printed in *Yearbook... 1976*, vol. II (Part One).

³¹ United Nations, *Treaty Series*, vol. 500, p. 95.

³² *Ibid.*, vol. 596, p. 261.

³³ General Assembly resolution 2530 (XXIV), annex.

³⁴ Article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.

³⁵ Article 49 of the Convention on Special Missions.

in that respect, and recognized the importance of the question. The Commission found that this field is not one which affords an opportunity for codification of international law because the requirements for this process, as described in article 15 of the Statute of the Commission, namely, extensive State practice, precedents and doctrine, are not easily discernible. The Commission has therefore attempted to enter into the field of progressive development and has adopted article 21. It also adopted article 27 in the hope that further development may take place in this field in the future.⁴⁰

4. THE GENERAL CHARACTER OF THE DRAFT ARTICLES

44. As noted above,⁴¹ the Commission originally took up its study of the most-favoured-nation clause as an aspect of the general law of treaties. The Commission considers that the 1969 Vienna Convention on the Law of Treaties⁴² is today the most authoritative statement of the general law of treaties. Accordingly, the draft articles on the most-favoured-nation clause, which contain particular rules applicable to certain types of treaty provisions, namely, to most-favoured-nation clauses, should be interpreted in the light of the provisions of that Convention. Articles 1, 2, 3, 24 and 25 of the present draft follow closely the language of the corresponding articles of the Vienna Convention. Nevertheless, the present articles are intended to constitute an autonomous set concerning the legal rules relating to most-favoured-nation clauses; they are not intended to form an "annex" to the Vienna Convention. Furthermore, the residual character of the draft articles is expressly recognized in article 26 and explained in the commentary thereto.

(a) *Scope of the draft*

45. 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.⁴³ 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.⁴⁴ 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.⁴⁵

46. The Commission maintains the position which it took in 1968 and points out that the fact that the 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.

47. The Commission has been cognizant of matters relating to the operation of the most-favoured-nation clause in the field of international trade, such as the existence of the General Agreement on Tariffs and Trade (GATT), the emergence of State-owned enterprises, the application of the clause between countries with different economic systems, the application of the clause vis-à-vis quantitative restrictions and the problem of the so-called "anti-dumping" and "countervailing" duties. The Commission has attempted to maintain the line which it set for itself between law and economics, so as not to try to resolve questions of a technical economic nature, such as those mentioned above, which belong to fields specifically entrusted to other international organizations.

48. On the other hand, while it was not the Commission's intention to deal with matters which belong to fields specifically entrusted to other international organizations, it wished to take into consideration all modern developments which may have a bearing upon the codification or progressive development of rules pertaining to the operation of the clause. In this connexion, the Commission has devoted 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 economic relations can be given expression in legal rules.⁴⁶

49. The Commission also limited the scope of the present draft articles by the introduction of articles 1, 3 and 24; the reasons for this are given below in the commentaries to those articles.

50. In his fifth report, the Special Rapporteur proposed several draft articles dealing with national treatment and the national treatment clause (articles

⁴⁰ See below, articles 21 and 27 and commentaries thereto.

⁴¹ See above, para. 11.

⁴² For the text of the 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), p. 289. The Convention will be referred to hereafter as "the Vienna Convention".

⁴³ See above, para. 10.

⁴⁴ See above, para. 11.

⁴⁵ See above, para. 12.

⁴⁶ See above, paras. 41 *et seq.* and below, articles 21 and 27 and commentaries thereto.

9 *et seq.*)⁴⁷ He deemed it appropriate to do so bearing in mind the close relationship which exists between a most-favoured-nation clause and a national treatment clause and the fact that both clauses often appear in treaties side by side and sometimes in combination, and in order to be able to deal with important questions arising from the cumulation of the two.⁴⁸ In his sixth report the Special Rapporteur proposed mentioning explicitly both the most-favoured-nation clause and the national treatment clause in the articles applicable to the two clauses.⁴⁹

51. At its twenty-seventh session, the Commission considered the question whether or not the draft should also deal with national treatment clauses and national treatment, particularly in connexion with draft articles 9 and 10 proposed by the Special Rapporteur, which indicate the meaning to be attributed to those terms for the purposes of the draft. After a general discussion in which divergent views were expressed, the Commission agreed to concentrate its work at that session on formulating draft rules concerning specifically most-favoured-nation clauses and most-favoured-nation treatment. Nevertheless, the Commission adopted two articles dealing respectively with the right to national treatment under a most-favoured-nation clause (article 16) and most-favoured-nation treatment and national or other treatment with respect to the same subject-matter (article 17). In addition, the Commission suggested in its report on the work of that session that the General Assembly might wish to pronounce on the question whether the draft being prepared should extend further in relation to national treatment and national treatment clauses.⁵⁰

52. At the present session, the Commission, upon the suggestion of the Special Rapporteur (A/CN.4/293 and Add.1, para. 16), decided to leave the draft articles in their present form, at least for first reading, in view of the divergent opinions expressed in the Commission and in the General Assembly on the matter of extending their scope to national treatment clauses beyond the provisions contained in articles 16 and 17.

53. Further in regard to the general scope of the draft articles, it may be recalled that in presenting its draft articles on the law of treaties to the General Assembly in 1966, the Commission indicated that it had not included therein a provision regarding the application of treaties providing for obligations or rights to be performed or enjoyed by individuals.⁵¹ The Vienna Convention similarly does not contain

such a provision. The Commission therefore felt that although most-favoured-nation clauses do very often contain provisions for rights to be enjoyed by individuals, in the absence of a codification as to the general rules on this matter and in the light of the relationship between these draft articles and the general law of treaties and the Vienna Convention,⁵² it was preferable in this respect to remain within the ambit of the scope provided for in that Convention.

54. The Commission is also fully aware that the implementation of the rules on most-favoured-nation clauses may cause particular difficulties inasmuch as they often refer expressly or by implication to domestic laws, and hence their application may involve conflict-of-laws rules. However, the Commission has confined itself to the field of public international law in the belief that the difficulties of implementation in particular cases are inherent in the subject and that the existence of such difficulties does not detract from the value of adopting rules of a general international law character.

55. Lastly, the Commission is aware that the provisions of the draft articles will not give an automatic solution to all questions which may arise in connexion with the interpretation and application of most-favoured-nation clauses (see A/CN.4/293 and Add.1, paras. 26 and 27). The Commission has maintained its tradition of dealing with the subject-matter as much as possible within the framework of a codification of general rules, and has not embarked on a "case-by-case" approach. As noted earlier,⁵³ the Special Rapporteur in his seventh report referred to the question of the settlement of disputes (*ibid.* para. 132). During the course of the present session, the Commission decided that it would not be useful at the present stage to include a provision on the settlement of disputes in the articles on the most-favoured-nation clause. It was decided that the question should be referred to the General Assembly and Member States and, ultimately, following the second reading, to the body which may be entrusted with the task of finalizing the draft articles. On the other hand, certain members of the Commission believed that a provision should be included specifying that failing settlement by other means, a party to a dispute arising out of the application of a most-favoured-nation clause and involving the interpretation or application of the present articles had the right to refer the matter for judicial settlement, for example to the International Court of Justice.

(b) *Form of the draft*

56. The final form of the codification of the law relating to the most-favoured-nation clause is clearly a matter to be decided at a later stage, when the Commission has completed the second reading of the

⁴⁷ See above, para. 27.

⁴⁸ See *Yearbook... 1974*, vol. II (Part One), p. 124, document A/CN.4/280, para. (1) of the commentary to articles 9 and 10.

⁴⁹ See *Yearbook... 1975*, vol. II, p. 2, document A/CN.4/286, paras. 2-4.

⁵⁰ *Ibid.*, p. 118, document A/10010/Rev.1, para. 108.

⁵¹ *Yearbook... 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para. 33.

⁵² See above, para. 44.

⁵³ See above, para. 32.

draft articles in the light of the observations of Governments. At that time, in accordance with the provisions of its Statute, the Commission will make the recommendation on that matter which it considers appropriate.

57. Without prejudging that recommendation, the Commission has cast its study of the most-favoured-nation clause in the form of a group of draft articles, as recommended by the General Assembly. The draft articles have been prepared in a form to render them capable of serving as a basis for the conclusion of a convention, should this be decided upon. The Commission was in any event of the view that the preparation of draft articles was the most appropriate and effective method of studying and identifying the rules of international law relating to the most-favoured-nation clause.

(c) *Scheme of the draft*

58. The Commission did not deem it necessary to depart from the general scheme of the draft, which is composed of only 27 articles, by introducing therein chapters or sections. However, the Commission wishes to point out the following: the first seven articles may be considered as introductory articles of a definitional nature, and as relating to the scope and basis of most-favoured-nation treatment; articles 8 to 20 relate to the general application of the most-favoured-nation clause; articles 21 to 23 relate to exceptions to the application of the most-favoured-nation clause; and articles 24 to 27 constitute what may be considered as miscellaneous provisions.

59. Finally, the Commission wishes to indicate at this stage that it considers that its work on the most-favoured-nation clause constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements both of progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.

B. Resolution adopted by the Commission

60. The Commission, at its 1404th meeting, on 8 July 1976, adopted by acclamation the following resolution:

The International Law Commission,

Having adopted provisionally the draft articles on the most-favoured-nation clause,

Desires to express to the Special Rapporteur, Mr. Endre Ustor, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the most-favoured-nation clause.

C. Draft articles on the most-favoured-nation clause

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; 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 to the term "treaty" the same meaning as in the Vienna Convention, a meaning which specifically limits the term to "an international agreement concluded between States".

(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.

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;

(e) "material reciprocity" means that the beneficiary State is entitled to the treatment provided for

under a most-favoured-nation clause only if it accords equivalent treatment to the granting State in the agreed sphere of relations.

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. 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.⁵⁴ Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general 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. 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 extended 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) In the course of the present session one member of the Commission in the Drafting Committee proposed the amendment of the text of paragraph (d) to read as follows:

"third State" means any State other than the granting State or the beneficiary State, except any particular State or States excluded by agreement between the granting State and the beneficiary State.

This proposal, however, was withdrawn on the understanding that article 26 makes it possible for the granting State and the beneficiary State to except by agreement any particular State or States from the notion of "third State".

(7) Paragraph (e) gives the meaning of the term "material reciprocity". Although this meaning is more fully explained below,⁵⁵ the Commission believed that it would be useful to include in the text of the articles themselves an explanation of that term.

(8) As to the meaning of the expression, a simple definition has been given by Szászy, according to which material reciprocity exists when the citizen of a country is treated in a foreign country in the same way as the country to which the citizen in question belongs treats the citizen of the other country. This is to be distinguished from formal reciprocity which subsists when a foreign country treats the citizen of another country as it treats its own citizens.⁵⁶

(9) A fuller explanation is given by Niboyet, according to whom:

Material reciprocity means that a given right claimed by one party shall not be accorded to it unless that party itself executes a consideration which must be identical.

Material reciprocity may be defined as the mutual consideration stipulated by States in a treaty, where such consideration relates to a certain specific right which must be the same for both parties. This is somewhat like a vehicle that needs two wheels; each State supplies one wheel, but the two must match to within a fraction of an inch.*

* Some "tolerance" must, of course, be allowed; otherwise the condition could not be met. Each party therefore allows that equivalence is sufficient, but the outer limits of equivalence are impossible to specify in advance. This will depend on the factual circumstances and on the liberality of those who will have to interpret the treaty.⁵⁷

(10) It is believed that for the present purposes it is not necessary to enter into further discussion of the niceties of material reciprocity. Obviously, because of the differences in individual national legal systems, cases may occur where doubts arise whether the

⁵⁵ See below, paras. (31)–(38) of the commentary to articles 8, 9 and 10.

⁵⁶ I. Szászy, *International Civil Procedure (A Comparative Study)* (Budapest, Akademia Kiado, 1967), pp. 187–188.

⁵⁷ J.-P. Niboyet, *Traité de droit international privé français* (Paris, Sirey, 1951, 1951), vol. II, pp. 308–309.

⁵⁴ See above, para. 44.

treatment offered by the beneficiary State is materially "equivalent" to that accorded by the granting State. Such doubts have to be dispelled by the parties themselves and the possible disputes settled.

(11) Material reciprocity is normally stipulated when treatment of nationals or things, like ships and possibly aircraft, is in question. In commercial treaties dealing with the exchange of goods, material reciprocity is, by the nature of things, practically never required.

(12) On the basis of these considerations, paragraph (e) defines the term "material reciprocity", stating that if this condition is stipulated then the beneficiary State is entitled to the treatment provided for under the clause only if it accords equivalent treatment to the granting State in the agreed sphere of relations.

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 extended 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. 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 extended 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 extended by them to other such subjects of international law. That matter was considered during the course of the twenty-eighth session but the Commission decided to omit such a reference as it 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 Convention—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 agreements 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.

(5) Some members of the Commission thought that article 3 should be slightly redrafted. Others believed that a radical rearrangement would be necessary. The Commission ultimately retained article 3 for the purpose of the first reading in the form of wording adopted in 1973. It will return to the problem in the course of the preparation of the text for the second reading, taking into account the comments of Governments.

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.⁵⁸ 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 as imprecise, 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 any combination of such provisions, including entire treaties when appropriate. 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 in treaties in the sense of the word “treaty” as defined in article 2 of the Vienna Convention 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 short 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 accord 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 a 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 accorded to the Community, against special preferences, unilateral most-favoured-nation treatment of imports and exports in certain agreements on association and commerce.⁵⁹

(7) In the usual case, both States parties to a treaty, or in the case of a multilateral treaty, all States parties, accord 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 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

⁵⁸ See below, para. (4) of the commentary to article 5.

⁵⁹ 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* (Leyden, Sijthoff, 1971), vol. 130, p. 324). See also the pledge of Cyprus, quoted in para. (14) below.

promises is that the contracting party concerned will treat the other party as well as it treats any third State, 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.⁶⁰ 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.⁶¹

(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.⁶²

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 in-

⁶⁰ See below, para. (10).

⁶¹ United Nations, *Treaty series*, vol. 374, p. 116.

⁶² *Ibid.*, vol. 55, pp. 196 and 198; *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.

tended 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.⁶³

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 to it equal treatment to that extended 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.⁶⁴ Thus, the operation of the GATT clause differs in this respect from that of the usual bilateral most-favoured-nation clause, although the concession can be withdrawn from all members by the granting State subject to any temporal commitment in effect.

(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.⁶⁵

(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.⁶⁶ Other examples are article XIII, paragraph 1, of the General Agreement, which requires that the administration of quantitative restrictions shall be non-discriminatory,⁶⁷

⁶³ 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).

⁶⁴ H. C. Hawkins, *Commercial treaties and Agreements: Principles and Practice* (New York, Rinehart, 1951), P. 226.

⁶⁵ See below, para. (2) of the commentary to article 5.

⁶⁶ 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.

⁶⁷ *Ibid.*, p. 234, quoted in *Yearbook... 1970*, vol. II, pp. 223-224, document A/CN.4/228 and Add.1, para. 160.

and article 23 of the Montevideo Treaty.⁶⁸ 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, article 72 of the Vienna Convention on Consular Relations and article 49 of the Convention on Special Missions.⁶⁹ 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".⁷⁰ Expressed in other words: "Speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination",⁷¹ and further: "there are innumerable most-favoured-nation clauses, but there is only *one* most-favoured-nation [treatment] standard".⁷² 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 to 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:

⁶⁸ 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.

⁶⁹ See above, para. 40.

⁷⁰ A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1962), p. 273.

⁷¹ D. Anzilotti and A. D. MacNair, quoted in Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 138.

⁷² *Ibid.*, p. 159.

The Republic of Cyprus shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature.⁷³

(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...".⁷⁴ 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.⁷⁵

(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 judgments, security for costs (*cautio judicatum solvi*), etc.

The research to be undertaken by the Secretariat⁷⁶ 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 falling within the scope of the subject-matter of the clause, is dealt with below in connexion with articles 11 and 12.

⁷³ 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).

⁷⁴ Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic, article 2 (United Nations, *Treaty Series*, vol. 374, p. 114).

⁷⁵ Quoted above in para. (10) of this commentary.

⁷⁶ See above, para. 22.

Article 5. — Most-favoured-nation treatment

Most-favoured-nation treatment means treatment accorded by the granting State to the beneficiary State or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to 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 naibolee blagopriatsvenoi 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).⁷⁷ 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 granting 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.

⁷⁷ 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).

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.⁷⁸

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 Secretariat Digest).⁷⁹ 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.⁸⁰ 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-favoured-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-favoured-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 ...⁸¹

(3) Article 5 states that the persons or things whose treatment is in question have to be in a “determined

⁷⁸ Jurisdiction of the Courts of Danzig Case (*P.C.I.J.* Series B, No. 15, p. 31).

⁷⁹ *Yearbook...* 1973, vol. II, p. 117, document A/CN.4/269.

⁸⁰ See G. Bebr, “Directly Applicable Provisions of Community Law: the Development of a Community Concept”, in *International and Comparative Law Quarterly* (London), vol. 19, April 1970, p. 257.

⁸¹ *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.

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 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. Such relationships are nationality or citizenship of persons, place of registry of vessels, State of origin or 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, however, came 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 extended 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 although it may be required to accord such preferential treatment under other most-favoured-nation clauses. 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 extended 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 begins to operate, 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 formal 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 due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause. The commencement and the termination or suspension of enjoyment of rights under the clause are dealt with below, in articles 18 and 19.

(6) According to article 5, "treatment" is that

which is granted 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.⁸² After a 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 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).⁸³ 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 Escotois*".⁸⁴ 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 extended to France and Germany by virtue of the Treaties of 6 February 1882 and 12 July 1883.⁸⁵ 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".

(8) 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. This question is examined in greater detail below in connexion with article 26. The establishment of customs unions, free-trade areas and other groupings may also result in conventional exceptions to most-favoured-nation pledges.⁸⁶ 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 discrimination against the weaker members of the international community. The Commission's consideration of this important question is reflected below in articles 21 and 27, and the commentaries thereto.

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 it is proved that the State in question has a legal obligation to accord to the claiming State

⁸² 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).

⁸³ See above, para. (5) of the commentary to article 2.

⁸⁴ G. Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice", *The British Year Book of International Law*, 1945 (London), vol. 22, p. 97.

⁸⁵ Cited in B. Nolde, "Droit et technique des traités de commerce", *Recueil des cours ... 1924-II* (Paris, Hachette, 1925), vol. 3, p. 413.

⁸⁶ See below, paras. (24) to (37) of the commentary to article 15.

the same treatment as that conferred upon the 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.⁸⁷

(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...".⁸⁸ 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.⁸⁹

(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 inter-

national 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 an international 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 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

1. **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.**

2. **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 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

⁸⁷ See, *inter alia*, E. T. 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, (*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.

⁸⁸ League of Nations, "Recommendations of the Economic Committee relating to Tariff Policy and the Most-Favoured-Nation Clause" (document E.805.1933.II.B.I), quoted in *Yearbook... 1969*, vol. II, p. 175, document A/CN.4/213, annex I.

⁸⁹ Cf. G. Schwarzenberger, "The principles and standards of international economic law", *Recueil des cours... 1966-1* (Leyden, Sijthoff, 1967), vol. 117, p. 74.

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 extended 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...⁹⁰

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.⁹¹

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*.⁹²

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.⁹³ Legal theory seems now unanimous in endorsing the findings of the majority of the Court.⁹⁴

(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 extends 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. As explained in the commentary of the Commission to article 32 of 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...⁹⁵

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.

(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."⁹⁶

⁹³ 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. Accioly, *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.

⁹⁴ G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed. (London, Stevens, 1957), p. 243; P. Guggenheim, *Traité de droit international public*, 2nd rev. ed. (Geneva, Georg, 1967), vol. I, pp. 208-209; and E. Saignon, *op. cit.*, p. 78.

⁹⁵ *Yearbook... 1966*, vol. II, p. 229, document A/6309/Rev. I, part II, para. (7) of the commentary to article 32 of the draft articles on the law of treaties.

⁹⁶ *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.

⁹⁰ *I.C.J. Pleadings*, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (1952), p. 533.

⁹¹ *Ibid.*, p. 616.

⁹² Anglo-Iranian Oil Co. Case (Jurisdiction), Judgement of 22 July 1952, (*I.C.J. Reports*, 1952, p. 109).

(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 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.⁹⁷

(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 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 is dealt with below.⁹⁸ 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 extended by the granting State to a third State. In other words, the treatment granted to the third State by the granting State is applicably 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.

⁹⁷ 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.

⁹⁸ See below, articles 8, 9 and 10 and the commentary thereto.

Article 8. — Unconditionality of most-favoured-nation clauses

A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.

Article 9. — Effect of an unconditional most-favoured-nation clause

If a most-favoured-nation clause is not made subject to conditions, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State.

Article 10. — Effect of a most-favoured-nation clause conditional on material reciprocity

If a most-favoured-nation clause is made subject to the condition of material reciprocity, the beneficiary State acquires the right to most-favoured-nation treatment only upon according material reciprocity to the granting State.

Commentary to articles 8, 9 and 10

The conditional form and the conditional interpretation

(1) For the explanation of the necessity of a provision like that stated in article 8, reference has to be made to the history of the so-called "conditional" most-favoured-nation clauses and to the "conditional" interpretation of clauses which in their terms made no reference to conditions.

(2) It was in the eighteenth century that the "conditional" form made its first appearance in the treaty of amity and commerce concluded between France and the United States of America on 6 February 1778. Article II of this treaty read as follows:

The Most Christian King and the United States engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favor, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.⁹⁹

It has been held that the conditional clause was inserted in the treaty of 1778 at French insistence. Even if it were true that the idea was of French origin, the conditional form of the clause seemed peculiarly suited to the political and economic interests of the United States for a long period.¹⁰⁰

⁹⁹ W.M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, D.C., U.S. Government Printing Office, 1910), vol. I, p. 468.

¹⁰⁰ V.G. Setser, "Did Americans Originate the Conditional Most-Favored-Nation Clause?", *The Journal of Modern History* (Chicago), vol. V (September 1933), pp. 319-323.

(3) The phrase "freely, if the concession was freely made, or on allowing the same compensation [or the equivalent], if the concession was conditional" was the model for practically all commercial treaties of the United States until 1923. Prior to that year, the commercial treaties of the United States contained (with only three exceptions) conditional rather than unconditional pledges on the part of that country.¹⁰¹

(4) The difference between the unconditional clause and the conditional form of the clause as it appeared in United States practice until 1923 was well explained by the Department of State in 1940:

... Under the most-favoured-nation clause in a bilateral treaty or agreement concerning commerce, each of the parties undertakes to extend to the goods of the country of the other party treatment no less favorable than the treatment which it accords to like goods originating in any third country. The unconditional form of the most-favoured-nation clause provides that any advantage, favor, privilege, or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party. In this form only does the clause provide for complete and continuous nondiscriminatory treatment. Under the conditional form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions "equivalent" to the concessions made by such third countries ...¹⁰²

(5) The conditional form of the clause was dominant also in Europe after the Napoleonic period. It has been asserted that perhaps 90 per cent of the clauses written into treaties during the years 1830 to 1860 were conditional in form.¹⁰³ The conditional form was virtually abandoned with the conclusion of the treaty of commerce between Great Britain and France of 23 January 1860,¹⁰⁴ often called the Cobden treaty or Chevalier-Cobden treaty after the main English negotiator, Richard Cobden, a passionate advocate of free trade and *laissez-faire*, and his counterpart, Michel Chevalier, the economic adviser to Napoleon III. In this treaty England and France reduced their tariffs substantially, abolished import prohibitions and granted each other unconditionally the status of a most-favoured-nation.

¹⁰¹ C. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown, 1947) vol. II, p. 1504.

¹⁰² United States of America, Department of State, *Bulletin No. 58* of 3 August 1940, quoted in M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1970), vol. 14, p. 751.

¹⁰³ L.-E. Visser, "La clause de la nation la plus favorisée dans les traités de commerce", *Revue de droit international et de législation comparée* (Brussels), IInd series, vol. IV (1902), pp. 66, 159 and 270. Quoted by R. C. Snyder, *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948), p. 41.

¹⁰⁴ *British and Foreign State Papers, 1859-1860* (London, Ridgway, 1867), vol. 50, p. 13.

(6) The Chevalier-Cobden treaty was a signal for starting the negotiation of many commercial agreements embodying the unconditional clause with a wider scope of application than at any time in its history. A wave of liberal economic sentiment carried the unconditional clause to the height of its effectiveness. In the period following the Chevalier-Cobden treaty the unconditional form and interpretation of the clause were entirely dominant in intra-European relations.¹⁰⁵

(7) The conditional clause served the purposes of the United States so long as it was a net importer and its primary aim was to protect a growing industrial system. When the position of the United States in the world economy changed after the First World War, the conditional clause was inadequate. The essential condition for successful access to international markets, that is, the elimination of discrimination against American products, could only be achieved through the unconditional clause.¹⁰⁶

(8) The departure of the United States from the practice of employing the conditional type of the most-favoured-nation clause was explained by the United States Tariff Commission as follows:

... the use by the United States of the conditional interpretation of the most-favoured-nation clause has for half a century occasioned and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries.¹⁰⁷

(9) Urging the Senate to approve the change in the policy of the United States in matters of trade, Secretary of State Hughes wrote in 1924:

... It was the interest and fundamental aim of this country to secure equality of treatment but the conditional most-favoured-nation clause was not in fact productive of equality of treatment and could not guarantee it. It merely promised an opportunity to bargain for such treatment. Moreover, the ascertaining of what might constitute equivalent compensation in the application of the conditional most-favoured-nation principle was found to be difficult or impracticable. Reciprocal commercial arrangements were but temporary makeshifts; they caused constant negotiation and created uncertainty. Under present conditions, the expanding foreign commerce of the United States needs a guarantee of equality of treatment which cannot be furnished by the conditional form of the most-favoured-nation clause.

While we were persevering in the following of the policy of conditional most-favoured-nation treatment, the leading commercial countries of Europe, and in fact most of the countries of the world, adopted and pursued the policy of unconditional most-favoured-nation treatment: Each concession which one country made to another became generalized in favor of all countries to which the country making the concession was obligated by treaty to extend most-favoured-nation treatment ... As we seek pledges

¹⁰⁵ A. Nussbaum, *A Concise History of the Law of Nations*, rev. ed. (New York, MacMillan, 1954), p. 202.

¹⁰⁶ R. C. Snyder, *op. cit.*, p. 243; and E. T. Usenko, chapter on commercial treaties in: State Institute of Law of the Academy of Sciences of the Soviet Union, *Kurs mezhdunarodnogo prava*, edited by F. I. Kozhevnikov *et al.* (Moscow, Nauka, 1968), vol. IV, p. 251.

¹⁰⁷ Quoted by C. C. Hyde, *op. cit.*, p. 1506, foot-note 13.

from other foreign countries that they will refrain from practising discrimination, we must be ready to give such pledges, and history has shown that these pledges can be made adequate only in terms of unconditional most-favoured-nation treatment.¹⁰⁸

(10) The use of the conditional clause, as practised until 1923 by the United States, completely disappeared from the international scene. The reasons for this are stated by M. Virally to be as follows:

... the elimination of automatism from the most-favoured-nation clause, ostensibly better to ensure reciprocity, fails to achieve its aim and renders the clause itself completely useless. That fact together with the trade expansion which currently characterizes the trade policy of all States, explains why the conditional clause has generally been abandoned in recent treaty practice.¹⁰⁹

(11) Because of the general abandonment of this conditional form of the clause, it is now of historical significance only. All available sources agree that this form of the clause has definitely fallen into disuse.¹¹⁰

The conditional interpretation of an unconditional clause

(12) In the last century and in the first decades of the present one, international doctrine and practice were divided on the interpretation of a most-favoured-nation clause which does not explicitly state whether it is conditional or unconditional.¹¹¹ The division was due to the then constant practice of the United States that even if the character of the clause was not spelled out explicitly it was construed as conditional.¹¹²

(13) The American position can be traced back to the time of the Louisiana Purchase, the treaty of 30 April 1803 by which France ceded Louisiana to the United States. Article 8 of this treaty provided that "the ships of France shall be treated upon the footing of the most favoured nations" in the ports of the ceded territory. By virtue of this provision, the French Government asked in 1817 that the advantages granted to Great Britain in all the ports of the United States should be secured to France in the ports of Louisiana. The advantages accorded to Great Britain were based upon an Act of Congress of 3 March 1815. This Act exempted the vessels of foreign countries from discriminating duties in ports of

the United States on condition of a like exemption of American vessels in the ports of such countries. This exemption was granted by Great Britain but not by France, with the result that French vessels continued to pay discriminating duties in the ports of the United States, while British vessels became exempt. The French claim was rejected upon the ground that the clause did not mean that France should enjoy as a free gift that which was conceded to other nations for a full equivalent. The United States position was explained as follows:

"It is obvious", said Mr. Adams, "that if French vessels should be admitted into the ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favoured-nation, according to the article in question, but upon a footing more favoured than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price."

France, however, did not concede the correctness of this position and maintained her claim in diplomatic correspondence until 1831, when it was settled by a treaty which practically accepted the American interpretation.¹¹³

(14) Not only did the commercial policy of the United States and the relevant treaty practice change from the use of conditional clauses to that of unconditional ones; a shift in the interpretation of the remaining conditional clauses also took place. At the time of the conclusion of the Treaty of Friendship, Commerce and Consular Rights of 8 December 1923 between the United States and Germany, the American position was stated by Secretary of State Hughes as follows:

There is one apparent misapprehension which I should like to remove. It may be argued that by the most-favoured-nation clauses in the pending treaty with Germany we would automatically extend privileges given to Germany to other Powers without obtaining the advantages which the treaty with Germany gives to us. This is a mistake. We give to Germany explicitly the unconditional most-favoured-nation treatment which she gives to us. We do not give unconditional most-favoured-nation treatment to other Powers unless they are willing to make with us the same treaty, in substance, that Germany has made. Most-favoured-nation treatment would be given to other Powers only by virtue of our treaties with them, and these treaties, so far as we have them, do not embrace unconditional most-favoured-nation treatment. We cannot make treaties with all the Powers at the same moment, but if the Senate approves the treaty which we have made with Germany we shall endeavour to negotiate similar treaties with other Powers and such other powers will not obtain unconditional most-favoured-nation treatment unless they conclude with us treaties similar to the one with Germany.¹¹⁴

Ten years later, however, Secretary of State Hull took the less rigid position that the according of a benefit

¹⁰⁸ G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, p. 273.

¹⁰⁹ M. Virally, "Le principe de réciprocité en droit international contemporain", *Recueil des cours... 1967-III* (Leiden, Sijthoff, 1969), vol. 122, p. 74.

¹¹⁰ Snyder, *op. cit.*, p. 56. See also G. Jaenicke, "Meistbegünstigungsklausel" in K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. (Schlochauer), (Berlin, de Gruyter, 1961), vol. II, p. 498; P. Level, "Clause de la nation la plus favorisée", in *Encyclopédie Dalloz — Droit international* (Paris, Dalloz, 1968), vol. I, p. 333, para. 5; Sauvignon, *op. cit.*, p. 23.

¹¹¹ S. Basdevant, "Clause de la nation la plus favorisée" in A. G. de Lapradelle and J. P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, p. 479, para. 73.

¹¹² See C. C. Hyde, "Concerning the interpretation of treaties", *American Journal of International Law* (Washington, D.C.), vol. 3, No. 1 (January 1909), p. 57.

¹¹³ J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. V, pp. 257-260. See also G. W. Wickersham, Rapporteur, Committee of Experts for the Progressive Codification of International Law, League of Nations document C.205.M.79.1927.V., p. 7.

¹¹⁴ M. Whiteman, *op. cit.*, p. 754.

to a country pursuant to an unconditional most-favoured-nation clause constitutes the according of it freely within the terms of a conditional most-favoured-nation clause, with the result that the benefit should be accorded immediately and without compensation pursuant to the conditional clause. Consistent with this interpretation, when in 1946 the United States sought waivers from most-favoured-nation clauses in existing treaties, for tariff preferences to be extended on the basis of reciprocity to most Philippine products following Philippine independence, such waivers were sought from countries with which the United States had treaties containing clauses which were conditional as well as from those countries the treaties with which contained clauses which were unconditional.¹¹⁵ The consequence of this change in interpretation was to produce a system in which conditional treatment was merged to a certain extent with unconditional treatment.

(15) The British and continental position at the turn of the century was that concessions granted for consideration could properly be claimed under a most-favoured-nation clause. According to that view:

... The basis of the American theory is to be found in the Anglo-Saxon system of contracts and the requirement that advantages must be reciprocal for the formation of a contract (consideration). However, this application of the theory is not justified here, for the nation which has acquired equal treatment has paid in advance for the third-party rights which it may thus acquire, since it has granted to the other contracting party the same equal treatment and the right to receive the advantages of third parties ... The search for "equivalents" designed to pay for the third-party right by conventional means imposed on the contracting parties is tantamount to stating that the most-favoured-nation clause in itself has absolutely no effect. Lastly, from the customs point of view, the American system leads to a preferential system based on favours granted to some nations and refused to others, for States which have amended their tariffs no longer have any equivalents to offer.¹¹⁶

More recent practice and doctrinal views

(16) The Economic Committee of the League of Nations, basing its views on economic considerations, strongly favoured the use of unconditional most-favoured-nation clauses in customs matters. The following are excerpts from its conclusions of 1933 and 1936:

The most-favoured-nation clause implies the right to demand and the obligation to concede all reductions of duties and taxes and all privileges of every kind accorded to the most-favoured-nation, no matter whether such reductions and privileges are granted autonomously or in virtue of conventions with third parties.

Regarded in this way, the clause confers a whole body of advantages, the extent of which actually depends on the extent of

the concessions granted to other countries. At the same time, it constitutes a guarantee, in the sense that it provides completely and, so to speak automatically, for full and entire equality of treatment with the country which is most favoured in the matter in question.

However, in order that the clause may produce these results it must be understood to mean that a Government which has granted most-favoured-nation treatment is bound to concede to the other contracting party every advantage which has been granted to any third country, immediately and as a matter of right, without the other party being required to give anything by way of compensation. In other words, the clause must be unconditional.

As is generally known, conditional most-favoured-nation clauses have in some cases been inserted in treaties, while in other cases existing most-favoured-nation clauses have been construed in a conditional sense, with the effect that a reduction of duties granted to a given country in exchange for a given concession may not be accorded to a third country, except in exchange for the like or equivalent concessions. This opinion is based on the conception that a country which has not, in some given respect, made the same concessions as another is not entitled to obtain, in this respect, the same advantages, even if it has made wider concessions in other respects. It cannot, however, be too often repeated that a conditional clause of this kind — in justification of which it is argued that, if it does not grant equality of tariffs, it offers at any rate equality of opportunity — has nothing whatever in common with the sort of clause which the [1927] International Economic Conference and the Economic Consultative Committee recommended for the widest possible adoption.

It is in fact the negation of such a clause, for the very essence of the most-favoured-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination; it does not offer any of the advantages of the most-favoured-nation clause proper, which seeks to eliminate economic conflicts, to simplify international trade and establish it on firmer foundations. Moreover, it is open to the very grave objection of being unfair to countries which have very few, or very low, duties and which are thus less favourably situated for negotiating than those which possess heavy or numerous duties.

Moreover, it has very rightly been observed that the granting of the conditional clause really amounts to a polite refusal to grant the most-favoured-nation clause, and that the real significance of this "conditional clause" is that it constitutes a *pactum de contrahendo*, by which the contracting States undertake to enter later into negotiations to grant each other certain advantages similar or correlative to those previously granted to third countries.

...

We may therefore conclude that the first fundamental principle, implicit in the conception of most-favoured-nation treatment, is that this treatment must be *unconditional*.¹¹⁷

(17) The Institute of International Law in paragraph 1 of its 1936 resolution entitled "The effects of the most-favoured-nation clause in matters of commerce and navigation" expressed the view that:

The most-favoured-nation clause is unconditional, unless there are express provisions to the contrary.

Consequently, in matters of commerce and navigation, the clause confers upon the nationals, goods and ships of the contracting countries as a matter of right and without compensation, the régime enjoyed by any third country.¹¹⁸

¹¹⁵ *Ibid.*, p. 753.

¹¹⁶ Basdevant, *loc. cit.*, pp. 479-480, para. 77, quoting, *inter alia*, P.L.E. Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines* (Paris, Durand et Pédone-Lauriel, 1888), vol. IV, p. 394.

¹¹⁷ *Yearbook... 1969*, vol. II, pp. 175 *et seq.*, document A/CN.4/213, annex I.

¹¹⁸ *Ibid.*, p. 181, document A/CN.4/213, annex II.

(18) Other sources state this rule in general terms not restricted to the field of commerce:

If there is any doubt, the most-favoured-nation clause should be considered unconditional.¹¹⁹

Since it is liable to limit the application of the clause, the condition cannot be implied.¹²⁰

The clause is, in principle, unconditional ... Although the high contracting parties have the option of stating that the clause is conditional, its conditional nature is not presumed and is thus not an essential feature of the clause ...¹²¹

... If it is not expressly stated that the clause is conditional, it is agreed ... that it shall be considered unconditional.¹²²

(19) In the commercial treaty practice of the Soviet Union and other socialist countries the most-favoured-nation clause is always applied in its unconditional and gratuitous form. This is expressly provided for in many treaties but even without express provision to this effect most-favoured-nation clauses are understood to grant most-favoured-nation treatment unconditionally and without compensation. This follows from the fact that the treaties in question do not contain any reservation concerning compensation or countervalue.¹²³

(20) As to the British practice, it has been stated that:

In principle, m.f.n. clauses ought to be interpreted unconditionally ... "those clauses have the same meaning whether that word [unconditionally] be inserted or not".¹²⁴

The same writer adds:

This rule of interpretation must, however, be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type of m.f.n. clause as part and parcel of its national treaty policy.¹²⁵

(21) On that matter a more balanced view was taken before the International Court of Justice by the representative of the United States in the *Case concerning the Rights of Nationals of the United States of America in Morocco* (1952):

¹¹⁹ Guggenheim, *op. cit.*, p. 211.

¹²⁰ Level, *loc. cit.*, p. 333, para. 5, citing the North Atlantic Coast Fisheries Case of 7 September 1910 before the Permanent Court of Arbitration (see United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 167), and J. Basdevant, "L'affaire des pêcheries des côtes septentrionales de l'Atlantique", *Revue générale de droit international public* (Paris), vol. XIX (1912), pp. 538 *et seq.*

¹²¹ Level, *loc. cit.*, p. 338, para. 35.

¹²² Vignes, *loc. cit.*, p. 219, who quotes in support of this view also D. P. O'Connell, *International Law* (London, Stevens, 1970), vol. I, p. 268 and J. Dehaussy, *Juris-classeur de droit international*, fasc. 12-B, *Sources du droit international — Les traités (Effets: Situation des États tiers et de leurs ressortissants)* (Paris, Editions techniques, 1959), vol. 5, p. 7, para. 15.

¹²³ See State Institute of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 251.

¹²⁴ G. Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 137, quoting *British and Foreign State Papers, 1885-1886* (London, Ridgway, 1893), vol. 77, p. 796.

¹²⁵ *Ibid.*

The United States is entirely in agreement that the meaning of the clause should be determined by reference to the intent of the parties at the time. The only difference that we have with our distinguished opponents is that they would construe the clause as conditional by referring only to the practice of the United States in interpreting other treaties signed under other circumstances, and not by what the United States and Morocco intended when they signed the treaties which are in issue before this court.¹²⁶

The following excerpt from a Memorandum of the Counsellor for the Department of State (Moore) of 8 October 1913 is also of relevance:

It is proper to advert to the fact that the so-called most-favoured-nation clause does not bear an invariable form. In two instances during the past twenty-five years the United States has been obliged to yield its interpretation when confronted with documentary proof that the most-favoured-nation clauses then in question were, during the negotiation of the particular treaties, expressly understood and agreed to have the wider effect claimed by the other contracting parties.¹²⁷

(22) It can be safely said that both doctrine and State practice today favour the presumption of the unconditionality of the most-favoured-nation clause.

Conditions not related to the treatment accorded by the granting State to the third State

(23) In the previous paragraphs of the commentary to the present articles, as in the literature and practice concerning most-favoured-nation clauses generally, a clause was meant to be conditional if it was couched in a form such as appeared in the practice of the United States until 1923. That this form, as has been shown above, has been abandoned, does not mean that States cannot agree to couple their most-favoured-nation agreement with other types of conditions, conditions which are not related to the treatment accorded by the granting State to a third State.

(24) An agreement by which, e.g., unconditional most-favoured-nation treatment is promised to the beneficiary State on condition that the latter will accord certain economic (e.g. a long-term loan) or political advantages to the granting State is perfectly feasible. Similarly, conditions can be set as to the beginning or the end of the enjoyment of most-favoured-nation treatment, etc. Obviously such or other conditions have to be inserted in the clause, or in the treaty containing it, or be otherwise agreed between the granting and the beneficiary States.

(25) The articles adopted by the Commission do not deal explicitly with the so-called American form of the conditional clause which has become obsolete nor with other "independent" conditions which are "separate from the favored interest and relating only

¹²⁶ Rejoinder of 26 July 1952 (*I.C.J. Pleadings, Morocco Case* (France v. U.S.A.)), vol. II, p. 318. For a fuller reference, see *Yearbook... 1970*, vol. II, p. 208, document A/CN.4/228 and Add.1, para. 52.

¹²⁷ Hackworth, *op. cit.*, p. 279.

to something the other party must do or not do to qualify as the most-favoured-nation".¹²⁸ Nevertheless, there is one type of conditional clause to which the Commission paid special attention, namely, the most-favoured-nation clause coupled with the condition of material reciprocity.

The clause and formal reciprocity

(26) When speaking of reciprocity in relation to the most-favoured-nation clause, it has to be kept in mind that normally most-favoured-nation clauses are granted on a reciprocal basis, i.e. both parties to a bilateral treaty or all parties to a multilateral treaty accord each other most-favoured-nation treatment in a defined sphere of relations. This formal reciprocity is a normal feature of the unconditional most-favoured-nation clause; it could be said to be the clause's essential ingredient. Unilateral most-favoured-nation clauses occur only exceptionally at the present time.

(27) A case in point is the treaty of 13 October 1909 in which Switzerland granted unilaterally most-favoured-nation treatment to Germany and Italy regarding the use of the railway built on the Gotthard in Switzerland.¹²⁹ Such a unilateral clause can occur, as noted above,¹³⁰ in a treaty by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting State. Thus in article 11 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959, the latter State granted unilaterally most-favoured-nation treatment to "Czechoslovak merchant vessels and their cargoes ... on entering and leaving, and while lying in, the ports of the German Democratic Republic".¹³¹ A similar situation may arise if the treaty regulates specifically the trade and the customs tariff regarding one particular kind of product only (e.g., oranges) in respect of which there is but one-way traffic between the two contracting parties.

(28) A unilateral promise, or rather a *pactum de contrahendo* concerning future agreements on unilateral most-favoured-nation grants, is stipulated in Annex F, Part II, of the treaty concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, quoted above.¹³²

(29) Unilateral most-favoured-nation clauses, coupled with formal reciprocity, were included in the Peace Treaties which the Allied and Associated Powers concluded in 1947 with Bulgaria¹³³ (article 29); Hungary¹³⁴ (article 33); Romania¹³⁵ (article 31); Fin-

land¹³⁶ (article 30); and Italy¹³⁷ (article 82). The same clause was included in the State Treaty for the re-establishment of an independent and democratic Austria (article 29).¹³⁸

(30) By the mere stipulation of formal reciprocity a unilateral clause does not become bilateral.¹³⁹ This can be illustrated by the following quotation from article 33 of the Hungarian Peace Treaty:

... the Hungarian Government ... shall grant the following treatment to each of the United Nations which, in fact, reciprocally grants similar treatment in like matters to Hungary:

(a) In all that concerns duties and charges on ... the United Nations shall be granted unconditional most-favoured-nation treatment; ...¹⁴⁰

The meaning of this clause is clear: although the United Nations' right to claim most-favoured-nation treatment was subject to the offering of reciprocity it still was a unilateral right; the provision did not entitle Hungary to demand most-favoured-nation treatment.

The clause combined with material reciprocity (réciprocité trait pour trait)

(31) While the American form of the conditional clause can now be deemed to have virtually disappeared, the most-favoured-nation clause coupled with the condition of material reciprocity still exists. It is to be noted, however, that the application of this form of the clause is restricted to certain fields, such as consular immunities and functions, matters of private international law and those matters customarily dealt with by establishment treaties.

(32) It was indicated by one member at the twentieth session of the International Law Commission¹⁴¹ that the shift in the policy of the United States from conditional to unconditional most-favoured-nation treatment with regard to commercial matters in the early 1920s had not been accompanied by a shift in relation to consular rights and privileges, with respect to which the use of the conditional clause (or rather the clause conditional on material reciprocity) continued.

(33) In a letter dated 20 January 1967, the Department of State reported to the Senate Foreign Relations Committee that most of the consular agreements concluded by the United States of America contain a criminal immunity provision which is applicable to the consular personnel if the sending State

¹²⁸ Snyder, *op. cit.*, p. 21.

¹²⁹ Guggenheim, *op. cit.*, p. 207.

¹³⁰ See above, para. (6) of the commentary to article 4.

¹³¹ United Nations, *Treaty Series*, vol. 374, p. 120.

¹³² See above, paragraph (14) of the commentary to article 4.

¹³³ United Nations, vol. 41, p. 21.

¹³⁴ *Ibid.*, p. 135.

¹³⁵ *Ibid.*, vol. 42, p. 3.

¹³⁶ *Ibid.*, vol. 48, p. 203.

¹³⁷ *Ibid.*, vol. 49, p. 3.

¹³⁸ *Ibid.*, vol. 217, p. 223.

¹³⁹ For a different view on the matter, see that of the Rapporteur of the Institute of International Law, P. Pescatore, "La clause de la nation la plus favorisée dans les conventions multilatérales", *Annuaire de l'Institut de droit international*, 1969 (Basle), vol. 53, t. 1., p. 204, foot-note 3.

¹⁴⁰ United Nations, *Treaty Series*, vol. 41, p. 204.

¹⁴¹ *Yearbook... 1968*, vol. 1, p. 186, 976th meeting, para. 8.

concerned agrees to give reciprocal treatment to American consular officers.¹⁴²

(34) An example of this kind of clause based on material reciprocity is article 14 of the Italo-Turkish Consular Convention of 9 September 1929. It reads as follows:

The Consular officials of each of the High Contracting Parties shall further enjoy, subject to reciprocity, in the territory of the other Party, the same privileges and immunities as the Consular officials of any third Party of the same character and rank, so long as the latter enjoy such privileges.

The High Contracting Parties agree that neither of them shall be entitled to appeal to the advantages under a Convention with a third Party in order to claim for its Consular officials privileges or immunities other or more extended than those granted by the Party itself to the Consular officials of the other Party.¹⁴³

(35) A more recent instance of such a provision is the first paragraph of article 3 of the Convention on conditions of residence and navigation between the Kingdom of Sweden and the French Republic signed at Paris on 16 February 1954:

Subject to the effective application of reciprocity, the nationals of each of the High Contracting Parties residing in the territory of the other Contracting Party shall have the right, in the territory of the other Contracting Party, under the same conditions as nationals of the most-favoured-nation, to engage in any commerce or industry, as well as in any trade or profession, that is not reserved for nationals.¹⁴⁴

(36) Another recent example can be found in the Consular Convention between the Polish People's Republic and the Federal People's Republic of Yugoslavia, signed at Belgrade on 17 November 1958, article 46 of which reads as follows:

Each Contracting Party undertakes to accord the other Contracting Party most-favoured-nation treatment in all matters relating to the privileges, immunities, rights and functions of consuls and consular staff. However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.¹⁴⁵

(37) The clause conditional upon material reciprocity can be considered a simplified form of the traditional conditional clause.¹⁴⁶ According to Alice Piot:

This system seems clearer and more practical than the preceding one: it does not refer to the counterpart provided by the favoured State, but seeks to establish perfect symmetry between the benefits provided by the granting State and by the State benefiting by the clause. In other words, it seeks to establish material reciprocity. This implies a measure of symmetry between the two legislations. As Niboyet says, "this diplomatic reciprocity thus has an international head but two national feet. It is a triptych."

...

¹⁴² Whiteman, *op. cit.*, pp. 752-753.

¹⁴³ League of Nations, *Treaty Series*, vol. CXXIX, p. 195.

¹⁴⁴ United Nations, *Treaty Series*, vol. 228, p. 141.

¹⁴⁵ *Ibid.*, vol. 432, p. 332.

¹⁴⁶ *Yearbook... 1969*, vol. II, pp. 166-167, document A/CN.4/213, para. 58.

From the purely logical point of view, this is quite satisfying intellectually, but not very satisfactory in practice. Quite apart from the difficulties which the interpretation of reciprocity always entails, this system has the disadvantage of reducing the benefits, if any, of the most-favoured-nation clause, without eliminating the resulting disadvantages for the granting State. Of course, the beneficiary State cannot bring the clause into operation without offering the very advantages which it claims, but the unilateral nature of that step will almost always mean that the reciprocal benefits, although theoretically equivalent, will be very different in practice...¹⁴⁷

(38) Clearly the drafters of most-favoured-nation clauses combined with a condition of reciprocity do not aim at a treatment of their compatriots in foreign lands which is equal with that of the nationals of other countries whereas equality with competitors is of paramount importance in matters of trade and particularly as regards customs duties. What they are interested in is a different kind of equality: equal treatment granted by the contracting States to each other's nationals. Hence the view of level:

The most-favoured-nation clause combined with the condition of reciprocity does not seem to be conducive to the unification and simplification of international relations, a fact which deprives the clause of the few merits formerly attributed to it.¹⁴⁸

The text of the articles adopted by the Commission on the ground of the preceding considerations

(39) Article 8 adopted by the Commission states, in conformity with the general rules of the law of treaties, that a most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree. Articles 9 and 10 describe the effect of an unconditional most-favoured-nation clause and that of a most-favoured-nation clause conditional on material reciprocity. According to article 9, in the case of an unconditional most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment (as defined in article 5) and the obligation to accord material reciprocity to the granting State does not arise for the beneficiary State. Article 10, on the other hand, states that in the case of a most-favoured-nation clause conditional on material reciprocity the beneficiary State acquires the right to most-favoured-nation treatment only upon according material reciprocity to the granting State.

(40) A most-favoured-nation clause can be made subject to the condition of material reciprocity by the wording of the clause itself, or by another provision of the treaty containing the clause or of any other treaty, or by any other kind of agreement between the granting and the beneficiary State.

(41) The meaning of material reciprocity, as indicated in paragraph (e) of article 2,¹⁴⁹ is "equivalent"

¹⁴⁷ A. Piot, "La clause de la nation la plus favorisée, *Revue critique de droit international privé* (Paris), vol. 45 (January-March 1956), No. 1, pp. 9-10 [translation from French].

¹⁴⁸ Level, *loc. cit.*, p. 338, para. 37 [translation from French].

¹⁴⁹ See above, paras. (7) to (12) of the commentary to article 2.

treatment, i.e., treatment of the same kind and of the same measure. For instance, if both the granting State and the beneficiary State permit each other's nationals access to their courts without depositing security for costs (*cautio judicatum solvi*), this constitutes material reciprocity, or similarly if they permit each other's nationals the free exercise of a certain kind of trade. This is called in French doctrine *réciprocité trait pour trait*. As will be seen in connexion with article 18, a most-favoured-nation clause of such a kind does not possess the same automaticity as the unconditional form, because the beneficiary State can enjoy the treatment extended by the granting State to a third State only after assuring the granting State that it will accord to it or to persons and things in a determined relationship with it treatment of the same kind.

(42) The conditions of reciprocity in a most-favoured-nation clause can give rise to serious questions of interpretation, mainly if the relevant rules of the interested countries differ substantially from each other.¹⁵⁰ This inherent difficulty, however, does not alter the validity of the rule.

(43) The commencement and the termination or suspension of the functioning of a most-favoured-nation clause combined with material reciprocity are dealt with later.¹⁵¹

Article 11. — Scope of rights under a most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State is entitled, for itself or for the benefit of persons or things in a determined relationship with it, only to those rights which fall within the scope of the subject-matter of the clause.

2. The beneficiary State is entitled to the rights under paragraph 1 only in respect of those categories of persons or things which are specified in the clause or implied from the subject-matter of that clause.

Article 12. — Entitlement to rights under a most-favoured-nation clause

1. The beneficiary State is entitled to the rights under article 11 for itself only if the granting State extends to a third State treatment which is within the field of the subject-matter of the most-favoured-nation clause.

2. The beneficiary State is entitled to the rights in respect of persons or things within categories under paragraph 2 of article 11 only if they

(a) belong to the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State and

(b) have the same relationship with the beneficiary State as those persons or things have with that third State.

Commentary to articles 11 and 12

The scope of the most-favoured-nation clause regarding its subject-matter

(1) The rule which is sometimes referred to as the *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice. The essence of the rule is explained by A. D. McNair in the following graphic way:

Suppose that a most-favoured-nation clause in a commercial treaty between State A and State B entitled State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.¹⁵²

Although the meaning of the rule is clear, its application is not always simple. From the abundant practice the following selection of cases may illustrate the difficulties and solutions.

(2) In the *Anglo-Iranian Oil Company Case* (1952), the International Court of Justice stated:

The United Kingdom also put forward, in a quite different form, an argument concerning the most-favoured-nation clause. If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under the most-favoured-nation clause, then the United Kingdom would not be in the position of the most-favoured-nation. *The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments.** If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This cannot give rise to any question relating to most-favoured-nation treatment.¹⁵³

(3) In the *Ambatielos case*¹⁵⁴ the Commission of Arbitration held, in its award of 6 March 1956, the following views on article X (most-favoured-nation clause) of the Anglo-Greek Treaty of Commerce and Navigation of 1886:

¹⁵² McNair, *op. cit.*, p. 287.

¹⁵³ *Anglo-Iranian Oil Co. Case (Jurisdiction)*, Judgment of 22 July 1952 (*I.C.J. Reports 1952*, p. 93). For the facts and other aspects of the case, see *Yearbook... 1970*, vol. II, pp. 202-205, document A/CN.4/228 and Add.1, paras. 10-30.

¹⁵⁴ *The Ambatielos Case (merits: obligation to arbitrate)*, Judgment of 19 May 1953 (*I.C.J. Reports 1953*, p. 10).

¹⁵⁰ H. Batiffol, *Droit international privé*, 4th ed. (Paris, Librairie générale de droit et de jurisprudence, 1967), pp. 213-214, No. 188.

¹⁵¹ See below, articles 18 and 19 and the commentaries thereto.

The Commission [of Arbitration] does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State", which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.

On the other hand, the Commission [of Arbitration] holds that the most-favoured-nation clause can *only attract matters belonging to the same category of subject as that to which the clause itself relates*:*

The Commission [of Arbitration] is, however, of the opinion that in the present case the application of this rule can lead to conclusions different from those put forward by the United Kingdom Government.

In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including "all matters relating to commerce and navigation". It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3, of which guarantees to the subjects of the two Contracting Parties "free access to the Courts of Justice for the prosecution and defense of their rights". That is also the case as regards the other Treaties referred to by the Greek Government in connexion with the application of the most-favoured-nation clause.

It is true that "the administration of Justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connexion with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.¹⁵⁵

In summing up its views with respect to the interpretation of article X of the Treaty of 1886, the Commission of Arbitration stated that it was of the opinion:

(1) that the Treaty concluded on 1st August 1911, by the United Kingdom with Bolivia cannot have the effect of incorporating in the Anglo-Greek Treaty of 1886 the "principles of international law", by the application of the most-favoured-nation clause;

(2) that the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation;

(3) that none of the provisions concerning the administration of justice which are contained in the Treaties relied upon by the

Greek Government can be interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of "justice", "right", and "equity" different from that for which the municipal law of the State concerned provides;

(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;

(5) that it follows from the decision summarized in (3) above that Article X of the Treaty does not give to its beneficiaries any remedy based on "unjust enrichment" different from that for which the municipal law of the State provides.

... the Commission [of Arbitration] is of the opinion that "free access to the Courts", which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886, includes the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

The Commission [of Arbitration] is therefore of the opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute ...¹⁵⁶

(4) Decisions of national courts also testify to the general recognition of the rule. In an early French case (1913), the French Court of Cassation had to decide whether certain procedural requirements for bringing suit as provided in a French-Swiss Convention on jurisdiction and execution of judgement applied also to German nationals as a result of a most-favoured-nation clause in a Franco-German commercial treaty concluded at Frankfurt on 10 May 1871. The Franco-German treaty guaranteed most-favoured-nation treatment in their commercial relations including the "admission and treatment of subjects of the two nations". The decision of the Court was based in part on the following propositions: that "these provisions pertain exclusively to the commercial relations between France and Germany, considered from the viewpoint of the rights under international law, but they do not concern, either expressly or implicitly, the rights under civil law, particularly, the rules governing jurisdiction and procedure that are applicable to any disputes that develop in commercial relations between the subjects of the two States"; and that further: "The most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as that of the particularly favourable treaty the benefit of which is claimed"¹⁵⁷

(5) In *Lloyds Bank v. De Ricqlès and De Gaillard* before the Commercial Tribunal of the Seine, Lloyds Bank, which as the plaintiff had been ordered to give security for costs (*cautio judicatum solvi*) invoked ar-

¹⁵⁶ *Ibid.*, pp. 109-110.

¹⁵⁷ Whiteman, *op. cit.*, pp. 755-756, quoting the decision of the French Court of Cassation, 22 December 1913, in the case of *Braunkohlen Briker Verkaufsverein Gesellschaft c. Goffart, ès qualités*. The decision is also quoted by Level, *loc. cit.*, p. 338, para. 38, and Batiffol, *op. cit.*, p. 216, No. 189.

¹⁵⁵ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 106-107.

ticle I of an Anglo-French Convention of 28 February 1882.¹⁵⁸ That Convention intended, according to its Preamble, "to regulate the commercial maritime relations between the two countries, as well as the status of their subjects", and article I provided, with an exception not relevant here, that:

... each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce or industry which have been or may be conceded by one of the High Contracting Parties to any third nation whatsoever, whether within or beyond Europe.¹⁵⁹

On the basis of that article Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. The court rejected this claim, holding that a party to a convention of a general character such as the Anglo-French Convention regulating the commercial and maritime relations of the two countries could not claim under the most-favoured-nation treatment clause the benefits of a special Convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely, freedom from the obligation to give security for costs.¹⁶⁰

(6) Drafters of a most-favoured-nation clause are always confronted with the dilemma of either drafting the clause in too general terms, risking thereby the loss of its effectiveness through a rigid interpretation of the *ejusdem generis* rule, or drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration.

(7) The rule is observed also in the extra-judicial practice of States as shown by the case concerning the Commercial Agreement of 25 May 1935 between the United States of America and Sweden, article I of which provided as follows:

Sweden and the United States of America will grant each other unconditional and unrestricted most-favoured-nation treatment in all matters concerning the Customs duties and subsidiary charges of every kind and in the method of levying duties, and, further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the Customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.¹⁶¹

A request was submitted in 1949 to the Department of State that it inform the New York State Liquor

Authority that a liquor licence to sell imported Swedish beer in New York should be issued to a certain firm of importers. The Office of the Legal Adviser, Department of State, interpreted the treaty provisions as follows:

Since the most-favoured-nation provision in the Reciprocal Trade Agreement between the United States and Sweden signed in 1935 is designed only to prevent discrimination between imports from and exports to Sweden as compared with imports from and exports to other countries, I regret that this Department would be unable to send to the New York Liquor Authority a letter such as you suggest to the effect that the Agreement accords to Swedish *nationals* the same treatment as is accorded to the *nationals* of other countries.

All of the countries listed in the enclosure to your letter (countries, nationals of which are held by the New York State Liquor Authority to be entitled to liquor licences) have treaties with the United States which grant either national or most-favoured-nation rights as to engaging in trade to nationals of those countries. Thus existence of the trade agreements to which you refer in addition to these treaties, is irrelevant ...¹⁶²

(8) In the following examples the question of the application of the rule arose under extraordinary circumstances. In the case of *Nyugat-Swiss Corporation Société Anonyme Maritime et Commerciale v. State* (Kingdom of the Netherlands) the facts were as follows: on 13 April 1941, the steamship *Nyugat* was sailing outside territorial waters of the former Dutch East Indies. She sailed under the Hungarian flag. The Netherlands destroyer *Kortenaar* stopped her, searched her and took her into Surabaya, where she was sunk in 1942. The plaintiffs claimed that the action taken with regard to the *Nyugat* was illegal. The vessel was Swiss property. She had formerly belonged to a Hungarian company, but the Swiss Corporation became the ship's owner in 1941, when it already held all shares in the Hungarian company. The Hungarian flag was a neutral flag. Defendant relied upon the fact that on 9 April 1941, diplomatic relations between the Netherlands and Hungary were severed, that on 11 April 1941, Hungary, as an ally of Germany, attacked Yugoslavia and that consequently on the basis of certain relevant Dutch decrees the capture of the ship was legal. Plaintiffs contended that these decrees were in conflict with the Treaty of Friendship, Establishment and Commerce, concluded with Switzerland at Berne on 19 August 1875¹⁶³ and with the Treaty of Commerce, concluded with Hungary on 9 December 1924,¹⁶⁴ and notably the most-favoured-nation clause contained in these treaties. Plaintiffs referred to the Treaty of Friendship, Navigation and Commerce signed on 1 May 1829, with the Republic of Colombia, providing that "if at any time unfortunately a rupture of the ties of friendship should take place" the subjects of the one

¹⁵⁸ *British and Foreign State Papers, 1881-1882* (London, Ridgway, 1889), vol. 73, p. 22.

¹⁵⁹ *Ibid.*, pp. 23-24.

¹⁶⁰ H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1929-30*, London, vol. 5 (1935), Case No. 252, p. 404; *Journal du droit international* (Paris), 58th year (1931), p. 1018, digested by McNair, *op. cit.*, p. 287. Other cases before French courts based on the *ejusdem generis* rule are cited by A.-Ch. Kiss, "La convention européenne d'établissement et la clause de la nation la plus favorisée", *Annuaire français de droit international*, 1957 (Paris), vol. III, p. 478; cases before American courts, by Hackworth, *op. cit.*, pp. 292-293.

¹⁶¹ League of Nations, *Treaty Series*, vol. CLXI, p. 111.

¹⁶² Legal Adviser Fisher, Department of State, 3 November 1949, MS. Department of State, quoted by Whiteman, *op. cit.*, p. 760.

¹⁶³ Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, No. 137, 1878, Decree of 19 September 1878.

¹⁶⁴ *Ibid.*, No. 36, 1926, Decree of 3 March 1926.

party residing in the territory of the other party "will enjoy the privilege of residing there and of continuing their business ... as long as they behave peacefully and do not violate the laws; their property ... will not be subject to seizure and attachment".¹⁶⁵ The Court held:

The invoking of this provision fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the Second World War; in the present case the determination of the flag was also based upon the assumption by Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in with the provisions of the 1829 Treaty. From the preceding it follows that the shipowners are wrong in their opinion that the Court should not apply the Decree as being contrary to international provisions.¹⁶⁶

(9) According to A. D. McNair, "some authority exists" for the view that rights and privileges obtained in the course of a territorial and political arrangement or a peace treaty "cannot be claimed under a most-favoured-nation clause". "The reason", he believes, "presumably is that such concessions are not commercial, while most-favoured-nation clauses are usually concerned with trade and commerce".¹⁶⁷ He quotes an opinion of a law officer given in 1851. This denied to Portugal and Portuguese subjects the right "to dry on the coast of Newfoundland the Cod-fish caught by them on the Banks adjoining thereto". The claim was based on a most-favoured-nation clause in a treaty of 1842 between Great Britain and Portugal designed to secure the same privileges as were granted by Britain to France and to the United States of America by the Treaties of 1783. Those Treaties formed part of a general arrangement made at the termination of a war. The law officer stated:

... I am of opinion that the Stipulation of the 4th Article of the Treaty of 1842 cannot justly be considered as applicable to the permission which he [the Portuguese Chargé d'Affaires] claims on behalf of Portuguese Subjects.

I consider that these privileges were conceded to France and the United States of America as part of a Territorial and Political Arrangement extorted from Great Britain at the termination of a War which had been successfully carried on against her by those Nations.¹⁶⁸

(10) There is no writer who would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the

rights conferred by other treaties (or unilateral acts) in regard to the same matter or class of matter.¹⁶⁹

(11) The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.¹⁷⁰ Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.

(12) The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.¹⁷¹ The granting State cannot evade its obligations, unless an express reservation so provides,¹⁷² on the ground that the relations between itself and the third country are friendlier than or "not similar" to those existing between it and the beneficiary. It is only the subject-matter of the clause which must belong to the same category, the *idem genus*, and not the *relation* between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the *treaty* including the clause must be of the same category (*ejusdem generis*) as that of the benefits which are claimed under the clause.¹⁷³ To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

The scope of the most-favoured-nation clause regarding persons and things

(13) In respect of the subject-matter, the right of the beneficiary State is restricted in two ways: first, by the clause itself, which always refers to a certain

¹⁶⁹ See *Yearbook... 1970*, vol. II, p. 210, document A/CN.4/228 and Add.1, para. 68.

¹⁷⁰ *Ibid.*, p. 211, document A/CN.4/228 and Add.1, para. 72.

¹⁷¹ In connexion with the problem of "like products", see the relevant passage in the excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause annexed to the Special Rapporteur's first report (*Yearbook... 1969*, vol. II, p. 178, document A/CN.4/213, annex 1); and articles I, II and XIII of the General Agreement on Tariffs and Trade (United Nations, *Treaty Series*, vol. 55, pp. 196-200, 204-208 and 234-238; *ibid.*, vol. 62, pp. 82-86 and 90; *ibid.*, vol. 138, p. 336). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose; these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (*ibid.*, vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (*ibid.*, vol. 347, p. 127).

¹⁷² See below, article 26 and commentary thereto.

¹⁷³ Vignes, *loc. cit.*, p. 282.

¹⁶⁵ *British and Foreign State Papers, 1829-1830* (London, Ridgway, 1832), p. 902.

¹⁶⁶ Judgment of 6 March 1959 by the Supreme Court of the Netherlands (*Nederlandse Jurisprudentie 1962*, No. 2, pp. 18-19) [original text: Dutch].

¹⁶⁷ McNair, *op. cit.*, p. 302.

¹⁶⁸ *Ibid.*, p. 303.

matter,¹⁷⁴ and secondly, by the right conferred by the granting State on the third State.

(14) The situation is similar, though not identical, in respect of the subjects in the interest of which the beneficiary State is entitled to claim most-favoured-nation treatment. The clause itself may indicate those persons, ships, products, etc., to which it applies but it may not necessarily do so. The clause may simply state that the beneficiary State is accorded most-favoured-nation treatment in respect of customs duties, or in the field of commerce, shipping, establishment, etc., without specifying the persons or the things that will be given most-favoured-nation treatment. In such cases the indication of the field of operation for the clause implicitly denotes the class of persons and things in whose interest the beneficiary may exercise its rights.

(15) The beneficiary State may claim most-favoured-nation treatment only for that category of persons or things (merchants, commercial travellers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) which receives or is entitled to receive certain treatment, certain favours under the right of a third State. And, further, the persons and things in respect of which most-favoured-nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons and things with the third State (nationals, resident nationals, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.).¹⁷⁵

(16) The following French case can serve as an illustration of the proposed rule: Alexander Serebriakoff, a Russian subject, brought an action against Mme. d'Oldenbourg, also a Russian subject, alleging the nullity of a will under which she was a beneficiary. The defendant, after having obtained French citizenship by naturalization, obtained an *ex parte* decision from the Court of Appeal of Paris ordering Serebriakoff to furnish 100,000 francs security. Against this *ex parte* decision Serebriakoff appealed, claiming *inter alia* that he was exempt from furnishing security by the terms of the Franco-Russian agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court said:

Whereas the Decree of 23 January 1934 ordering the provisional application of the trade agreement concluded on 11 January 1934 between France and the USSR ... is not applicable in the current case; and Alexander Serebriakoff is not entitled to claim the benefit of that agreement; and, while the agreement does provide, on the basis of reciprocity, free and unrestricted access by Russian subjects to French courts, the privilege thus granted to such sub-

jects is limited strictly to merchants and industrialists; and this conclusion results inevitably both from the agreement as a whole and from the separate consideration of each of its provisions; and the agreement in question is entitled "Trade Agreement"; and the various articles of which it is composed confirm that description, and its article 9, on which Serebriakoff specifically relies, in determining the beneficiaries of the provisions in question, begins with the word: "Save in so far as may be otherwise provided subsequently, French merchants and manufacturers, being natural or legal persons under French law, shall not be less favourably treated ... than nationals of the most-favoured-nation ..."¹⁷⁶

(17) In another case the Tribunal de Grande Instance de la Seine held that the most-favoured-nation clause embodied in the Franco-British Convention of 28 February 1882, as supplemented by an exchange of letters of interpretation of 21 and 25 May 1929, by which British subjects were entitled to rely on treaties stipulating the assimilation of foreigners to nationals, applied solely to British subjects who settled in France. The Tribunal said:

... [a] British national domiciled in Switzerland may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British Nationals established in France and therefore entitled to carry on a remunerative activity there on a permanent basis.¹⁷⁷

(18) Article 12, when referring to the same category of things, implicitly states the rule regarding the controversial notion of "like articles" or "like products". It is not uncommon for commercial treaties to state explicitly that in respect to customs duties or other charges, the products, goods, articles, etc., of the beneficiary State will be accorded any favours accorded to like products, etc., of the third State.¹⁷⁸ Obviously, even in the absence of such an explicit statement the beneficiary State may claim most-favoured-nation treatment only for the goods specified in the clause or belonging to the same category as the goods enjoying favoured treatment by the third State.

(19) The Commission did not wish to delve into all the intricacies of the notion of "like products". The following paragraphs supply a brief explanation. As to exactly what is meant by the expression as it appears in commercial treaties, H. C. Hawkins has this to say:

One test in such cases is a comparison of the intrinsic characteristics of the goods concerned. Such a test would prevent the classification of articles on the basis of external characteristics. If products are intrinsically alike, they should be considered to be like products, and differing rates of duty on them would contravene the most-favoured-nation clause. For example, in the Swiss Cow case¹⁷⁹ the question arises whether a cow raised at a certain elevation is "like" a cow raised at a lower level. Applying the intrinsic-characteristics test gives a simple answer to the question. The cows are intrinsically alike, and a tariff classification based on

¹⁷⁴ With very rare exceptions, there is no clause in modern times which would not be restricted to a certain sphere of relations, e.g., commerce, establishment and shipping. See above, para. (14) and (15) of the commentary to article 4.

¹⁷⁵ See above, para. (3) of the commentary to article 5.

¹⁷⁶ See *Yearbook... 1973*, vol. II, p. 132, document A/CN.4/269, para. 40.

¹⁷⁷ *Ibid.*, p. 145, document A/CN.4/269, para. 78.

¹⁷⁸ See article I, para. 1, of the General Agreement on Tariffs and Trade, quoted above (para. (10) of the commentary to article 4).

¹⁷⁹ See below, para. (20) of this commentary.

such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favor of a particular country.

In other situations the application of the intrinsic characteristic test would show clearly that a classification was *not* objectionable. To invent such a case: under the tariff law of the United States, apples are dutiable and bananas are free of duty. If Canada and the United States have a treaty providing that products of either party will be accorded treatment no less favourable than that accorded to "like articles" of any third country, Canada might argue that apples should be free of duty. Any such claim would have to be based on the argument that since both bananas and apples are used for the same purpose, i.e. eating, they are "like articles". Applying the test of intrinsic characteristics in this case would promptly settle the question, since apples and bananas are intrinsically different products.¹⁸⁰

(20) As to the Swiss Cow case, mentioned in the text quoted in the preceding paragraph, the Special Rapporteur in his second report had the following to say:

The difficulties inherent in the expression "like product" can *ad oculos* be demonstrated in the following manner. In the working paper on the most-favoured-nation clause in the law of treaties, submitted by the Special Rapporteur on 19 June 1968, the following classical example of an unduly specialized tariff was cited under the heading "Violations of the clause".¹³⁷ In 1904 Germany granted a duty reduction to Switzerland on:

"large dappled mountain cattle or brown cattle reared at a spot at least 300 metres above sea level and which have at least one month's grazing each year at a spot at least 800 metres above sea level."¹³⁸

Sources quoting this example generally consider a cow raised at a certain elevation "like" a cow raised at a lower level. This being so, they believe—and the working paper followed this belief—that a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country, in the case in question, in favour of Switzerland and against, for example, Denmark.¹³⁹ However, the Food and Agriculture Organization of the United Nations, being an interested agency and having special expertise in matters of animal trade, in its reply to the circular letter of the Secretary-General, made the following comment on the example given in the working paper.

"In view of the background situation relating to the case cited in the example, it would seem that the specialized tariff may have been technically justified because of the genetic improvement programme which was carried out in Southern Germany at that time. At present, this specialized tariff would presumably have been worded in a different way, but in 1904 terms like Simmental or Brown Swiss were probably not recognized as legally valid characteristics [...]. Apart from this, it must be recognized that unduly specialized tariffs and other technical or sanitary specifications have been—and continue to be—used occasionally for reasons that may be regarded as discriminatory."

¹³⁷ Yearbook... 1968, vol. II, p. 170, document A/CN.4/L.127, para. 31.

¹³⁸ League of Nations, Economic and Financial Section, *Memorandum on Discriminatory Classifications* (Ser.L.O.N.P.1927.II.27), p. 8.

¹³⁹ H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart, 1951, pp. 93-94; J. E. S. Fawcett, "Trade and Finance in International Law", ... *Recueil des cours*... 1968 (Leyden, Sijthoff, 1969), vol. 123, p.263.¹⁸¹

¹⁸⁰ Hawkins, *op.cit.*, pp. 93-94.

¹⁸¹ Yearbook... 1970, vol. II, pp. 221-222, document A/CN.4/228 and Add.1, para 148.

(21) That the difficulties caused by the interpretation of the phrase "like products" are not insurmountable between parties acting in good faith is shown by an exchange of views made in the Preparatory Committee of the International Conference on Trade and Employment:

... the United States said:

"This phrase had been used in the most-favoured-nation clause of several treaties. There was no precise definition but the Economic Committee of the League of Nations had put out a report that 'like product' meant 'practically identical with another product'.

This lack of definition, however, in the view of the British delegate,

"has not prevented commercial treaties from functioning, and I think it would not prevent our Charter from functioning until such time as the ITO is able to go into this matter and make a proper study of it. I do not think we could suspend other action pending that study ..."

and Australia further noted:

"All who have had any familiarity with customs administration know how this question of 'like products' tends to sort itself out. It is really adjusted through a system of tariff classification, and from time to time disputes do arise as to whether the classification that is placed on a thing is really a correct classification. I think while you have provision for complaints procedure through the Organization you would find that this issue would be self-solving."¹⁸²

(22) The Commission is aware that the application of the rule contained in articles 11 and 12 can, in certain cases, cause considerable difficulties. It has stated already that the expression "same relationship" has to be used with caution because, for 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.¹⁸³ Similar difficulties can be encountered when treaties refer to internal law in other instances: for example, where the right of establishment of legal persons is concerned. The case of legal persons can raise a particularly difficult problem because they are defined by internal law. When, for example, a treaty expressly grants to a third State favourable treatment for a category of legal persons specified according to the internal law of the third State, e.g., a particular kind of German limited liability company (*Gesellschaft mit beschränkter Haftung*) that is unknown to the Anglo-Saxon countries, could the United Kingdom invoke the most-favoured-nation clause to claim the same advantages for the British type of company that most closely re-

¹⁸² J. H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Indianapolis, Bobbs-Merrill, 1969), pp. 260-261. Excerpts from the reports of the Economic Committee of the League of Nations are annexed to the Special Rapporteur's First report (see Yearbook... 1969, vol. II, p. 175, document A/CN.4/213, annex I).

¹⁸³ See above, para. (3) of the commentary to article 5.

sembles the German type of company referred to in the treaty, or would it be debarred from doing so? Similarly, if a treaty grants some advantage to French companies of the type known as *association en participation*, which corresponds to the "joint venture" of the common law countries, would an Anglo-Saxon country be able to invoke the most-favoured-nation clause to claim the same advantages for those of its companies which are of the "joint venture" type?

(23) A similar problem may arise in connexion with the nationality of companies, which is not determined by international law. For when, under a treaty of establishment, a State grants to another advantages for its national companies, it is the law of that State which determines the nationality of those companies. That being so, could the State which claims the benefit of the most-favoured-nation clause claim it for all the companies defined as national under its own law? Under that law a company might be regarded as national merely if it had its registered offices or principal place of business in the territory of the State in question, or if that State controlled a substantial part of the registered capital. Might not then the granting State be able to object that the national companies of a third State to which it had granted advantages were defined much more restrictively under the law of that third State? Hence, the granting State might refuse to accord the benefit of the clause, arguing that it had extended to the third State a specific kind of advantage, which, if it were transposed into the law of another State, would become more extensive.

(24) Some of the cases quoted above testify to the difficulties which are encountered when it comes to the question whether a particular right falls within the scope of the subject-matter of the clause or is outside it. All these difficulties are inherent in the application of a most-favoured-nation clause and do not detract from the usefulness of articles 11 and 12 which, as a general rule, state and elucidate the mechanism of the most-favoured-nation clause.

(25) On the basis of the foregoing, article 11 entitled "Scope of rights under a most-favoured-nation clause" indicates indeed the *potential* scope of the clause. Its *paragraph 1* provides that the beneficiary State is entitled only to those rights which fall within the scope of the subject-matter of the clause, and *paragraph 2* gives a further precision to the rule in stating that the beneficiary State can exercise its rights falling within the subject-matter of the clause only in respect of those categories of persons or things which are specified in the clause or implied from the subject-matter of that clause. If the clause refers simply, e.g., to shipping or to consular matters or to commerce in general, then these general references imply in a more or less precise fashion the persons or things in respect of which the beneficiary State is entitled to the rights in a most-favoured-nation clause.

(26) Article 12 which appears under the heading "Entitlement to rights under a most-favoured-nation

clause" indicates the *actual* scope of the clause. *Paragraph 1* provides that even if the beneficiary State wishes to claim for itself rights falling within the scope of the subject-matter of the clause, it will be entitled to those rights only if a condition is fulfilled, namely, that the granting State extends to a third State treatment which falls within the same subject-matter. *Paragraph 2* of the article provides that if the beneficiary State makes claim to rights in respect of persons or things which are specified in the clause or implied from the subject-matter, it will be entitled to the rights under the clause only if the persons or things in question: (a) fall into the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State, and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

Article 13. — Irrelevance of the fact that treatment is extended gratuitously or against compensation

The beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, acquires under a most-favoured-nation clause the right to most-favoured-nation treatment independently of whether the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended gratuitously or against compensation.

Commentary

(1) It is not only most-favoured-nation promises which can be classified as unconditional or conditional on material reciprocity or on another kind of compensation; the favours extended by the granting State to third States can be classified in a similar manner; they can be granted unilaterally as a gift, in theory at least, or they can be accorded against some kind of compensation. For example, the granting State may reduce its tariffs on oranges imported from a third State unilaterally or it can bind this reduction to a tariff reduction by the third State on the textiles imported by the latter from the granting State. To give another example, the granting State can assure the third State that the consuls of the latter will have immunity from criminal jurisdiction unilaterally or it may agree with the third State that the grant of immunity from criminal jurisdiction will be reciprocal. If in such types of cases the granting State offers the most-favoured-nation treatment to a beneficiary State unconditionally, the question arises: are the rights of the beneficiary State affected by whether the promises of the granting State to the third State were made subject to certain conditions or not?

(2) There is a contradictory practice regarding the question just posed. In certain cases the courts reached conclusions different from that reflected in article 13. Thus in 1919 the highest Court of Argen-

tina rejected an appeal against a decision of the High Court of Santa Fé and ruled that:

... neither the appellant's invocation of the powers conferred upon consuls under the treaties concluded with the United Kingdom in 1825 (article 13) and with the Kingdom of Prussia and the States of the German Customs Union in 1857 (article 9), which he claims extend to consuls of the Kingdom of Italy by virtue of the most-favoured-nation clause inserted in the agreements concluded with that Kingdom, nor precedent—if any—would affect the settlement of the point at issue under federal law. In the first place, since these were concessions granted subject to reciprocity, it would have been necessary to show that the Italian Government granted, or was prepared to grant, those same concessions to consuls of Argentina ...¹⁸⁴

(3) A German court in 1922 rejected an appeal by a French plaintiff against an order to deposit security for costs in an action brought by him against a German national. Section 110 of the German Code of Civil Procedure laid down that aliens appearing as plaintiffs before German courts must at the defendant's request deposit a security for costs. This provision did not apply to aliens whose own State did not demand security for costs from Germans appearing as plaintiffs. In article 291 (I) of the Treaty of Versailles Germany undertook:

to secure to the Allied and Associated Powers, and to the officials and nationals of the said Powers, the enjoyment of all the rights and advantages of any kind which she may have granted to Austria, Hungary, Bulgaria or Turkey, or to the officials and nationals of these States by treaties, conventions or arrangements concluded before August 1, 1914, so long as those treaties, conventions or arrangements remain in force.

There existed between Germany and Bulgaria a treaty providing for the exemption, on the basis of reciprocity, from the duty to deposit security for costs. In a note, communicated to Germany in April 1921, the French Government informed the German Government that it wished to avail itself of the relevant provisions of the Treaty between Germany and Bulgaria. The plaintiff did not prove that in France German nationals were exempt from depositing security for costs in actions brought against French nationals. The Upper District Court held that the appeal must be dismissed. Article 291 of the Treaty of Versailles, according to the Court, did not oblige Germany to grant to French nationals wider privileges than those granted to the nationals of the former Central Powers. The Court said that the treaty with Bulgaria was based on reciprocity and that, as France did not grant such reciprocal treatment, its nationals were not entitled to an exemption from the duty to deposit security for costs.¹⁸⁵

(4) The following instance, although coloured with references to French internal legislation, reveals the various trends in French thinking on the problem at

issue. The brothers Betsou, Greek subjects, in 1917 leased certain premises in Paris for commercial use. The lease expired in 1926. The lessors refused to renew the lease, whereupon the plaintiffs claimed 200,000 francs as damages for eviction. Their claim was based on the provisions of the Law of 30 June 1926, which granted certain privileges to those engaged in business activities. In support of their claim to the privileges of this law in spite of their foreign nationality, they cited the Franco-Greek Convention of 8 September 1926, and through the operation of the most-favoured-nation clause contained therein, the Franco-Danish Convention of 9 February 1910, Denmark being in this regard the most-favoured-nation. Article 19 of the Law of 1926 provided that aliens should be entitled to its privileges only subject to reciprocity. The Civil Tribunal of the Seine held for the plaintiffs and said that through the operation of the most-favoured-nation clause, Greek subjects in France enjoyed the same privileges in commerce and industry as Danish subjects. The Franco-Danish Convention stipulated that in the exercise of their commercial activities Danes enjoyed all the privileges granted to French nationals by subsequent legislation. The Law of 30 June 1926, undoubtedly conferred privileges upon those who were engaged in commerce. Although the terms of article 19 of the French Law required reciprocity in legislation as an absolute and imperative rule, and although there was no legislation on commercial property in Denmark, the French Law should be interpreted in accordance with the Franco-Danish Convention. Danish subjects could not be deprived of their rights and privileges by subsequent French legislation. The Tribunal said:

A convention between nations, as a contract between private persons, is a reciprocal engagement which should be observed by both parties so long as the treaty is not denounced or replaced by a new treaty which restricts the effects of the original contract.

The Court of Appeal of Paris, reversing the decision of the Tribunal of the Seine, held that the brothers Betsou could not claim a right to the renewal of their lease. The Law of 30 June 1926 clearly showed that it construed the right of commercial property as *un droit civil stricto sensu*, that is to say, as a right subject to the provision of article 11 of the Civil Code which made the enjoyment of rights by foreigners dependent upon the reciprocal treatment of French subjects abroad. In the Franco-Danish treaty it had been carefully stated that the nationals of the two States would only enjoy the rights and privileges stipulated in so far as those rights and privileges were compatible with the existing legislation of the two States, and Danish legislation did not recognize the rights of foreigners to hold commercial property in Denmark.¹⁸⁶

(5) An important French source finds the solution of the lower court, the Civil Tribunal of the Seine, justified. According to this source:

¹⁸⁴ See *Yearbook... 1973*, vol. II, p. 118, document A/CN.4/269, foot-note 2.

¹⁸⁵ *Security for Costs (Treaty of Versailles) Case*, Germany, Upper District Court, Frankfurt-on-the-Main, 11 December 1922 (*ibid.*, p. 128, document A/CN.4/269, paras. 24–25).

¹⁸⁶ *Betsou v. Volzenlogel*, France, Civil Tribunal of the Seine, 23 December 1927; Court of Appeal of Paris (First Chamber), 24 December 1928 (*ibid.*, p. 129, document A/CN.4/269, paras. 28–30).

... reciprocity (whether that of article 11 [of the Civil Code] or that deriving from a reciprocity clause) is concrete reciprocity. On the other hand, the most-favoured-nation clause, when it is bilateral, establishes a kind of abstract reciprocity: States mutually undertake to accord to each other the treatment which they accord to some more-favoured third States. Here the clause appears like one of those treaties referred to in article 11 [of the Civil Code] which grant exemption from the requirement of material reciprocity.¹⁸⁷

(6) A convincing motivation for the solution proposed in article 13 can be found in a Greek decision reported as follows: the Convention concerning Establishment and Judicial Protection concluded between Greece and Switzerland on 1 December 1927 provides in article 9 that:

in no case shall the nationals of either of the Contracting Parties be subjected on the territory of the other Contracting Party to charges, customs duties, taxes, dues or contributions of any nature different from or higher than those which are or will be imposed on subjects of the most-favoured-nation.

Article II, which relates to commercial, industrial, agricultural and financial companies, duly constituted according to the laws of one of the Contracting Parties and having their *siège* on its territory, provides that the said companies

shall enjoy, in every respect, the benefits accorded by the most-favoured-nation clause to similar companies, and, in particular they shall not be subjected to any fiscal contribution or charge, of whatever kind and however called, different from or higher than those which are or will be levied on companies of the most-favoured-nation.

The appellant in this case, a Swiss company whose head office was situated in Geneva, claimed exemption from income tax, invoking in support of that claim the Anglo-Greek Convention of 1936 for the Reciprocal Exemption from Income Tax on Certain Profits or Gains Arising from an Agency. Under that Convention, the profits or gains accruing in Greece to a person resident or to a body corporate whose business was managed and controlled in the United Kingdom, were exempted from income tax on condition of reciprocity. It was held that the appellant was entitled to fiscal exemption. It was said, *inter alia* that:

Whereas, in economic treaties in particular, the purpose of the most-favoured-nation clause is to avoid the danger that the subjects of Contracting States might possibly be placed in an unfavourable position compared with subjects of other States in the context of international economic competition. Through the operation of that clause, each of the two Contracting States grants to the other the favours which it has already granted to a third State and undertakes to grant it any favours which it may grant to a third State in future, for the duration of the treaty. Provided that there is no stipulation to the contrary in the agreement, such latter favours accrue *ipso jure* to the beneficiary of the clause, which does not have to furnish any additional compensation, even where the concessions granted to the third State are not unilateral but are subject to reciprocity. When interpreted in that sense, the clause achieves the purpose for which it was designed, namely, as-

simulation in each of the two States, in respect of the matters to which the clause relates, of the subjects or enterprises of the other State to the subjects or enterprises of a third and favoured country.

Whereas, in the current case, the most-favoured-nation clause embodied in the convention between Greece and Switzerland is simply stated without restriction or onerous conditions, and as such confers upon Swiss enterprises operating in Greece the right to fiscal exemption under the conditions under which the same exemption is granted to British enterprises, even if Greek enterprises do not enjoy in Switzerland the favour which they enjoy in Great Britain. Consequently, the impugned decision ... should for that reason be set aside ...¹⁸⁸

(7) The Commission believes that the rule stated in article 13 is in conformity with modern thinking on the operation of the most-favoured-nation clause. If the clause is unconditional, then the beneficiary State and the persons or things in a determined relationship with it acquire automatically the favours extended by the granting State to third States or to persons or things in a determined relationship with it in the manner and under the conditions described in articles 11 and 12. If the most-favoured-nation clause in question is explicitly termed unconditional or if it is silent concerning conditions, then, in the view of the Commission, the beneficiary State cannot be refused the treatment extended by the granting State to a third State on the ground that that treatment has been given against material reciprocity or against any other compensation. This is obvious if it is considered that the American form of conditional clause has completely gone out of use. It seems to be evident also in fields other than trade. In these fields the parties to a most-favoured-nation clause can freely agree on granting each other most-favoured-nation treatment subject to material reciprocity. In such cases the question does not arise. If they fail to do so, however, it follows from the nature of an unconditional most-favoured-nation clause that the granting State cannot withhold from the beneficiary State the treatment extended by it to a third State on the ground that that latter treatment was not extended gratuitously but against reciprocity or any other kind of compensation.

(8) On the basis of the foregoing, the Commission found it appropriate to adopt a rule stating the irrelevance of whether the treatment granted to a third State was accorded gratuitously or against compensation. This rule is in accordance with the basic purposes of a most-favoured-nation clause and also with the presumption of the unconditionality of that clause.

**Article 14. — Irrelevance of restrictions
agreed between the granting and third States**

The beneficiary State is entitled to treatment extended by the granting State to a third State whether

¹⁸⁷ Level, *loc. cit.*, p. 338, para. 36.

¹⁸⁸ Fiscal Exemption Case in Greece; Greece, Conseil d'État, 1954 (*Yearbook...* 1973, vol. II, p. 138, document A/CN.4/269, paras. 58-59).

or not such treatment is extended under an agreement limiting its application to relations between the granting State and the third State.

Commentary

(1) This rule clearly follows from the general rule regarding third States of the Vienna Convention (articles 34–35) and also from the nature of the most-favoured-nation clause itself. The statement of the rule is, however, warranted by the fact that there exist a number of agreements aiming more or less clearly at a result of the kind referred to in the article, notwithstanding the doubts about the effect of such agreements upon the rights of third States, beneficiaries of a most-favoured-nation clause. Such agreements can take the form of treaty provisions (*clauses réservées*) or they may purportedly be implied in certain multilateral treaties.

(2) The rule proposed in the article applies to most-favoured-nation clauses irrespective of whether they belong to the unconditional type or take the form of a clause conditional upon material reciprocity. The rule was formulated in paragraph 2 of the resolution adopted by the Institute of International Law at its fortieth session, in 1936, as follows:

This régime of unconditional equality [established by the operation of an unconditional most-favoured-nation clause] cannot be affected by the contrary provisions of ... conventions establishing relations with third States.¹⁸⁹

(3) In the League of Nations Economic Committee there was a discussion of the question, originally raised at the Diplomatic Conference held at Geneva to draw up an International Convention on the Abolition of Import and Export Prohibitions and Restrictions, whether States not parties to the proposed Convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories of the International Convention. At the Conference it was soon realized, however, that this question could not be answered in the Convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. In the Economic Committee, a proposal was made to adopt a provision designed to restrict the stipulations of the Convention to the contracting parties.¹⁹⁰

(4) There are a number of conventions which contain clauses by which the parties intend to restrict certain benefits to the relations established between themselves. Thus, the first paragraph of article 6 of the International Convention for the Unification of Certain Rules Relating to the Immunity of State-

owned Vessels, signed at Brussels on 10 April 1926,¹⁹¹ reads as follows:

The provisions of this Convention shall be applied in each contracting State, with the reservation that its benefits may not be extended to non-contracting States and their nationals, and that its application may be conditioned on reciprocity.

The following remark is made concerning this provision by D. Vignes:

Such a provision has the disadvantage of failing to release contracting States from their obligations under previous clauses, of having the status of *res inter alios acta* for the other States which are parties to those clauses and thus placing the States which subscribe to it in the position of being potential violators of the clause.¹⁹²

The reference in the clause to reciprocity does not counteract its inherent weakness, because unconditional obligations cannot be transformed into conditional ones without the consent of the respective beneficiaries.

(5) A somewhat milder version of the clause has been inserted in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages signed at Brussels, also on 10 April 1926.¹⁹³ Article 14 of the Convention reads as follows:

The provisions of this Convention shall be applied in each contracting State in cases in which the vessel to which the claim relates belongs to a contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this Convention in favour of the nationals of a non-contracting State.

(6) Article 98, paragraph 4, of the Havana Charter of 24 March 1948, which was prepared with the intention of establishing an International Trade Organization (ITO) read as follows:

Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms or the spirit of the Charter.¹⁹⁴

Although this provision is not a "*clause réservée*", it was severely criticized as long ago as 1948. The representative of the Soviet Union, Mr. Arutiunian, stated in the Economic and Social Council that:

Such a provision was equivalent to authorization of a departure from the most-favoured-nation principle in reciprocal relations

¹⁸⁹ *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

¹⁹⁰ *Ibid.*, pp. 179–180, document A/CN.4/213, annex I, under the heading "Relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions".

¹⁹¹ League of Nations, *Treaty Series*, vol. CLXXXVI, p. 209.

¹⁹² Vignes, *loc. cit.*, p. 291.

¹⁹³ League of Nations, *Treaty Series*, vol. CXX, p. 209.

¹⁹⁴ *United Nations Conference on Trade and Employment (Havana, Cuba, November 1947–March 1948), Final Act and Related Documents* (United Nations publication, Sales No. 1948.II.D.4), p. 51.

with non-member countries, and was in patent contradiction to the purpose of expanding world trade...¹⁹⁵

(7) From a strictly legal point of view, paragraph 4 of article 98 of the ITO Charter is an empty provision because it states only the obvious, namely, that the Charter does not impose obligations upon the members vis-à-vis non-members. The provision has, however, a certain propagational effect even if it is not assumed that it indirectly encourages the parties to the Charter to break the obligations which may exist for them under bilateral most-favoured-nation clauses with non-members. However, the ITO provision is not, and never was, in force and can hardly be considered as having any effect at present, not even through Article XXIX of the GATT, paragraph 1 of which states that:

The contracting parties undertake to observe to the fullest extent of their executive authority the general principles... of the Havana Charter...¹⁹⁶

(8) The idea of the provision contained in article 98 of the Havana Charter is, according to H.G. Hawkins,¹⁹⁷ reminiscent of the old conditional most-favoured-nation clause, in that countries that refuse to become parties to the General Agreement—and to make the tariff concessions that such participation would entail—may not be allowed to enjoy freely the benefits of that Agreement.

(9) There is no author expressly denying the rule proposed in article 14. As stated by one writer:

... The validity of the "clause réservée" is difficult to assess. Since the "clause réservée" is *res inter alios acta* as far as the beneficiary State entitled to claim most-favoured-nation treatment is concerned, it is hard to see how that clause, to which the State in question has not acceded, can reduce the scope of the commitments assumed towards it by the granting State.¹⁹⁸

The same writer tries to distinguish between two situations:

... If the treaty granting the privileged advantages and making them the subject of a "clause réservée" predates the convention according most-favoured-nation treatment it could be argued, taking into account the publicity necessarily given to treaties, that the beneficiary State could not have been unaware of the commitments entered into by the granting State and the "clause réservée" relating to those commitments. In such circumstances, the beneficiary State may be regarded as implicitly acceding to the "clause réservée". However, in the case of a "clause réservée" laid down after the most-favoured-nation clauses, the granting State, which has not attached to the latter clauses any accompanying provision limiting their scope, cannot, *a posteriori*, avoid their application by virtue of a commitment entered into with the favoured State to which the granting State has not been a party...¹⁹⁹

¹⁹⁵ See *Official Records of the Economic and Social Council, Seventh Session, 195th meeting*, p. 329.

¹⁹⁶ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 49. For a contrary view, see Jackson, *op. cit.*, p. 118.

¹⁹⁷ Hawkins, *op. cit.*, p. 85.

¹⁹⁸ Level, *loc. cit.*, p. 336, para. 20.

¹⁹⁹ *Ibid.*, para. 21 [original text: French].

This distinction, however, seems unwarranted and the argumentation in favour of the effect of the *clause réservée* stipulated previously to the most-favoured-nation clause is not sustained by any rule of the law of treaties. The author quoted himself abandons this idea when he concludes as follows:

... We know the solution... given by the International Court of Justice [in the *Anglo-Iranian Oil Co. case*]. The legal basis for most-favoured-nation treatment lies in the treaty which provides for such treatment, and the advantages accorded to the third State apply to the beneficiary State only by reference. Consequently, the "clause réservée" cannot be invoked against the State which is a beneficiary of the most-favoured-nation clause, since the rights of that State do not derive from the treaty containing the "clause réservée"...²⁰⁰

Article 15. — Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement.

Commentary

(1) The Commission has stated above that

It is not necessary... that the treatment actually granted to the third State, with respect to itself or the persons and things concerned, be based on a formal 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.²⁰¹

It would seem obvious that unless the clause otherwise provides or the parties to the treaty otherwise agreed, the beneficiary of the clause is entitled to its benefits irrespective of whether the granting State extended the favoured treatment to a third State by a mere fact or by a bilateral or multilateral agreement.

The most-favoured-nation clause and multilateral agreements

(2) However, the question whether a most-favoured-nation clause attracts benefits arising from a multilateral agreement is not without its own history. The relation between bilateral agreements based on the most-favoured-nation clause and "economic plurilateral conventions" was a matter of discussion already in the period of the League of Nations. The following is an excerpt from the conclusions of the Economic Committee of the League of Nations:

²⁰⁰ *Ibid.*

²⁰¹ See above, para. (5) of the commentary to article 5.

During the Diplomatic Conference held at Geneva to draw up an International Convention on the Abolition of Import and Export Prohibitions and Restrictions, the question arose whether States not parties to that Convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories of the International Convention. In deference to this consideration, it was even proposed to include a clause to that effect in the Convention. It was soon realized, however, that this question could not be answered in the Convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. The Conference realized the great importance of the problem, both for the general economic work of the League and for the conclusion of future economic agreements under the League's auspices, and the nature and field of application of such agreements. It was urged at the Conference that the conclusion of plurilateral conventions would be hindered if countries, while not acceding to such agreements, could still, without giving any counter-engagements, avail themselves of the engagements undertaken by the signatory States of such conventions.

The Economic Committee of the League was asked to make an exhaustive study of the most-favoured-nation clause in commercial treaties and to put forward proposals regulating it in as comprehensive and as uniform a manner as possible, and it has carefully considered the question, which is the subject of the present report. It took the view that the World Economic Conference of Geneva, when it recommended the conclusion of plurilateral economic conventions with the object of improving the world economic situation and the application of the most-favoured-nation clause in the widest and most unconditional form, probably did not quite realize that—up to a point—these two recommendations might clash. One argument—and a very sound one—brought up in the Economic Committee was that in certain cases countries would have little or no interest in acceding to a plurilateral economic convention or in undertaking the commitments it entailed if, by invoking the most-favoured-nation clause, as embodied in bilateral agreements, they could claim as of right and without incurring corresponding obligations, that the obligations contracted by the signatory States of the plurilateral convention should apply to themselves. It was strongly urged, indeed, that such possibility might seriously impair the whole future economic work of the League and that the only means of averting the danger would be to adopt a provision whereby the most-favoured-nation clause embodied in bilateral commercial treaties would not, as a rule, affect plurilateral economic conventions.

It was objected, however, that a clause of this kind, instead of leading, as the World Economic Conference recommended, to the unlimited application of the most-favoured-nation clause, would actually check it, and that, more especially in countries where the unlimited application of this clause is the basis of commercial relations with foreign countries, such a reservation would probably be misunderstood and might give rise to a hostile attitude towards the League's economic work. It was further argued that a State might quite conceivably, on wholly serious and genuine grounds, be unable to undertake the commitments involved by an international economic convention; that the final decision whether it could do so or not would lie with the State itself; and that it could hardly be asked, as a result of a most-favoured-nation clause drafted *ad hoc* in bilateral commercial treaties, to give up the right in cases of this kind to refuse to accept differential treatment on the part of one or more other States.

The arguments advanced on both sides are so cogent that the Economic Committee has not found it possible at this moment to find a general and final solution for this difficult problem.

It is unanimously of opinion, however, that, although this reservation in plurilateral conventions may appear in some cases legitimate, it can only be justified in the case of plurilateral conventions of a general character and aiming at the improvement of

economic relations between peoples, and not in the case of conventions concluded by certain countries to attain particular ends the benefits of which those countries would, by such a procedure, be refusing to other States when the latter might, by invoking most-favoured-nation treatment, derive legitimate advantages.

The said reservation should also be expressly stipulated and should not deprive a State not a party to the plurilateral convention of advantages it enjoys either under the national laws of the participating State or under a bilateral agreement concluded by the latter with a third State itself not a party to the said plurilateral convention.

Finally, this reservation should not be admitted in cases in which the State claiming the advantages arising under the plurilateral convention, though not acceding to it, would be prepared to grant full reciprocity in the matter.

The Economic Committee expresses the view that countries which, with reference to the terms of plurilateral economic conventions, agreed to embody in their bilateral agreements based on the most-favoured-nation clause a reservation defined in accordance with the principles set forth above would not be acting contrary to the recommendations of the World Economic Conference of Geneva, and consequently will not be acting in a manner inconsistent with the objects which the League has set itself to attain.²⁰²

(3) Reservations of this kind were indeed embodied in several European treaties in the following years. One example is the following provision of a commercial treaty concluded between the Economic Union of Belgium and Luxembourg and Switzerland on 26 August 1929:

It is furthermore understood that the most-favoured-nation clause may not be invoked by the High Contracting Parties in order to obtain new rights or privileges which either of them may hereafter grant under collective conventions to which the other is not a party, provided that the said conventions are concluded under the auspices of the League of Nations or registered by it and open for the accession of the States. Nevertheless, the High Contracting Party concerned may claim the benefit of the rights or privileges in question if such rights or privileges are also stipulated in conventions other than collective conventions which fulfil the aforementioned conditions, or if the Party claiming such benefits is prepared to grant reciprocal treatment.²⁰³

(4) In the era preceding the World Monetary and Economic Conference held at London in 1933, proposals for reaching agreement as to preferred status for collective arrangements came from Europe and were intended in some form or another to cope with American competition in foreign trade on the European market.²⁰⁴ Such proposals met with strong opposition from the United States. The situation changed somewhat at the 1933 Conference, where the United States Secretary of State, Mr. Cordell Hull, outlined the conditions under which the United States would be willing to accept the exception of

²⁰² League of Nations, "Recommendations of the Economic Committee relating to Tariff Policy and the Most-Favoured-Nation Clause" (E.805.1933.II.B.1), pp. 102-104.

²⁰³ League of Nations, *Treaty Series*, vol. CV, p. 13.

²⁰⁴ See details in J. Viner, *The Customs Union issue* (Studies in the administration of international law and organization, No. 10 (New York, Carnegie Endowment for International Peace, 1950)), pp. 22 *et seq.*

multilateral arrangements from most-favoured-nation commitments. The provision proposed by Mr. Hull for adoption by the Conference read as follows:

The participating Governments urge the general acceptance of the principle that the rule of equality shall not require the generalization to non-participants of the reduction of tariff rates or import restrictions made in conformity with plurilateral agreements that give reasonable promise of bringing about such general economic strengthening of the trade area involved as to prove of benefit to the nations generally; provided such agreements:

- (a) Include a trade area of substantial size;
- (b) Call for reductions that are made by uniform percentages of all tariff rates or by some other formula of equally broad applicability;
- (c) Are open to the accession of all countries;
- (d) Give the benefit of the reductions to all countries which in fact make the concessions stipulated; and
- (e) When the countries party to the plurilateral agreement do not, during the term of the plurilateral treaty, materially increase trade barriers against imports from countries outside of such agreement.²⁰⁵

The London Conference, however, "... was not only fated to be an addition to the already long list of abortive international economic conferences but, as the result of President Roosevelt's famous message blasting the currency stabilization proposals before the Conference, it was destined to collapse without even the standard amount of pretence that it had succeeded in accomplishing anything of consequence."²⁰⁶ Later in 1933, at the Seventh International Conference of American States, held at Montevideo, Secretary Hull submitted and obtained the adoption in principle of a draft agreement having much in common with the proposal he had submitted to the London Conference.

(5) The United States proposal led to the opening for signature on 15 July 1934 of an Agreement concerning non-application of the most-favoured-nation clause to certain multilateral economic conventions.²⁰⁷ The substantive provisions of the Agreement provide:

Article I

The High Contracting Parties, with respect to their relations with one another, will not, except as provided in Article II hereof, invoke the obligations of the most-favoured-nation clause for the purpose of obtaining from Parties to multilateral conventions of the type hereinafter stated, the advantages or benefits enjoyed by the Parties thereto.

²⁰⁵ League of Nations, Monetary and Economic Conference, *Reports Approved by the Conference on July 27th, 1933, and Resolutions Adopted by the Bureau and the Executive Committee*, document C.435.M.220.1933.II [Conf. M.E.22(1)], p. 43.

²⁰⁶ Viner, *op. cit.*, p. 36.

²⁰⁷ Agreement between the United States of America, Economic Union of Belgium and Luxembourg, Colombia, Cuba, Greece, Guatemala, Nicaragua and Panama to refrain from invoking the Obligations of the Most-favoured-nation clause for the purpose of obtaining the Advantages or Benefits established by Certain Economic Multilateral Conventions (League of Nations, *Treaty Series*, vol. CLXV, p. 9).

The multilateral economic conventions contemplated in this Article are those which are of general applicability, which include a trade area of substantial size, which have as their objective the liberalization and promotion of international trade or other international economic intercourse, and which are open to adoption by all countries.

Article II

Notwithstanding the stipulation of Article I, any High Contracting Party may demand, from a State with which it maintains a treaty containing the most-favoured-nation clause, the fulfilment of that clause insofar as such High Contracting Party accords in fact to such State the benefits which it claims.

(6) Notwithstanding the 1935 statement of Secretary Hull, quoted in the Commission,²⁰⁸ this Agreement can hardly be interpreted otherwise than as an expression of the view that a most-favoured-pledge, unless otherwise provided, extends the benefits granted under a multiateral agreement. (It seems that the position taken by the United States at the time is similarly interpreted by Whiteman.²⁰⁹ The intention of the Agreement obviously was to create by common consent a conventional and if possible widely accepted exception to the general rule. The experiment failed because only three States became parties to the Agreement: Cuba, Greece and the United States. Little significance can be attributed to the fact that when signing the Agreement, *ad referendum*, the Belgian Ambassador took the attitude that it did not constitute a new rule but merely stated that which was already international law.²¹⁰ What the Belgian Ambassador considered settled law in 1935 was put forward by the Belgian Premier in 1938 as a proposal. M. van Zeeland in his report submitted upon the request of the British and French Governments recommended that:

Exceptions to MFN ... be admitted in order to allow the formation of group agreements aimed at lowering tariff barriers, provided these are open to the accession of other States.²¹¹

(7) The idea that the most-favoured-nation clause should not attract benefits resulting from provisions of multilateral trade conventions open for all States found its way into the resolution adopted by the Institute of International Law at its fortieth session (Brussels, 1936). Paragraph 7 of that resolution states *inter alia*:

The most-favoured-nation clause does not confer the right:
...

to the treatment resulting from the provisions of conventions open for signature by all States whose purpose is to facilitate and

²⁰⁸ Secretary of State Cordell Hull to President Roosevelt, 10 May 1935, MS. Department of State, File 710G, Commercial Agreement /108 (see *Yearbook... 1968*, vol. 1, p. 186, 976th meeting, para. 11 and foot-note 4).

²⁰⁹ Whiteman, *op. cit.*, p. 765.

²¹⁰ Hackworth, *op. cit.*, p. 293.

²¹¹ League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (Ser. L.o.N.P.1942.II.A.6), p. 84.

stimulate international trade and economic relations by a systematic reduction of customs duties;²¹²

(8) In the field of theory it was a Japanese writer, N. Ito, who proposed that a distinction be made in the field of international trade and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest".²¹³ Most-favoured-nation clauses embodied in bilateral treaties would attract the benefits stipulated in the former but would not give the right to advantages promised in treaties of the latter type because, the argument went, these treaties being open to all States their advantages could be easily acquired by accession. In this way acceding States would assume also the obligations imposed by the treaty and put themselves in a position of equality with the other parties to it, whereas through the operation of a most-favoured-nation clause they would claim only the advantages of the multilateral treaty without submitting to its obligations.²¹⁴

(9) The above theory received strong criticism from E. Allix. Referring to the argument based on the openness of the multilateral treaties in question he wrote:

Two answers may be made to this: the first is that, if the clause is unconditional, it will be turned into a conditional clause since the country acceding to the treaty will have to assume the obligations of that treaty in order to acquire its advantages. To maintain that any other solution would be immoral would be to question the very concept of the unconditional clause, since it invariably has the effect of conferring advantages without corresponding obligations.

Moreover, how can the criticism levelled at the unconditional clause in connexion with plurilateral treaties be reconciled with the Economic Committee's recommendation that the unconditional formula should always be used? Furthermore, the fact that the commitment entered into becomes burdensome at a particular point in time is insufficient grounds for *arrogating the right to modify it*. *

In any event, what is an open treaty? Mr. Ito himself mentions the case of a treaty to which all States wishing to do so could theoretically become parties but whose terms are such that, in practice, they could only be fulfilled by the original signatories.

Furthermore, even if those terms can be fulfilled, they are far from being unimportant. A State acceding to the treaty at a subsequent stage would have to accept them without having been able to discuss them. Such a State may find the obligations imposed on it in return for advantages to which it would in fact be entitled without counterpart if the clause was unconditional more burdensome than do other countries. It may also have special reasons for not acceding to the treaty. Affiliation to a group, even one of a purely economic character, invariably has political repercussions which may preclude such affiliation.

To call upon the country to which the clause has been accorded to accede to an agreement which it may find unacceptable is rather like someone telling his creditor: "I have promised to pay

²¹² *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

²¹³ N. Ito. *La clause de la nation la plus favorisée* (Paris, les Editions internationales, 1930).

²¹⁴ Similarly: G. Scelle, *Précis de droit des gens: Principes et systématique* (Paris, Sirey, 1934), vol. II, p. 390.

you a million, but I am absolved from having to do so because you are free to marry Miss X, whose dowry will provide you with that amount."

The fact that, in such a case, all the benefits of the clause would be withdrawn from the country to which an undertaking has been made also emerges clearly from the fact that it would be placed on exactly the same footing as countries which had not obtained the promise of most-favoured-nation treatment and which are in just as good a position as that country to accede to the open treaty.

We are thus led to conclude that the most-favoured-nation clause is indeed an obstacle to the negotiation of plurilateral treaties and that that obstacle can be removed only by an express reservation in the instrument embodying the clause or by the amicable agreement of the States beneficiaries of the clause.²¹⁵

(10) The views of Allix have received support from Ch. Rousseau, who writes:

... whatever the arguments in favour of the opportuneness of excluding [from the advantages of a collective treaty] the State party to the bilateral treaty, such exclusion is difficult to reconcile with the most-favoured-nation clause and clearly contradicts the guarantees of equality previously given to the State which is the beneficiary of that clause. While the ostensible purpose of such action would be to thwart the selfish designs of a State wishing to obtain tariff advantages cheaply, would it not be even more immoral to deny a co-contractor the application of a clause whose benefits it had previously been promised?

...

It must be recognized that, from the point of view of legal technique, the latter solution [an express reservation or the amicable agreement of the States beneficiaries of the clause] was more correct, since it shows greater concern to respect the concordance of the will of States, which is the only sound basis for positive law...²¹⁶

GATT and non-member States

(11) The General Agreement on Tariffs and Trade does not include a provision on the lines of article 98, paragraph 4 of the Havana Charter.²¹⁷ The cornerstone of the General Agreement is an unconditional most-favoured-nation clause. The Agreement is open to accession by all States, or at least this is how certain authors²¹⁸ interpret the text of article XXXIII, which reads as follows:

A government not party to this Agreement ... may accede to this Agreement ... on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.²¹⁹

(12) What is the position of third States, not members of GATT? Can they claim GATT advantages through the operation of a most-favoured-nation clause concluded with a GATT member State? That

²¹⁵ E. Allix, "Les aspects juridiques de la clause de la nation la plus favorisée", *Revue politique et parlementaire* (Paris), vol. 148 (July-September 1931), pp. 231-232.

²¹⁶ Ch. Rousseau, *Principes généraux du droit international public* (Paris, Pédone, 1944), vol. I, pp. 777 and 778.

²¹⁷ See above, para. (6) of the commentary to article 14.

²¹⁸ Sauvignon, *op. cit.*, p. 267.

²¹⁹ United Nations, *Treaty Series*, vol. 62, p. 34.

question has been answered in the affirmative by a recognized authority on GATT matters, J. H. Jackson, who has written:

Any advantage granted by a GATT contracting party to any other country may be granted to all contracting parties. Thus advantages granted by a contracting party to a non-GATT member must also be granted to all contracting parties. Consequently, if *A* and *B* are GATT members but *X* is not and *A* concludes a bilateral trade agreement with *X*, all advantages given to *X* in that agreement must also be extended to *B*. And *vice versa*, if the *A-X* treaty has a MFN clause, *X* derives all the advantages that *A* owes GATT members by virtue of the entire GATT agreement. Thus the impact of GATT goes well beyond its membership. Some suggestion was made at the 1947 Geneva meetings that GATT benefits should apply only to GATT members, but this idea was rejected.⁹ In some instances the net result is to greatly reduce the incentive for a nation to enter GATT since, if it has a most-favoured-nation bilateral treaty with its principal trading partners and these partners are GATT members, it obtains most of the advantages of GATT without granting anything to those GATT members with which it has no trade agreements.¹⁰

⁹ United Nations document E/PC/T/C.II/3 (1946), p. 14.

¹⁰ ... This may explain why relatively few Latin American countries have become members of GATT. Among those which are not members are Costa Rica, Ecuador, El Salvador, Paraguay and Venezuela.²²⁰

(13) The Working Group on organizational and functional questions of GATT considered in 1955 the question of the extension by contracting parties to non-contracting parties of the benefits of the Agreement by means of bilateral agreements. It was pointed out in the discussion that non-contracting parties frequently received all the benefits of the Agreement without having to undertake its corresponding obligations. Despite some dissatisfaction with this situation, the majority consensus was that the attitude which the contracting party wished to adopt in this respect was a matter for each contracting party to decide.²²¹

(14) According to the Soviet textbook of international law, Austria after its accession to the GATT did not immediately extend GATT rates of customs duties to the Soviet Union notwithstanding the most-favoured-nation treaty in force between the two countries. The extension of such rates took place only upon the express demand of the USSR. Other Western European countries having most-favoured-nation treaties with the Soviet Union extended GATT benefits to Soviet products automatically.²²²

Other open multilateral agreements and States not parties

(15) Before the United States became a party to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950

(Florence Agreement),²²³ it claimed, under most-favoured-nation clauses, the same treatment for United States products as was accorded by a party to the Agreement to the products of another party. Thus, on 12 June 1963, the Department of State instructed the United States Embassy at Rome:

In view of the disadvantageous competitive position in which US exports of scientific equipment have been put by the Italian Government's action, it is suggested that the Embassy take the matter up informally with the proper Italian authorities. The objective of such discussions should be to obtain duty-free treatment of such equipment if imported from the United States for sale to approved institutions. In its approach to the Italian Government, the embassy might point out that article XIV-1 of our FCN Treaty with Italy^[224] and article I:1 of GATT^[225] provide for unconditional most-favoured-nation treatment of US products. Although such treatment is subject to specified exceptions, the Florence Agreement does not appear to fall within any of these exceptions. If Italy accords duty-free treatment under certain circumstances to scientific equipment of any other country, then it must accord the same treatment to imports of US scientific equipment.²²⁶

In connexion with its presentation to Congress of proposed implementing legislation of the United States for this Agreement, the Executive prepared an affirmative reply to the question whether a country not a party to the Agreement would "be entitled under the most-favoured-nation clause to the duty-free treatment accorded by a party to the Agreement to another such party", and it was explained that "the United States considers that legally a country not a party to the agreement would be entitled to such treatment pursuant to an unconditional most-favoured-nation clause with a party thereto", although it was recognized that some parties to the agreement might give a negative answer to the question.²²⁷

(16) In a discussion on 21 October 1957, at a Meeting of Governmental Experts on the Agreement on the Importation of Educational, Scientific and Cultural Materials, held at Geneva from 21 to 29 October 1957, it was reported that the French representative:

... recalled that the provisions of paragraph 1 of Article I were applicable only to materials mentioned in Annexes A, B, C, D and E of the Agreement which were the products of another Contracting State. France, however, granted duty-free entry for such materials, irrespective of the country of origin or exportation, for it considered that, by virtue of the unconditional "most-favoured-nation" clause included in the trade agreements which it had concluded with most countries, and having regard to the obligations mentioned in Article IV, subparagraph (a), of the Agreement, no distinction as to country of origin or exportation should be made with regard to the materials concerned. The French Government wished to know whether such an interpretation was accepted by the other Contracting States.²²⁸

(17) Article IV (a) of the Florence Agreement, referred to above, states that the parties "undertake

²²³ United Nations, *Treaty Series*, vol. 131, p. 25.

²²⁴ Treaty of Friendship, Commerce and Navigation signed at Rome on 2 February 1948 (*ibid.*, vol. 79, pp. 190 and 192).

²²⁵ *Ibid.*, vol. 55, p. 196 and vol. 138, p. 336.

²²⁶ Whiteman, *op. cit.*, pp. 766-767.

²²⁷ *Ibid.*, p. 767.

²²⁸ Document UNESCO/MC/34/SR.I-II, p. 9, as quoted by M. Whiteman, *op. cit.*, p. 768.

²²⁰ Jackson, *op. cit.*, pp. 257-258.

²²¹ GATT document L/327, quoted in K. Hasan, *op. cit.*, p. 78, foot-note 2. See also *Yearbook... 1970*, vol. II, p. 230, document A/CN.4/228 and Add.1, para. 187.

²²² State Institute of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 270.

that they will as far as possible ... continue their common efforts to promote by every means the free circulation" of the materials to which the Agreement relates, "and abolish or reduce any restrictions to that free circulation which are not referred to in this Agreement".²²⁹

(18) The following three cases further illustrate the point. In the first case, the Asia Trading Company, of Djakarta, brought an action in the District Court of Amsterdam against the firm of Biltimex, of Amsterdam. The defendant applied for an order that the plaintiff, being a foreign company, should deposit security for costs (*cautio judicatum solvi*). The plaintiffs opposed the application. The Court held that the order for the security (*cautio*) must be refused. This followed from article 24 of the Netherlands-Indonesian Union Statute agreed upon on 2 November 1949, which promised the nationals of each partner to the Union treatment on a footing of substantial equality with the other's own nationals, and in any case most-favoured-nation treatment. The latter provision guaranteed to Indonesians exemption from the security for costs (*cautio judicatum solvi*), because the Netherlands had previously exempted other foreigners and foreign countries from the security (*cautio*) under the Hague Convention on Procedure in Civil Cases of 17 July 1905.²³⁰

(19) The second case serves as negative proof to the above proposition. Although the claim based upon the most-favoured-nation clause is rejected, this is done on the ground that the subject-matter of the multilateral treaty in question (the Hague Convention on Procedure in Civil Cases of 17 July 1905) is not *ejusdem generis* as that of the clause upon which the appellant relied. Thus the judgement implicitly acknowledges that in the case where the clause and the multilateral treaty covered the same ground, appellant could not have been denied the benefits of the latter. The appellant, a United States citizen domiciled in Belgium, owed an acknowledged debt to the respondent. When in the Netherlands, he was imprisoned for his debt under an order given by the President of the District Court of Zutphen. The appellant sought to be released by the President of the District Court of The Hague, but his appeal failed. He appealed further to the Court of Appeal of The Hague, relying, *inter alia*, on two treaty provisions by virtue of which, he argued, he should be set free. The first of these was article 24 of the Convention relating to Civil Procedure of 17 July 1905.²³¹ The ap-

²²⁹ United Nations, *Treaty Series*, vol. 131, p. 30.

²³⁰ *Asia Trading Co., Limited, v. Biltimex, Netherlands, District Court of Amsterdam, 17 October 1951*. See *Yearbook... 1973*, vol. II, p. 137, document A/CN.4/269, para. 55.

²³¹ The article reads [translation from the official French text]: "Civil imprisonment, whether as a means of enforcement or as a simple preventive measure, may not, in civil or commercial proceedings, be imposed on aliens who are nationals of one of the contracting States in cases where it would not be imposed on nationals of the country. A circumstance which may be invoked by a national domiciled within the country to secure the ending of civil imprisonment must produce the same effect for the benefit of a national of a contracting State, even if that circumstance arises outside the country."

pellant further relied on article III, section I, of the Netherlands-United States Treaty of Friendship, Commerce and Navigation of 27 March 1956.²³² The appellant submitted that he was entitled to benefit from article 24 of the Hague Convention on Procedure in Civil Cases through the operation of the most-favoured-nation clause. The Court, which held that the appeal must be dismissed, stated

The appellant deems his imprisonment to be illegal on account of its being contrary to Article III, section I, of the Netherlands-United States Treaty of Friendship, Commerce and Navigation, which was ratified by the (Netherlands) Act of 5 December 1957... This provision, assuming it is binding upon everyone, does not prevent a citizen of the United States from being imprisoned in this country under article 768 of the Code of Civil Procedure. Civil imprisonment, indeed, does not run counter to the protection of rights which the Kingdom of the Netherlands under the Treaty owes to citizens of the United States. Moreover, from Article V of the Treaty, as from Article 5 of the annexed protocol of signature, it becomes clear that the Treaty is of limited purport only as far as civil procedure is concerned: civil imprisonment is not referred to, still less precluded. A more liberal interpretation of Article III, section I, as sought by the appellant and under which in this country a citizen of the United States would enjoy the protection of Article 24 of the convention on Civil Procedure without the United States having acceded to it, is therefore unacceptable to the Court.²³³

(20) In the third case, it has been expressly recognized that privileges provided pursuant to a "multiple or bipartite international treaty" can be claimed on the basis of a most-favoured-nation clause.²³⁴

(21) As regards the so-called open multilateral treaties, it has been found that there is no such constant and uniform usage, accepted as law, which would warrant a proposal for a rule excepting open-ended multilateral treaties, i.e. the favours resulting from such treaties, from the operation of most-favoured-nation clauses. A recent thorough study has come to the same conclusion:

At present there seems to be no justification in law for saying that a customary usage may exempt open multilateral conventions from the scope of the clause. Neither the material element—the usual practice of States—nor the *opinio juris* affect the issue. At least, the prevailing feeling allows that the question may be approached from various angles, and it is concerned to give due weight to the elements which might lead to an opposing conclusion.

...

²³² This provision reads:

"Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security. They shall be accorded in like circumstances treatment no less favourable than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favourable than that accorded nationals of any third country or that required by international law."

²³³ *McLane v. N.V. Koninklijke Vleeswarenfabriek B. Linthorst en Zonen*, Netherlands, Court of Appeal of the Hague, 4 February 1959. See *Yearbook... 1973*, vol. II, p. 142, document A/CN.4/269, para. 68.

²³⁴ *Taxation Office v. Fulgor (Greek Electricity Company)*, Greece, Council of State, Decision of 28 May 1969. *Ibid.*, p. 148, document A/CN.4/269, para. 87.

... as international law stands at present, the only legal solution is to insert a specific exception in the clause.²³⁵

(22) As regards the so-called closed multilateral treaties, it has also been found that the advantages accorded under such treaties do not escape the operation of a most-favoured-nation clause. The argument has been put forward that the main reason (although a false one—cf. in this regard E. Allix, quoted above²³⁶) for exempting the favours of an open multilateral treaty from the operation of a most-favoured-nation clause is that States can easily acquire the advantages of such treaties by acceding to them. In this way acceding States assume also the obligations arising from the treaty and put themselves in a position of equality with the other parties to the treaty, whereas through the operation of a most-favoured-nation clause they would claim only the advantages of the open multilateral treaty without submitting to its obligations. It follows from this reasoning that in the case of a closed multilateral treaty the possibility of an easy accession falls and—*cessante causa cessat effectus*—there remains no reason why the advantages of a closed multilateral treaty should not fall under the operation of a most-favoured-nation clause.

(23) On the basis of the foregoing considerations the Commission adopted article 15, which states that the beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement. This, of course, cannot be understood to mean that a bilateral or multilateral agreement is always needed for the operation of the clause. In this respect reference is made to paragraph (1) of this commentary.

The case of customs unions and similar associations of States

(24) Customs unions and similar associations of States are always established on the grounds of a bilateral or multilateral agreement. The question whether a most-favoured-nation clause does or does not attract benefits accorded within customs unions and similar associations of States was dealt with briefly by the Commission in the course of its twenty-seventh (1975) session. The Commission included the submissions of its Special Rapporteur on that question in its report on the work of that session, to which the reader is referred.²³⁷ A brief summary of the consideration of the matter by the Commission at the twenty-seventh session was given in the same report.²³⁸

Consideration of the matter in the course of the Commission's twenty-eighth session

(25) The discussion in the Commission at its present session took into account the views of representatives expressed in the deliberations of the Sixth Committee of the General Assembly and the material submitted by the Special Rapporteur the previous year²³⁹ and in his seventh report (A/CN.4/293 and Add.1,²⁴⁰ paras. 40–64), submitted in 1976.

(26) It is evident for the Commission that the “customs union issue”, as the problem has been briefly called, is not a general problem of the most-favoured-nation clauses; it arises only with regard to such clauses contained in commercial treaties, especially those relating to customs duties. It is also evident that the problem arises only in cases where the granting State enters a customs union or other association after the conclusion of an agreement containing a most-favoured-nation clause which is not coupled with an appropriate exception: in the hypothetical case where the granting State was already a member of such a union at the time of the conclusion of the agreement—which contains no exception—the automatic extension of the clause to customs union benefits is obvious. It is also evident that the question arises only in connexion with unconditional most-favoured-nation clauses because the so-called conditional clause of the “American type” is no longer in usage and clauses on customs duties are by their nature not based on material reciprocity. Most members of the Commission accept the view that the “customs-union issue” is of limited practical importance because the bulk of international trade is carried on under the terms of the General Agreement on Tariffs and Trade and in this respect provision for settlement is contained in article XXIV of that Agreement.²⁴¹ In commercial treaties concluded outside the General Agreement an appropriate exception is also a widely accepted practice.

(27) There was no disagreement between the members in respect of the right of States to join together in any way they wished, which was recognized as a prerogative of their sovereignty. Most of the members however—and even some of those who favoured an implied exception as an instance of progressive development—admitted that there is no rule of customary international law which would relieve States upon their entering into a customs union or other association from their obligations under a most-favoured-nation clause. According to one member, in international law the exercise of one right could not infringe upon another right unless it was accepted that the new right was a superior right. The most-favoured-nation clause was established by an agreement based on the rule of *pacta sunt servanda*. The

²³⁵ Sauvignon, *op. cit.*, pp. 267–268.

²³⁶ See above, para. (9) of this commentary.

²³⁷ See *Yearbook... 1975*, vol. II, p. 143, document A/10010/Rev.1., Chapter IV, section B, paras. (24)–(65) of the commentary to article 15.

²³⁸ *Ibid.*, pp. 153–154, paras. (66)–(71) of the commentary.

²³⁹ *Ibid.*, pp. 9 *et seq.*, document A/CN.4/286, paras. 9–63.

²⁴⁰ Printed in *Yearbook... 1976*, vol. II (Part One).

²⁴¹ See *Yearbook... 1975*, vol. II, p. 145, document A/10010/Rev.1., chap. IV, sect. B, paras. (35)–(39) of the commentary to article 15.

fact that a granting State which became a member of a customs union refused to grant to the beneficiary State most-favoured-nation treatment would run counter to the general character of the clause, which could not be limited by invoking an implicit intention. The State in such a case might not apply the treaty, i.e. the most-favoured-nation clause, but its responsibility would be entailed and it would have to accept the consequences. That is what happens when a State concludes a subsequent treaty which is incompatible with an earlier treaty.²⁴²

(28) Another member held that there was no evidence of any consensus among States regarding the existence of an alleged rule of customary international law which would provide for an implied exception to the application of the most-favoured-nation clause in the case of customs unions and similar associations of States. The absence of any such consensus meant that despite the frequency of the explicit exception in treaty practice, it could not be included in the draft as a matter of codification. The Commission could not claim to codify a rule that would be contrary to the terms of article 30 of the Vienna Convention. For the purposes of applying the rule in article 30 of the Vienna Convention the treaty containing the most-favoured-nation clause was the earlier treaty and the treaty setting up the customs union was the later treaty. The rule in article 30 meant that the granting State could not by the later treaty with other partners go back on its promises to the beneficiary State which was not a party to that later treaty.

(29) Again another member pointed out that a most-favoured-nation clause should not prevent the granting State from joining a customs union, but neither should the beneficiary State be harmed by the fact that the granting State had become a member of such union. Should it give up all or part of the advantages to which it was entitled under the most-favoured-nation clause? The *pacta sunt servanda* principle should not be infringed without strong justification.

(30) Regarding the practice of States, some members referred to article XXIV of the General Agreement on Tariffs and Trade²⁴³ and to the many other exceptions found in bilateral treaties. They considered this a sufficient body of State practice to justify the inclusion of the exception in the present articles. Other members contended that to invoke the frequency of the customs union exception as an argument for regarding it as customary law would be tantamount to ignoring the possibility of a contrary will on the part of individual parties. Presumptions were based on the most probable case: the more frequently the customs-union exception was included in the agreements promising most-favoured-nation treatment, the less probable it became that the parties had overlooked that possibility.

(31) As to the practice of States and their *opinio juris*, reference was made to article 234 of the treaty establishing the European Economic Community signed at Rome on 25 March 1957²⁴⁴ and also to article XXIV (chapter IX) of the Multilateral Treaty of Free Trade and Central American Economic Integration, signed at Tegucigalpa, Honduras, on 10 June 1958 which, in the same vein as article 234 of the Rome Treaty, provides that:

... if any of the trade agreements they [the parties] may conclude with other countries or their participation in other international arrangements, should constitute an obstacle to this Treaty, particularly as a result of provisions embodied in the other treaties permitting other countries to claim no less favorable treatment, they shall renegotiate or, as the case may be, denounce them at the earliest opportunity with a view to avoiding the difficulties or prejudice which might ensue for any of the contracting States as a result of claims of that nature.²⁴⁵

(32) Reference was made also to a quite recent and important document, namely, the Charter of Economic Rights and Duties of States adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, article 12, paragraph 1, of which reads as follows:

States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward-looking, *consistent with their international obligations** and with the needs of international economic co-operation, *and have full regard for the legitimate interests of third countries, especially developing countries**.

(33) Those members in favour of including an implied exception asserted that this could be done on the basis of progressive development. It was maintained that if the draft articles on the most-favoured-nation clause were to remain silent on the subject of customs unions and free-trade areas, they would create enormous difficulties for any country joining such a union or area. Economic regional integration was making progress all over the world and the Commission would only be weakening that process if it ignored the need of customs unions and free-trade areas to develop freely. On this basis one member of the Commission proposed the inclusion in the present draft of a provision to the effect that the most-favoured-nation clause did not confer the right to the treatment resulting from a customs union or a free-trade area. He proposed as an alternative a rule which would state that the provisions of the present articles should not prejudice any question that might arise in connexion with a customs union or a free-

²⁴² See article 30 of the Vienna Convention.

²⁴³ See above, foot-note 241.

²⁴⁴ See *Yearbook... 1975*, vol. II, p. 151, document A/10010/Rev.1, chapter IV, section B, para. (56) of the commentary to article 15.

²⁴⁵ Inter-American Institute of International Legal Studies, *Instruments Relating to the Economic Integration of Latin America* (Dobbs Ferry (N.Y.), Oceana Publications, 1968), p. 12.

trade area. With regard to the interests of the developing countries, he stressed that economic regional integration could be of the greatest importance in strengthening their position. It was maintained, on the other hand, that it was not clear where the interests of the developing countries lay, and the following finding taken from an UNCTAD document was quoted:

The difficulties faced by developing countries in exporting have been heightened with the formation of regional groupings among developed countries and the consequential removal of barriers to their intra-trade. Among the countries outside these groupings, the developing countries tend to be most vulnerable to the resultant differential tariff and non-tariff treatment, given their initial competitive disadvantages. As a result of the formation of such groupings and other preferential arrangements, almost two-fifths of the intra-trade in manufactured and semi-manufactured products among the developed market-economy countries are already on a preferential basis ...²⁴⁶

(34) Another member of the Commission quoted the draft articles adopted by the Commission on succession of States in respect of treaties and particularly article 30 on the effects of a uniting of States in respect of treaties in force at the date of the succession of States.²⁴⁷ In paragraph 3 of that article the Commission has admitted that there are cases in which treaties concluded no longer apply when two or more States unite voluntarily. If such a rule can be adopted in the case of a uniting of States, perhaps a similar rule could be adopted for the case of a mere association. The same member believed, however, that if a new member of the union repudiated its obligations under a most-favoured-nation clause, then it was natural that the beneficiary State of a most-favoured-nation clause, particularly if it was a small or medium-sized State, should receive compensation, and that the most-favoured-nation clause should be renegotiated. This member favoured this approach as a middle course. He found it inadmissible that under the cover of a customs union a State could throw overboard all its obligations, including those deriving from a most-favoured-nation clause. On the other hand, he could not accept that certain States should be imprisoned by a rule which would give a right of veto to a State that was the beneficiary of a most-favoured-nation clause. The idea of the requirement for negotiation was taken up also by others who believed that a repudiation of a most-favoured-nation clause entails international responsibility. If mitigating circumstances were present, they would not change the nature of the responsibility itself; they would, however, permit a solution to be reached by negotiation.

(35) The relevance of article 30, paragraph 3, of the draft articles on succession of States in respect of treaties to the case of customs unions and other associations of States was strongly denied by one mem-

ber of the Commission. In his view, the case of a uniting of States cannot be compared with an association in which the members retain their sovereignty. He also argued that if the idea were to be carried further then it could lead to the obviously absurd result that upon entering a customs union States could repudiate not only their most-favoured-nation obligations but also other treaty commitments.

(36) According to another member it was a well-known fact that where States had pressing reasons of high policy for contracting special relations with each other, their need and their desire to do so would prevail, to the extent necessary, over general obligations they had already contracted previously. State practice, however, also showed that when such a situation arose, the State seeking to join a new system would—and should—regard itself as having an obligation to adjust its relationships with the other States with which it was already bound.

(37) Reference was made in the discussion to the enormous technical difficulties which would arise if the Commission wished to include an article providing for an implied customs union exception. The Commission would have to decide exactly what it meant by a customs union or a free-trade area or an interim agreement. It was held that such a provision obviously could not refer to any type of economic association regardless of its size and nature. The General Agreement on Tariffs and Trade itself imposed very stringent conditions regarding those associations which qualified under it for an exception.

(38) Arguments of an economic nature were put forward for and against an exception. Among arguments for, reference was made to the trend towards economic integration mentioned above. Among arguments against, it was said that at a time when the world was endeavouring to eliminate trade barriers, to establish the exception as a rule would create only additional barriers.

(39) In view of this situation the Commission agreed not to include an article on a customs union exception in the draft articles. While some members considered this attitude as an implicit recognition of the fact that such a rule does not exist and that its adoption in the future is not desirable, others contested this view and said that the silence of the draft articles could not be interpreted in that way, but should rather be interpreted to mean that the ultimate decision is one of a political nature and that it will have to be taken by the States to which this draft is submitted.

Article 16. — Right to national treatment under a most-favoured-nation clause

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended as national treatment.

²⁴⁶ "Operational Guide to the Generalized System of Preferences (GSP): Report by the UNCTAD secretariat", document TD/B/AC.5/41 of 2 May 1972, para. 13.

²⁴⁷ See *Yearbook... 1974*, vol. II (Part One), p. 252, document A/9610/Rev.1, chapter II, section D).

Commentary

(1) This rule seems to be at first sight self-evident. When two States promise each other national treatment (inland parity) and then promise other States most-favoured-nation treatment, the latter group may legitimately claim that they are also entitled to be treated on a "national basis", for otherwise they are not being treated as favourably as the most-favoured-nation (assuming that there is a material difference in treatment as a result of different promises made).²⁴⁸

(2) This is also the British practice regarding the relation between national treatment and treatment accorded under a most-favoured-nation clause. According to G. Schwarzenberger:

... the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of m.f.n. treatment in the same field.²⁴⁹

(3) The same view is held by an author from the German Democratic Republic:

Since national treatment generally embraces a maximum number of rights and the rights accorded are clearly defined. States often seek to have their nationals placed on an equal footing with those of other countries. If national treatment is thus granted to the most-favoured-nation, all other entitled States can also claim it for their nationals by invoking the most-favoured-nation clause.²⁵⁰

(4) This effect of the most-favoured-nation clause has been explicitly recognized in France. The French Foreign Minister in a letter of 22 July 1929²⁵¹ published a list of countries enjoying national treatment in France. The Minister added:

A greater number of conventions were entered into on the basis of the treatment reserved for the nationals of the most-favoured-nation. Aliens capable of availing themselves of a convention of that nature are entitled to be treated in France as the nationals of the above-listed countries.²⁵²

The official French view on this point has not changed since.

(5) This position manifests itself also in the practice of French courts. As has been expressed by one author:

... [French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.²⁵³

²⁴⁸ Snyder, *op. cit.*, pp. 11–12.

²⁴⁹ Schwarzenberger, "The Most-Favoured-Nation Standard in British Practice" (*loc. cit.*), p. 119.

²⁵⁰ K. Becher, "Das Prinzip der Meistbegünstigung und die Völkerrechtskommission der Vereinten Nationen", *Deutschen Aussenpolitik* (East Berlin), 17th Year, No. 4 (July-August 1972), p. 774.

²⁵¹ France, *Journal officiel de la République française, Lois et décrets* (Paris), 12–13 August 1929, 61st year, No. 189.

²⁵² A. Piot, "Of realism in conventions of establishment", *Journal du droit international*, 88th year, No. 1 (January-March 1961), p. 45.

²⁵³ Level, *loc. cit.*, p. 338.

Thus a French court, the Tribunal Correctionnel de la Seine, in one case among many others, stated as follows:

Whereas Sciama, being of Italian nationality, may legitimately claim the benefit of article 2 of the treaty of establishment of 23 August 1951 between France and Italy, which provides: "The nationals of each of the High Contracting Parties shall enjoy in the territory of the other party most-favoured-nation treatment with regard to ... the practice of trade ..."; and whereas, consequently, he is entitled to rely on the provisions of article 1 of the convention concluded on 7 January 1862 between France and Spain, which provides that: "The subjects of both countries may travel and reside in the respective territories on the same footing as nationals ... practise both wholesale and retail trade operation ...".²⁵⁴

(6) The Supreme Court of the United States also had the occasion to discuss the effect of a most-favoured-nation clause when combined with a national treatment clause of another treaty. The most-favoured-nation clause in question was one included in an 1881 treaty between the United States and Serbia. The relevant portion of that clause ran as follows:

In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States shall enjoy the rights which the respective laws grant or shall grant in each of these States to the subjects of the most-favoured-nation.

Within these limits, and under the same conditions as the subjects of the most-favoured-nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imports or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favoured State ...²⁵⁵

The Supreme Court stated:

The 1881 Treaty clearly declares its basic purpose to bring about "reciprocally full and entire liberty of commerce and navigation" between the two signatory nations so that their citizens "shall be at liberty to establish themselves freely in each other's territory". Their citizens are also to be free to receive, hold and dispose of property by trading, donation, marriage, inheritance or any other manner "under the same conditions as the subjects of the most favored nation". Thus, both paragraphs of Art. II of the treaty which have pertinence here contain a "most favored nation" clause with regard to "acquiring, possessing or disposing of every kind of property". This clause means that each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will make. In this connexion we are pointed to a treaty of this country made with Argentina²⁵⁶ before the 1881 Treaty with Serbia, and treaties of

²⁵⁴ *In re: Sciama and Soussan*, France, Tribunal correctionnel de la Seine, 27 November 1962. See *Yearbook... 1973*, vol. II, p. 145, document A/CN.4/269, para. 77.

²⁵⁵ *British and Foreign State Papers, 1880–1881* (London, Ridgway, 1888), vol. 72, p. 1131.

²⁵⁶ The national treatment clause (article IX) of the Treaty of Friendship, Commerce, and Navigation between the United States and the Argentine Confederation, of 1853 provided:

"In whatever relates to... acquiring and disposing of property of every sort and denomination, either by sale, donation, ex-

Yugoslavia with Poland and Czechoslovakia, all of which unambiguously provide for the broadest kind of reciprocal rights of inheritance for nationals of the signatories which would precisely protect the right of these Yugoslavian claimants to inherit property of their American relatives ...

We hold that under the 1881 Treaty, with its "most favored nation" clause, these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Oregon ...²⁵⁷

(7) The solution sustained in practice and proposed in article 16 has been questioned in the writings of several authors. According to Level:

It may be argued against the affirmative solution that, among the concessions mutually granted by the High Contracting Parties, the most-favoured-nation clause is of a lower order than the national treatment clause and that it is paradoxical for the former to produce the same effects as the latter. It may also be asked whether the special nature of the two clauses does not bar their cumulative application. As clauses which grant equal treatment, in one case, with the most-favoured foreigner and, in the other case, with nationals, they have no effect by virtue of their content but by mere reference. Is the intent of the contracting States truly reflected by thus linking one clause to the other to the point of producing an effect which is not in keeping with the meaning of the first of the two clauses? ... Although this argument has its relevance, [French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.²⁵⁸

(8) Basing its views on the practice of States, the Commission has no reason to depart from the conclusion which follows from the ordinary meaning of the clause which assimilates its beneficiary to the nation most favoured: if the best, the highest, favour extended to a third State consists in national treatment, then it is this treatment which is in conformity with the promise due to the beneficiary. If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so. If such exception is not written in the treaty, then the consequences are that the national treatment promise follows the most-favoured-nation treaty. This situation requires nothing but a certain circumspection from those involved in treaty-making.

(9) At its twenty-seventh session, in 1975, the Commission, in order to indicate the residual character of the article, included the following phrase in square brackets at the beginning of the text of article 16: "Unless the treaty otherwise provides or it is otherwise agreed". At the current session, the Commission considered that with the inclusion of article

26²⁵⁹ it was no longer necessary or appropriate to include those introductory words and it therefore decided to delete them.

Article 17. — Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter

If a granting State has undertaken by treaty to accord to a beneficiary State most-favoured-nation treatment and national or other treatment with respect to the same subject-matter, the beneficiary State shall be entitled to whichever treatment it prefers in any particular case.

Commentary

(1) It is not uncommon that both national treatment and most-favoured-nation treatment are stipulated in respect of the same subject-matter. B. Nolde refers to the Portuguese-English treaty of 1642, in article 4 of which Portugal promised:

that the subjects of the Most Renowned King of Great Britain ... shall [not] be more burdened with Customs, Impositions, or other Taxes other than the Inhabitants and Subjects of the said Lands [Kingdoms, Provinces, Territories and Islands of the King of Portugal, in Europe], or other Subjects of any Nation whatsoever in league with the Portugals ...²⁶⁰

A more recent example is the provision of article 6, paragraph 1, of the Multilateral Convention on Cooperation in Maritime Commercial Navigation signed at Budapest on 3 December 1971 by Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, reading as follows:

Vessels flying the flags of the Contracting Parties shall enjoy in ports of the respective countries, on the basis of reciprocity, the most favourable treatment accorded to national vessels engaged in international traffic or, also on the basis of reciprocity, the most favourable treatment accorded to vessels of other countries in all matters relating to their entry into, stay in and departure from a port, the use of ports for loading and unloading operations, the taking-on and setting-down of passengers, and the use of navigation services.²⁶¹

(2) In some clauses it is specified that the basis of the treatment in question shall be that of the grant-

change, testament, or in any other manner whatsoever, ... the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights as native citizens ..."^a

^a United States of America, *The Statutes at Large and Treaties of the United States of America from December 1925 to March 1927* (Washington, D.C., U.S. Government Printing Office, 1927), vol. X, p. 1009. Text also in *British and Foreign State Papers, 1852-1853* (London, Ridgway, 1864), vol. 42, p. 772.

²⁵⁷ *Kolovrat et al. v. Oregon*, U.S. Supreme Court, 1 May 1961. See *Yearbook... 1973*, vol. II, p. 144, document A/CN.4/269, para. 73.

²⁵⁸ Level, *loc. cit.*, p. 338.

²⁵⁹ See article 26 below and commentary thereto.

²⁶⁰ B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels", *Recueil des cours ... 1932-I* (Paris, Sirey, 1932), vol. 39, p. 27.

²⁶¹ *Sbornik deistvuyshchikh dogovorov, soglasheny i konventsiy, zaklyuchennykh SSS s inostrannymi gosudarstvami*, vol. XXIX, *Deistvushchie dogovory, soglashenia i konventsiy, vstupivshie v silu mezhdru 1 yanvaraya i 31 dekabrya 1973 goda* (Treaties, agreements and conventions in force between the USSR and foreign countries, vol. XXIX, Treaties, agreements and conventions which came into force between 1 January and 31 December 1973) (Moscow, Mezhdunarodnye otnoshenia, 1975), pp. 364-365.

ing country's nationals or the nationals of the most-favoured-nation "whichever is more favourable".²⁶²

(3) The Secretariat of the Economic Commission for Europe, in a paper analysing the compatibility of these two kinds of grant, whether embodied in one or more instruments, came to the following conclusion:

... The problem of the compatibility of general most-favoured-nation treatment and the grant of "national treatment" to commercial shipping does not, in fact, appear to arise. Where both these systems exist side by side, the provision for "national treatment" has overriding force—always provided that no more favourable concession has been made to a third country. In such a case, it is this more favourable treatment which must be granted to shipping of the country eligible for both "national treatment" and most-favoured-nation treatment. Such a solution, undoubtedly prevailing in treaties of commerce which, like that between Norway and the USSR, contain the "national treatment" clause for commercial shipping side by side with a general most-favoured-nation clause, seems equally applicable both in the case of a multilateral convention containing both clauses and in the case of a multilateral convention containing only the general most-favoured-nation clause faced with bilateral conventions containing the "national treatment" clause for particular questions relating to commerce or navigation.²⁶³

(4) It is generally presumed that national treatment is at least equal or superior to the treatment of the most-favoured foreign country and therefore the former implies the latter. This has been explicitly stated in a protocol forming part of the Treaty of Commerce and Navigation between the United Kingdom and Turkey, signed on 1 March 1930. The protocol reads:

It is understood that, wherever the present treaty stipulates national treatment, this implies the treatment of the most-favoured foreign country, the intention of the high contracting parties clearly being that national treatment in their respective territories is at least equal or superior to treatment of the "most-favoured foreign country".²⁶⁴

The presumption is, however, open to rebuttal. There may be cases where foreigners enjoy advantages not granted to nationals. Should such a case occur, most-favoured-nation treatment surpasses national treatment. A specific stipulation to this effect may be found in the United Kingdom-Switzerland Treaty on Friendship, Commerce and Reciprocal Establishment of 6 September 1855, article VIII of which reads as follows:

In all that relates to the importation into, the warehousing in, the transit through, and the exportation from, their respective territories, of any article of lawful commerce, the two contracting parties engage that their respective subjects and citizens shall be placed upon the same footing as subjects and citizens of the country, or as the subjects and citizens of the most favoured nation in any case where the latter may enjoy an exceptional advantage not granted to natives.²⁶⁵

²⁶² See, e.g., article 38 of the Treaty on Friendship, Commerce and Navigation between the Federal Republic of Germany and Italy of 21 November 1957 (Strupp, *op. cit.*, p. 500).

²⁶³ E/ECE/270, part II, para. 42(h).

²⁶⁴ League of Nations, *Treaty Series*, vol. CVIII, p. 432.

²⁶⁵ United Kingdom, Foreign Office, *Handbook of Commercial Treaties etc. with Foreign Powers*, 4th ed. (London, H.M. Stationery Office, 1931), p. 669.

(5) According to a French source:

[National treatment] is sometimes granted concurrently with the most-favoured-nation clause. In such cases, it is the more favourable of the two types of treatment—normally national treatment—that applies. In exceptional cases, however, most-favoured-nation treatment may be more advantageous than national treatment. This is the case when a State which wishes to expand its industrial production grants foreign enterprises tax exemptions and other advantages greater than those accorded to national enterprises. It would therefore be quite false to suppose that the granting of national treatment automatically encompasses most-favoured-nation treatment.²⁶⁶

(6) According to Schwarzenberger:

Two or more of the standards may also be employed in the same treaty for the better attainment of the same or different objectives. Thus, the coupling of m.f.n. and national-treatment clauses may lead to treatment more advantageous to nationals of the other contracting party than could be achieved by the employment of one or the other standard in relation to, for instance, exemption from civil defence duties. In such cases, the typical intention of contracting parties is that the application of several standards should be cumulative. Therefore a presumption exists in favour of their cumulative interpretation.²⁶⁷

(7) It must be clearly seen that most-favoured-nation treatment and national treatment are of a different character. The first operates only on condition that a certain favoured treatment has been extended to a third State (and if this is not the case the grant remains empty). The other is a direct grant which confers an advantage upon the beneficiary independently of the fact that treatment has been extended to a third State or not. It may happen, however, that a most-favoured-nation pledge is coupled with another direct grant which is not national treatment. The granting State, e.g., may undertake to accord certain determined treatment to the beneficiary State, to its nationals, to its ships, etc., which may not be the same as the treatment of its own nationals. Article 17 envisages this situation also by means of the expression "or other treatment". At its twenty-seventh session, the Commission placed the words "or other" between square brackets to indicate that it would review the appropriateness of including in article 17 a reference to direct treatment other than national treatment. During the course of the current session, the Commission considered the comments made on the matter in 1975 by representatives in the Sixth Committee of the General Assembly and by members of the Commission this year and decided that it would not be inappropriate to drop the square brackets in the article, thus leaving the words "or other" in the title and the text of the article. The article states the general rule that whenever the beneficiary State is accorded different types of treatment with respect to the same subject-matter, it shall be entitled to whichever treatment it prefers in any particular case.

²⁶⁶ Sauvignon, *op. cit.*, p. 6.

²⁶⁷ "The principles and standards..." (*loc. cit.*), p. 69.

(8) The Commission is aware that a situation in which the beneficiary State on the basis of one or more treaties or other commitments is entitled to different types of treatment concerning the same subject-matter can involve great difficulties of implementation. Can the beneficiary State freely change its preference from one to another type of treatment? Can different types of treatment be demanded for one or another subject of the beneficiary State? Can, e.g., different shipping companies of the beneficiary State demand different types of treatment for their vessels? Can the advantages be demanded cumulatively? One member of the Commission stated during the twenty-seventh session that because of the difficulties involved it would be preferable that the rule should rather be formulated as a saving clause. He proposed the following text:

The right of the beneficiary State to any treatment under a most-favoured-nation clause shall not be prejudiced by the fact that the granting State has agreed to accord to the beneficiary State national [or any other] treatment with respect to the same subject-matter as that of the most-favoured-nation clause.

The Commission, however, decided to adopt the text of article 17 for the purpose of the first reading in its present form.

Article 18. — Commencement of enjoyment of rights under a most-favoured-nation clause

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the relevant treatment is extended by the granting State to a third State.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity arises at the time of the communication by the beneficiary State to the granting State of its consent to accord material reciprocity in respect of the treatment in question.

Commentary

(1) Article 18 deals with the time when the right of the beneficiary State to most-favoured-nation treatment arises. The presence of two elements is necessary to put into action an unconditional most-favoured-nation clause: (a) a valid clause contained in a treaty in force, and (b) a grant of favours by the granting State to a third State. A third element is needed in the case of a clause subject to material reciprocity: the according of that reciprocity. If one of the necessary elements is lacking, there is no such thing as an operating or a functioning clause.²⁶⁸ The time of the beginning of the functioning is the one when the last element (the second in the case of an

unconditional clause and the third in that of a clause subject to material reciprocity) comes into play. As to the first element, the validity and the being in force of the treaty are taken for granted and therefore they are not mentioned in article 18.

(2) A most-favoured-nation clause, unless otherwise agreed, obviously attracts benefits granted to a third State both before and after the entry into force of the treaty containing the clause. The reason for this rule has been explained as follows:

... since the purpose of the clause is to place the beneficiary State on an equal footing with third States, it would be an act of bad faith to confine that equality to future legal situations. A "*pro futuro*" clause or a clause directed towards the past cannot be deemed to exist unless it is worded in unequivocal fashion. Otherwise, the clause must extend to the beneficiary all advantages granted both in the past and in the future.²⁶⁹

(3) This view is sustained in practice as evidenced by the following case. The special legislation of Belgium regulating the duration of tenancies rendered nationals of countries which were either neutral or allied to Belgium during the First World War eligible to share in its benefits, on condition of reciprocal treatment. The claimant complained that the privilege of the legal extension of her tenancy had been denied her because of her French nationality and of the lack of reciprocal treatment of Belgian nationals in France. The Court held for the claimant. Pursuant to the Franco-Belgian convention of 6 October 1927, the nationals of each of the High Contracting Parties "shall enjoy in the territory of each other most-favoured-nation treatment in all questions of residence and establishment, as also in the carrying-on of trade, industry and the professions" (article 1). This privilege was extended to cover the possession, acquisition and leasing of real or personal property (article 2). The treaty concluded between Belgium and Italy on 11 December 1882 provided (article 3) that the nationals of each of the High Contracting Parties should enjoy within each other's territory full civil rights on an equal footing. The Court stated:

It follows, then, that by virtue of the most-favoured-nation clause, French nationals in Belgium are completely assimilated to Belgian nationals for the purposes of their civil rights, and consequently share in the legislation regulating rents. It is immaterial whether these treaties precede or succeed the legislation in question ...

The Franco-Belgian treaty of 6 October 1927 was concluded by the Belgian Government in the hope of securing for its nationals in France the benefit of all legislation affecting tenancies and commercial property, in order that the nationals of each country should be treated on an equal footing ...

The claimant, as a French national, is therefore entitled to claim a legal extension of her tenancy of the premises by virtue of the treaty of 6 October 1927.²⁷⁰

²⁶⁹ Sauvignon, *op. cit.*, p. 21, note 1. See, in the same sense, Basdevant, "Clause de la nation la plus favorisée" (*loc. cit.*), p. 488.

²⁷⁰ *Trossy v. Dumortier*, Belgium, Brussels Civil Court (Chamber of Rent Restriction Appeals) 31 May 1928. See *Yearbook... 1973*, vol. II, pp. 129-130, document A/CN.4/269, para 31.

²⁶⁸ As Schwarzenberger (*International Law and Order (op. cit.)*, p. 130) puts it, "In the absence of undertakings to third States, the standard is but an empty shell".

(4) The question has also been raised and discussed whether the beginning of the functioning of a most-favoured-nation clause cannot retroactively influence the position of the beneficiary State, i.e. the position of the persons who derive their rights from that State. According to Level:

What is at issue here is whether the clause follows the time-of-application provisions of the treaty from which it derives its content or those of the treaty which provides for most-favoured-nation treatment. In the latter case, nationals of the beneficiary State can also claim the advantages previously granted to the favoured State, but this treatment takes effect only on the date of the entry into force of the treaty containing the most-favoured-nation clause ... If the first assumption is correct and the clause is also *subject* to the time-of-application provisions of the treaty concluded with the favoured State, nationals of the beneficiary State are in exactly the same position as those of the favoured State and are thus entitled to claim that the advantages in question were applicable to them prior to the publication of the treaty containing the clause, i.e. as from the entry into force of the treaty concluded between the favoured State and the granting State. Thus, in the second of the two posited cases, nationals of the beneficiary State would be entitled to retroactive application—in relation to the date of publication of the treaty containing the clause—of most-favoured-nation treatment.

French legal thinking has rejected the idea of giving the clause this kind of retroactive effect. Nationals of the beneficiary State can claim the advantages granted to the favoured State only on the date of the entry into force of the treaty containing the clause. "The actual formulation of the clause does not warrant retroactive assimilation to foreigners who already enjoy favoured status." ... "If existing advantages are automatically made applicable, this applies only to the future." ... Of course, under the rule governing time of application, the High Contracting Parties may, by expressly so stipulating, provide for retroactive application of the clause. The view upheld by French legal thinking is in keeping with the analysis of the nature of the clause contained in the judgement rendered by the International Court of Justice in the Anglo-Iranian cases. The enjoyment of advantages under the clause derives from the clause itself and not from the treaty containing the substantive provisions whose application is sought. Although the clause permits enjoyment of the advantages granted to nationals of the favoured State, it does not retroactively make the beneficiary State a party to the treaty concluded between the granting State and the favoured State.²⁷¹

(5) In the same sense Christian Gavaldà writes:

The clause does not do away with past differences between the various national legal systems. The "standard" rule, which calls for an "inopportune" international legal situation to cease to exist at the earliest possible time ... does not prevail against the international legal principle of non-retroactivity ...

Most-favoured nation treatment is, as Scelle puts it, automatically communicated, but this applies only to the future. It should be noted that the same reasoning can be employed in determining the application in time of a treaty containing a reciprocity clause. The advantages granted on this basis to nationals of a given State also do not extend back to the time when our nationals first enjoyed this right (*de facto, de jure* or by treaty) in the country concerned.²⁷²

²⁷¹ Level, *op. cit.*, p. 337.

²⁷² *Revue critique de droit international privé* (Paris), No. 3 (July-September 1961), p. 538, note to a decision of the Court of Cassation of 12 October 1960.

This reasoning seems to be correct and it is in conformity with the rule set out in the article.

(6) McNair, in *The Law of Treaties*, examined the question "whether the operation of a most-favoured-nation clause is contingent upon a third State merely becoming entitled to claim certain treatment, or whether it operates only when the third State actually claims and begins to enjoy the treatment". It is pertinent to quote here his reasoning:

Supposing that Great Britain is entitled to most-favoured-nation treatment under a treaty with State A, and by reason of a treaty between State A and State B the latter is or becomes entitled to claim for itself or its nationals certain treatment from A, e.g. exemption from income-tax or from some legislation affecting the occupation of houses, when is Great Britain entitled to claim from A the treatment due to B? At once or only when B has succeeded in asserting its treaty right to this treatment? In answer to this question two views are possible. The first is that Great Britain has no *locus standi* to claim the treatment until she can point to its actual exercise and enjoyment by B or B's nationals. This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no nationals residing in the territory of A and earning a taxable income. The second view is that the most-favoured-nation clause in the treaty with Great Britain, automatically and absolutely, invests her and her nationals with all rights in *pari materia* which may be possessed at any time when the treaty is in force by B and its nationals, irrespective of the question whether those rights are in fact being exercised and enjoyed or not, that is, irrespective of the question whether B has claimed them or neglected to claim them or had no occasion to claim them. The United Kingdom Government has been advised by its law officers that the second view is the right one, that is to say, that while the question "must depend upon the true construction of the most-favoured-nation clause upon which it may arise, ... speaking generally ... the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or exercised or not". The United Kingdom has asserted, and succeeded in maintaining, this second view.²⁷³

According to the same source, a similar position was taken by the United Kingdom in cases where it was not the beneficiary but the granting State.

On 11 April 1906 on a question relating to the right of aliens to receive British pilotage certificates, the law officers, when asked whether the right claimable by subjects of the nations indicated was an absolute right by reason of the operation of the most-favoured-nation clause, or whether the right was one which was claimable only if and when the subjects of States who had been granted national treatment had claimed and received the particular privilege then under consideration, said that the answer to this question "must depend upon the true construction of the particular most-favoured-nation clause upon which it may arise; but speaking generally, we are of the opinion that the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or not. On the other hand, the treatment accorded in actual practice would be very material upon the construction of the treaty upon which it depends".²⁷⁴

A further source shows that this view is not restricted to British practice.

In 1943 the American Embassy in Santiago took the position that the unconditional most-favoured-nation clause in the United

²⁷³ McNair, *op. cit.*, pp. 278-279.

²⁷⁴ *Ibid.*, pp. 279-280.

States-Chilean commercial agreement gave the right to duty-free importation of United States lumber "of those species of woods specified in the memoranda exchanged between the Peruvian and Chilean Governments [providing duty-free treatment for such species of Peruvian lumber imported into Chile] and [that] this position holds regardless of whether there have been any imports into Chile from Peru or any other country of the particular species of wood specified in the memoranda". Thus, the most-favored-nation clause was interpreted to accord those rights legally accorded to products of another country, whether or not there was in fact any enjoyment of such right reference to such products.²⁷⁵

(7) As provided for in article 18, it is the extension of benefits to the third State which brings the clause into action. This "extension" can also take place by the conclusion of a treaty or by any other kind of agreement reached between the granting State and the third State. Is the effect the same if the grant is not based on a treaty but on the internal law of the granting State? According to McNair:

This question is frequently settled without any doubt by the wording of the relevant clause, for instance, the following clause is common:

The subjects of each of the High Contracting Parties in the territories of the other shall be at full liberty to acquire and possess every description of property ... which the laws of the other High Contracting Party permit the subjects of any foreign country to acquire and possess.

On the other hand, where the treaty merely provides that the nationals of A are entitled to whatever rights and privileges B may "grant" to the nationals of C, the question may arise whether the clause refers to grant by treaty or to grant by any means whatever. The British answer to this question is that the clause includes grant by any means whatever.²⁷⁶

(8) According to Nolde, "it is quite immaterial whether the advantages granted to 'any third country' derive from the domestic law of the other Contracting Party or from agreements concluded by the latter with 'any third country'".²⁷⁷ Further, he calls this rule "a rule which has long been established and is absolutely unchallengeable".²⁷⁸

(9) The 1936 resolution of the Institute of International Law is also explicit:

The most-favoured-nation clause confers upon the beneficiary the régime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law.²⁷⁹

(10) It is obvious that the answer to the question dealt with in the previous paragraphs depends on the interpretation of a given clause. The purpose of the proposed rule is precisely to give guidance in cases where the wording of the clause is such that it refers purely and simply to most-favoured-nation treatment

without containing details as to its functioning. It is believed that in such cases it can be presumed that the intention of the parties consists in bringing the beneficiary into the same legal position as the third State. This idea and the theory adopted by the Commission in article 7, according to which the source of the beneficiary's right lies in the treaty containing the clause, sufficiently warranted the adoption of the rule as proposed in article 18.

(11) *Paragraph 1* of article 18 accordingly provides that the right of the beneficiary State to the treatment enjoyed by the third State arises at the time when that treatment is extended by the granting State to a third State. It is to be understood that if the third State enjoys that treatment already at the moment of the entry into force of the clause, i.e., the treaty containing it, then the beneficiary State becomes immediately entitled to the same treatment. If, however, the relevant treatment is extended to the third State later, it is at that later time that the right of the beneficiary State arises.

(12) In case of a most-favoured-nation clause made subject to material reciprocity the presence of a third element is needed for the right of the beneficiary State to the treatment in question to arise: the beneficiary State will become entitled to that right only at the time when it communicates to the granting State its willingness to accord material reciprocity in respect of the treatment in question. Unless it is otherwise agreed by the parties, it is at this moment that the right of the beneficiary State to favoured treatment under a most-favoured-nation clause subject to material reciprocity arises.

Article 19. — Termination or suspension of enjoyment of rights under a most-favoured-nation clause

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity is also terminated or suspended at the time when the termination or suspension of the material reciprocity in question is communicated by the beneficiary State to the granting State.

Commentary

(1) It follows from the very nature of the most-favoured-nation clause that the right of the beneficiary State—and hence the functioning of the clause—ceases when the third State loses its privileged position. The privilege having disappeared, the fact which put the clause into operation no long-

²⁷⁵ Whiteman, *op. cit.*, p. 750.

²⁷⁶ McNair, *op. cit.*, p. 280.

²⁷⁷ Nolde, *loc. cit.*, p. 48.

²⁷⁸ *Ibid.* Similarly, Sauvignon, *loc. cit.*, p. 22.

²⁷⁹ See *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

er exists, and therefore the clause ceases to have effect.²⁸⁰

(2) Thus, the Supreme Court of Administration of Finland in the case of the application of the Trade Agreement between Finland and the United Kingdom passed a judgment on 12 March 1943 in the following sense:

The duties imposed on certain goods in the trade agreement between Finland and the United Kingdom were to be applied also to goods imported from Germany in accordance with the most-favoured-nation clause between Finland and Germany. The court decided that after the United Kingdom had declared war on Finland, the most-favoured-nation clause was no longer applicable to Germany, and consequently, the duties imposed on goods imported from Germany should be treated autonomously and not according to the trade agreement between Finland and England.²⁸¹

(3) This characteristic of the most-favoured-nation clause has been expressed by the Institute of International Law in its 1936 resolution in the following manner:

The duration of the effects of the most-favoured nation clause is limited by that of the conventions with third States which led to the application of that clause.²⁸²

In the course of the discussion on the codification of the law of treaties the following draft provision was submitted by Mr. Jiménez de Aréchaga:

When treaty provisions granting rights or privileges have been abrogated or renounced by the parties, such provisions can no longer be relied upon by a third State by virtue of a most-favoured-nation clause.²⁸³

Both texts are limited to the case where the favour granted by the granting State to a third State was embodied in a treaty.

(4) The will of the parties can of course under special circumstances change the operation of the clause. That such special circumstances existed was contended by the American party before the International Court of Justice in the case concerning rights of nationals of the United States of America in Morocco.²⁸⁴ The Court interpreted the most-favoured-nation clauses in the treaties between the United States and Morocco in accordance with the general nature and purpose of the most-favoured-nation clauses. In the words of the Court:

The second consideration [of the United States] was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment

and maintenance of equality of treatment without discrimination amongst the various countries concerned. According to this view rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they had been derived.

From either point of view, this contention is inconsistent with the intentions of the parties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from the examination of the treaties... These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.²⁸⁵

In the same judgment the Court held also:

It is not established that most-favoured-nation clauses in treaties with Morocco have a meaning and effect other than such clauses in other treaties or are governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause.²⁸⁶

(5) A notable instance of changing the general pattern of the operation of the clause is that of GATT. The key provision of the General Agreement is a general most-favoured-nation clause in respect of customs duties and other charges in article I, paragraph 1.²⁸⁷ Article II, paragraph 1 of the General Agreement, however, provides:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.²⁸⁸

According to Curzon:

It can even be maintained that Article II (i)—safeguarding of schedules—is of greater significance than the most-favoured-nation clause itself. This paragraph of article II is a completely new phenomenon in international commercial legislation and an addition to the most-favoured-nation clause of no mean import. The "Schedules" are the consolidated list of all concessions made by all contracting parties in their negotiations with their trading partners and maximum rates. The difference this addition makes to the most-favoured-nation clause is the protection it offers against the raising of the tariff on scheduled items. The traditional clause, while ensuring unconditional most-favoured-nation treatment, only provides equality of treatment against tariff changes...²⁸⁹

According to Hawkins, GATT

... goes beyond the most-favoured-nation principle in this respect. Each member giving a concession is directly obligated to grant the same concession to all other members in their own

²⁸⁰ Snyder, *op. cit.*, p. 37; Sibert, *op. cit.*, p. 255.

²⁸¹ Application of the Trade Agreement between Finland and the United Kingdom of Great Britain and Northern Ireland, Finland, Supreme Court of Administration, 12 March 1943. See *Yearbook*... 1973, vol. II, p. 124, document A/CN.4/269, para. 13.

²⁸² *Yearbook*... 1969, vol. II, p. 181, document A/CN.4/213, annex II.

²⁸³ *Yearbook*... 1964, vol. I, p. 184, 752nd meeting, para. 1.

²⁸⁴ *I.C.J. Reports* 1952, p. 176.

²⁸⁵ *Ibid.*, pp. 191-192.

²⁸⁶ *Ibid.*, pp. 204-205.

²⁸⁷ See above, para. (10) of the commentary to article 4.

²⁸⁸ GATT, *op. cit.*, p. 3.

²⁸⁹ G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques* (New York, Praeger, 1966), p. 64.

right; this is different from making the latter rely on continued agreement between the Party granting the concession and the Party that negotiated it.²⁹⁰

(6) A French author gives the following picture of the operation of the clause:

... the clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign States by the grantor State; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other States.²⁹¹

In the system of GATT, as has been shown, the provision of article II, paragraph 1, has indeed transformed the float of the clause into a balloon (the concessions once given cannot be withdrawn except through a complicated and cumbersome procedure of consultations with the contracting parties in accordance with article XXVIII of the General Agreement). It is submitted, however, that the special system of the General Agreement constitutes an exception to the general rule of the functioning of the clause and that this rule is by no means affected by the different functioning of the most-favoured-nation clause in the GATT which owes its existence to a specific agreement of the contracting parties.

(7) From the point of view of the termination or suspension of the functioning of the clause, it is irrelevant what caused the termination of the benefits granted to third States. The proposed rule being dispositive, the parties to a treaty containing the clause are free to agree to the continuation of their respective favoured treatment even after the expiry of the grant of benefits to the third State. They may maintain their respective favoured position also on the basis of special arrangements. A historic example of such a case is given as follows:

The Italo-Abyssinian War provides a final example of the preservation of an advantage for a State benefiting from the clause beyond the duration of the treatment of the favoured third country. The sanctions against Italy resulted in the denunciation by States Members of the League of Nations of their trade treaties with Rome. The advantages conferred by those treaties should normally have ceased at the same time to accrue to third countries benefiting from the clause. They were, however, preserved for the countries in question on the basis of Article 16, paragraph 3, of the Covenant, under which the Members of the League agreed that they would mutually support one another in the financial and economic measures taken as sanctions "in order to minimize the loss and inconvenience resulting from the above measures".²⁹²

The author quoting the case adds the following remark:

Article 49 of the United Nations Charter [mutual assistance in carrying out measures decided upon by the Security Council] can also justify a request along these lines by a beneficiary State, per-

²⁹⁰ *Op. cit.*, p. 226, note on chapter VIII.

²⁹¹ C. Rossillion, "La clause de la nation la plus favorisée dans la jurisprudence de la Cour Internationale de Justice", *Journal du droit international* (Paris), 82nd year, No. 1 (January-March, 1955), p. 106.

²⁹² Sauvignon, *op. cit.*, pp. 96-97.

haps after the latter has undertaken the consultation envisaged by Article 50.²⁹³

(8) *Paragraph 1* of article 19 applies to all kinds of most-favoured-nation clauses whether or not made subject to material reciprocity. The right of the beneficiary State to the favoured treatment obviously expires or is suspended at the time when the relevant treatment by the granting State terminates or is suspended, as the case may be. In cases where treatment which is within the field of the subject-matter of the clause is extended by the granting State to more than one third State it is to be understood that the right of the beneficiary State to the favoured treatment terminated or is suspended upon the the termination or suspension of the extension of the relevant treatment to all the third States concerned.

(9) *Paragraph 2* of article 19 envisages the case of a most-favoured-nation clause made subject to the condition of material reciprocity. In such a case the right of the beneficiary State to the benefits enjoyed by the third State will also be terminated or suspended at the time when the beneficiary State withdraws permanently or temporarily its consent to grant material reciprocity. The communication on behalf of the beneficiary State will have the effect of terminating or suspending its own right notwithstanding the fact that the third State continues to enjoy the favoured treatment in question.

(10) The provisions of article 19 are not of an exhaustive character. Other events can also terminate the enjoyment of the rights of the beneficiary State: the expiration of the time-limit inserted in the clause; the agreement of the granting State and the beneficiary State as to termination; and the uniting of the granting State and the third State. Some members of the Commission were of the opinion that the termination or suspension of the material reciprocity without communication would also have the effect of terminating or suspending the enjoyment of the rights of the beneficiary State.

Article 20. — The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State and for persons or things in a determined relationship with that State is subject to compliance with the relevant laws of the granting State. Those laws, however, shall not be applied in such a manner that the treatment of the beneficiary State and of persons or things in a determined relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.

²⁹³ *Ibid.* For details of the Ethiopian-Italian case see League of Nations, *Official Journal, Special Supplement No. 145*, p. 26 and *Special Supplement No. 150*, pp. 11-12.

Commentary

(1) An unconditional most-favoured-nation clause entitles the beneficiary State to the exercise of the enjoyment of the rights indicated in the clause without compensation and without any conditions. These rights are exercised or enjoyed in ordinary cases by the nationals, ships, products, etc. of the beneficiary State. The meaning of the expression "without any conditions" in this context is that the right of the beneficiary State and the right of its nationals, ships, products, etc. derived therefrom cannot be made dependent on the right exercised or enjoyed by the granting State (its nationals, ships, products, etc.) in the beneficiary State. The element of unconditionality, however, cannot be stretched so wide as to absolve the beneficiary State, i.e. its nationals, ships, products, etc., from the duty of respecting the internal laws and regulations of the granting State and to comply with them inasmuch as such compliance is expected from and exerted by any other State, i.e. from or by its nationals, products, etc.

(2) The following recent case, decided by the French Court of Cassation, explains fully the underlying idea of article 20. The appellant, an Italian citizen, was convicted under article 1 of the Decree of 12 November 1938 for having failed, as an alien, to obtain a trader's permit. He maintained that he was not required to be in possession of a trader's permit because by virtue of the most-favoured-nation clause contained in the Franco-Italian agreement of 17 May 1946 he was entitled to rely on the Franco-Spanish treaty of 7 January 1862, which gave Spanish citizens the right to carry on trade in France. The Public Prosecutor contended that the Franco-Spanish treaty did not exempt Spanish citizens from the requirements of obtaining a trader's permit, and that a letter of the French Minister for Foreign Affairs dated 15 April 1957 which stated that foreign nationals entitled to rely on treaties conferring the right to trade in France were not exempt from the requirements of obtaining traders' permits, was binding on the courts. The appeal was dismissed. The Court said:

The judgement under appeal, in view of the letter of the Minister for Foreign Affairs dated 15 April 1957, finds that the exercise of the right to trade in France which is granted to foreign nationals by international agreements does not exempt foreign nationals from the need to satisfy the necessary—as well as sufficient—requirement, namely, to be in possession of a trader's permit, and that this applies in particular to Italian nationals by virtue of the Franco-Italian agreement of 17 May 1946.

The judgement under appeal thus arrived at a correct decision, without violating any of the provisions referred to in the notice of appeal.

Notwithstanding that international agreements can only be interpreted by the Contracting Parties, the interpretation thereof, as far as France is concerned, is within the competence of the French Government, which alone is entitled to lay down the meaning and scope of a diplomatic document. The Franco-Italian agreement of 17 May 1946 provides that Italian nationals are entitled to the benefit of the most-favoured-nation clause, and the treaty of 7 January 1862, between France and Spain, on which the appellant relies and which applies to Italian nationals with regard

to the exercise of trading activities must, according to the interpretation given by the Minister for Foreign Affairs, be understood as follows: although the provisions which are applicable to foreign nationals must not, if they are not to violate the provisions of the international agreements, result in restricting the enjoyment of the rights which the treaty confers on Spanish nationals, the duty imposed upon a Spanish trader to be in possession of a special trader's permit does not affect the enjoyment of those rights but only the conditions of their exercise. To be in possession of a trader's permit is therefore a necessary as well as sufficient condition, which must be satisfied where a foreign national is to be entitled to rights which are granted to French nationals.²⁹⁴

(3) In some cases the clause itself contains a reference to the laws of the granting State and expressly stipulates that the rights in question must be exercised "in conformity with the laws" of that State. Such a case was dealt with in the following instance: the decedent was at the time of his death a resident of New York State. He died intestate. He was a citizen and subject of the Kingdom of Italy, and all of his next of kin were residents of Italy. He left no next of kin residing in the State of New York, and it was alleged in the petition that there were no creditors. The consul-general of the Kingdom of Italy filed a petition to administer the decedent's estate. The public administrator, though duly served, did not appear. The petitioner asserted a right to administration without giving any security, and in preference to the public administrator, and based his claim on treaty provisions in the consular treaty of 1878 between the United States and Italy. The letters of administration were granted. The court said:

Conceding that, under the most-favoured-nation clause in the provision of the treaty with Italy relating to the rights, prerogatives, immunities, and privileges of consuls-general, the stipulation contained in the treaty of 27 July 1853 with the Argentine Republic²⁹⁵ becomes a part of the treaty with Italy, I do not find in that stipulation any justification for the conclusion sought. A right to intervene conformably with the laws of the State of New York is something different from a right to set aside the laws of the State, and take from a person who, by those laws, is the officer entrusted with the administration of estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. And, when the laws of the State required an administrator to give a bond to be measured by the value of assets, nothing in the treaty provisions grants to the consul an immunity from this requirement to be obtained merely by asserting, in substance, that he has no knowledge of the existence of any debts... Therefore, the petitioner may have letters on giving the usual security, but that this is

²⁹⁴ *Corneli Case*, France, Court of Cassation, 2 July 1958. See *Yearbook*... 1973, vol. II, p. 139, document A/CN.4/269, para. 63.

²⁹⁵ Article 9 of the treaty between the United States of America and Argentina reads:

If any citizen of the two contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.

done pursuant to our local law, and because the public administrator has refused to act.²⁹⁶

(4) In other cases the duty of respecting the internal laws of the granting State is laid down in a separate provision of the treaty containing the most-favoured-nation clause. Thus, for example, the Long-Term Trade Agreement of 23 June 1962 between the Union of Soviet Socialist Republics and the United Arab Republic contains the following provision (article 6):

The circulation of goods between the USSR and the United Arab Republic shall take place in accordance with the provisions of this Agreement and with the import and export laws and regulations in force in the two countries provided that these laws and regulations are applied to all countries.²⁹⁷

(5) The rule proposed in article 20 is expressed by a German source in this way:

The conditions attaching to the grant of a specific type of more favourable treatment claimed under the most-favoured-nation clause are not to be confused with the conditional form of the most-favoured-nation clause. What is involved here is not reciprocal treatment within the meaning of the conditional form of the most-favoured-nation clause but requirements relating to the factual content of the more favourable treatment itself (e.g. a certificate of qualification as a requirement for the licensing of an alien to engage in a particular trade, certificates of origin or of analysis for purposes of proof of origin and customs classification of goods). Such factual requirements must, however, be objectively related to the advantage which is to be granted and must not be used for the purpose of engaging in concealed discrimination.²⁹⁸

The last sentence of the quotation draws attention to the requirement of good faith. This is of course not restricted to this particular situation.

(6) Although the commentaries and precedents refer to cases of unconditional most-favoured-nation clauses, it seems to be self-evident that the rule proposed applies also to cases where the most-favoured-nation clause is coupled with the requirement of material reciprocity. The rule proposed, therefore, is in general language and does not differentiate between the two types of clauses.

(7) The rule proposed in article 20 is in a certain relationship with article 41 of the Vienna Convention on Diplomatic Relations,²⁹⁹ article 55 of the Vienna Convention on Consular Relations³⁰⁰ and article 47 of the Convention on Special Missions.³⁰¹ In the first two Conventions, paragraph 1 of the relevant articles reads as follows:

²⁹⁶ *In re: Logiorato's Estate*, United States of America, State of New York, New York County Surrogate's Court, February 1901. See *Yearbook...* 1973, vol. II, p. 149, document A/CN.4/269, para. 89.

²⁹⁷ United Nations, *Treaty Series*, vol. 472, p. 74.

²⁹⁸ G. Jaenicke in Strupp, *op. cit.*, p. 497. Cf. above, the Swiss Cow case, cited in para. (20) of the commentary to articles 11 and 12.

²⁹⁹ United Nations, *Treaty Series*, vol. 500, p. 120.

³⁰⁰ *Ibid.*, vol. 596, pp. 308-310.

³⁰¹ General Assembly resolution 2530 (XXIV), annex.

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

Paragraph 1 of the relevant article of the Convention on Special Missions reproduces the foregoing text, with some drafting changes. The roots of the rule contained in article 20, however, can be traced further and ultimately to the principle of sovereignty and equality of States. Obviously, beyond the limits of the privileges granted by the State, its laws and regulations must be generally observed on its territory.

(8) The purpose of a most-favoured-nation clause, namely, to create a situation of non-discrimination between the beneficiary State and the granting State, can be defeated by a discriminatory application of the laws of the granting State. Therefore, the Commission has found that the rule embodied in article 20 which states the obligation of compliance with the relevant laws of the granting State should also contain a proviso as to the application of those laws. Consequently, article 20 states that the laws of the granting State shall not be applied in such a manner that the treatment of the beneficiary State, and all persons or things in a determined relationship with that State, is less favourable than that of the third State or of persons or things in the same relationship with that third State.

Article 21. — The most-favoured-nation clause in relation to treatment under a generalized system of preferences

A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.

Commentary

(1) As stated in the introduction to this chapter of the Commission's report,³⁰² the Commission from the early stages of its work has taken cognizance of the problem which the application of the most-favoured-nation clause creates in the field of economic relations when the world consists of States whose economic development is strikingly unequal. Part of General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session was also quoted.³⁰³ This principle was adopted in 1964 by a roll-call vote of 78 to 11 with 23 abstentions.

(2) The secretariat of UNCTAD has explained the meaning of General Principle Eight as follows:

From General Principle Eight it is clear that the basic philosophy of UNCTAD starts from the assumption that the trade needs of a developing economy are substantially different from

³⁰² See above, paras. 41-43.

³⁰³ See above, para. 42.

those of a developed one. As a consequence, the two types of economies should not be subject to the same rules in their international trade relations. 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 opening sentence of General Principle Eight lays down that "international trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment...". 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.**

** In the words of a report entitled "The developing countries in GATT", submitted to the first session of the Conference: "There is no dispute about the need for a rule of law in world trade. The question is: What should be the character of that law? Should it be a law based on the presumption that the world is essentially homogeneous, being composed of countries of equal strength and comparable levels of economic development, a law founded, therefore, on the principles of reciprocity and non-discrimination? Or should it be a law that recognizes diversity of levels of economic development and differences in economic and social systems?"³⁰⁴

(3) What is of primary interest to the developing countries is, of course, preferences granted to them by developed countries. The main aim of UNCTAD from the very beginning has been to achieve a system of generalized non-reciprocal and non-discriminatory preferences for the benefit of developing countries. The UNCTAD main ideas in this field are explained in the following way by an UNCTAD research memorandum:

In the relationship between developed and developing countries the most-favoured-nation clause is subject to important qualifications. These qualifications follow from the principle of generalized, non-reciprocal and non-discriminatory system of preferences. Developed market-economy countries are to accord preferential treatment in their markets to exports of manufactures and semi-manufactures from developing countries. This preferential treatment should be enjoyed only by the developing suppliers of these products. At the same time developing countries will not be required to grant developed countries reciprocal concessions.

The need for a preferential system in favour of all developing countries is referred to in a number of recommendations adopted by the first session of the United Nations Conference on Trade and Development. General Principle Eight states that "... developed countries should grant concessions to all developing countries ... and should not, in granting these or other concessions, require any concessions in return from developing countries."³⁰⁵ In its recommendation A.III.5, the Conference recommended "... that the Secretary-General of the United Nations make appropriate arrangements for the establishment as soon as possible of a committee of governmental representatives ... with a view to working out the best method of implementing such preferences on the basis of non-reciprocity from the developing countries."³⁰⁶

At the second session of the Conference, the principle of preferential treatment of exports of manufactures and semi-manufactures from developing countries was unanimously accepted. According to resolution 21 (II), the Conference:

"1. Agrees that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be:

- "(a) To increase their export earnings;
- "(b) To promote their industrialization;
- "(c) To accelerate their rates of economic growth;

"2. Establishes, to this end, a Special Committee on Preferences, as a subsidiary organ of the Trade and Development Board, to enable all the countries concerned to participate in the necessary consultations ...

"...

"4. Requests that ... the aim should be to settle the details of the arrangements in the course of 1969 with a view to seeking legislative authority and the required waiver in the General Agreement on Tariffs and Trade as soon as possible thereafter;

... "5. Notes the hope expressed by many countries that the arrangements should enter into effect in early 1970."³⁰⁷

This is not the occasion to go at length into the reasons and considerations underlying the position of UNCTAD on the issue of preferences. Given the sluggish expansion of exports of primary products, and the limitations of inward-looking industrialization, the economic growth of developing countries depends in no small measure upon the development of export-oriented industries. It is clear, however, that to gain a foothold in the highly competitive markets of the developed countries, the developing countries need to enjoy, for a certain period, preferential conditions of access. The case for such a preferential treatment is not unlike that of the infant industry argument. It has long been accepted that, in the early stages of industrialization, domestic producers should enjoy a sheltered home market vis-à-vis foreign competitors. Such a shelter is achieved through the protection of the nascent industries in the home market. By the same token it could be argued that the promotion of export-oriented industries requires a sheltered export market. This is achieved through the establishment of preferential conditions of access in favour of developing suppliers. Preferential treatment for exports of manufactures and semi-manufactures is supposed to last until developing suppliers are adjudged to have become competitive in the world market. Upon reaching this stage conditions of access to the markets of developed countries are to be governed again by the most-favoured-nation clause.

While UNCTAD is in favour of a general non-reciprocal system of preferences from which *all* developing countries would benefit, it does not favour the so-called special or vertical preferences. Those refer to the preferential arrangements actually in force between *some* developing countries and *some* developed countries. A typical example of vertical preferences is that between the European Economic Community (EEC) and eighteen African countries most of which are former French colonies. The same is true of the preferential arrangement between the United Kingdom and developing Commonwealth countries. Such preferential arrangements differ from the general system of preferences in two important respects:

(a) they involve discrimination in favour of some developing countries against all other developing countries. Accordingly third party developing countries stand to be adversely affected;

(b) they are reciprocal. Thus, the associated African countries enjoy preferential conditions of access in the Common Market. In return the Common Market countries enjoy preferential access to the markets of the associated countries. Although there are some exceptions, reciprocity is also characteristic of the relationship between the United Kingdom and the Commonwealth countries.

As has been mentioned before, these special preferential arrangements were countenanced by Article I of GATT as a dero-

³⁰⁴ See *Yearbook... 1970*, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188.

³⁰⁵ 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.

³⁰⁶ *Ibid.*, p.39.

³⁰⁷ *Ibid.*, *Second Session*, vol. I and Corr. 1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 38.

gation from the most-favoured-nation clause. According to UNCTAD recommendations these preferential arrangements are to be gradually phased out against the provision of equivalent advantages to the beneficiary developing countries. General Principle Eight states that:

"Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation."³⁰⁸

The question is taken up again in recommendation A.II.1.:

"Preferential arrangements between developed countries and developing countries which involve discrimination against other developing countries, and which are essential for the maintenance and growth of the export earnings and for the economic advancement of the less developed countries at present benefiting therefrom, should be abolished *pari passu* with the effective application of international measures providing at least equivalent advantages for the said countries. These international measures should be introduced gradually in such a way that they become operative before the end of the United Nations Development Decade."³⁰⁹

The position of UNCTAD on the issue of special preferences is motivated by various considerations. It is believed that the existence of such preferential arrangements may act as a hindrance to the eventual establishment of a fully-integrated world economy. The privileged position of some developing countries in the markets of some developed countries is likely to create pressure on third party developing countries to seek similar exclusive privileges in the same or in other developed countries. The experience of the last decade goes a long way to vindicate this belief. The Yaoundé Convention of 1963 providing for the preferential arrangements between EEC and the eighteen African countries has induced many other African countries (e.g. Nigeria, Kenya, Uganda, Tanzania) to seek similar association with EEC. Moreover, in Latin America there appears to be a growing feeling that, to counteract discrimination against them in the Common Market, it may be necessary to secure preferential treatment in the United States market from which the associated African countries would be excluded. Such a proliferation of special preferential arrangements between groups of countries may eventually lead to the division of the world economy into competing economic blocks.

Apart from the danger of proliferation, special preferences involve, as mentioned before, reciprocal treatment. Accordingly, some developed countries enjoy preferential access to the markets of some developing countries. Here again, the existence of the so-called reverse preferences may provide an additional inducement for proliferation of vertical trading arrangements.

For these considerations UNCTAD has recommended the gradual phasing-out of special preferences. It is recognized, however, that in the case of certain countries, the enjoyment of preferential access is essential for the maintenance and growth of their export earnings. For this reason the phasing-out of special preferences was made conditional upon the application of international measures providing at least equivalent advantages for developing countries benefiting therefrom.³¹⁰

(4) In the field of preferences a compromise agreement was reached unanimously at the second session of UNCTAD, in 1968, and embodied in resolution 21

(II). This resolution favoured the introduction of a generalized non-reciprocal, non-discriminatory system of preferences and envisaged the necessity of a gradual phasing-out of the special preferences.

(5) The Special Committee on Preferences established by resolution 21 (II) as a subsidiary organ of the Trade and Development Board succeeded in reaching "agreed conclusions" on a generalized system of preferences which were annexed to decision 75 (S-IV) adopted by the Trade and Development Board at its fourth special session held at Geneva on 12 and 13 October 1970.³¹¹ The following are excerpts from that very important document:

I

The Special Committee on Preferences

1. *Recalls* that in its resolution 21 (II) of 26 March 1968 the United Nations Conference on Trade and Development recognized the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal, non-discriminatory preferences which would be beneficial to the developing countries;

2. *Further recalls* the agreement that the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least developed among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth;

...

9. *Recognizes* that these preferential arrangements are mutually acceptable and represent a co-operative effort which has resulted from the detailed and extensive consultations between the developed and developing countries which have taken place in UNCTAD. This co-operation will continue to be reflected in the consultations which will take place in the future in connexion with the periodic reviews of the system and its operation;

10. *Notes* the determination of the prospective preference-giving countries to seek as rapidly as possible the necessary legislative or other sanction with the aim of implementing the preferential arrangements as early as possible in 1971;

...

II. REVERSE PREFERENCES AND SPECIAL PREFERENCES

1. The Special Committee notes that, consistent with Conference resolution 21 (II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset and that the attainment of this objective, in relation to the question of reverse preferences, which remains to be resolved, will require further consultations between the parties directly concerned. These consultations should be pursued as a matter of urgency with a view to finding solutions before the implementation of the schemes. The Secretary-General of UNCTAD will assist in these consultations with the agreement of the Governments concerned.

...

³⁰⁸ *Ibid.*, [First Session], vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

³⁰⁹ *Ibid.*, p. 30.

³¹⁰ UNCTAD, Research memorandum No. 33/Rev.1, paras. 19-27.

³¹¹ *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1)*, pp. 265 *et seq.*, Part Three, annex I.

III. SAFEGUARD MECHANISMS

1. All proposed individual schemes of preferences provide for certain safeguard mechanisms (for example, *a priori* limitation or escape-clause type measures) so as to retain some degree of control by preference-giving countries over the trade which might be generated by the new tariff advantages. The preference-giving countries reserve the right to make changes in the detailed application as in the scope of their measures, and in particular, if deemed necessary, to limit or withdraw entirely or partly some of the tariff advantages granted. The preference-giving countries, however, declare that such measures would remain exceptional and would be decided on only after taking due account, in so far as their legal provisions permit, of the aims of the generalized system of preferences and the general interests of the developing countries, and in particular the interests of the least developed among the developing countries.

...

IV. BENEFICIARIES

1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organisation for Economic Co-operation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries; ... namely:

"As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56, ... i.e., Section A in Part I."

...

V. SPECIAL MEASURES IN FAVOUR OF THE LEAST DEVELOPED AMONG THE DEVELOPING COUNTRIES

1. In implementing Conference resolution 21 (II), and as provided therein, the special need for improving the economic situation of the least developed among the developing countries is recognized. It is important that these countries should benefit to the fullest extent possible from the generalized system of preferences. In this context, the provisions of Conference resolution 24 (II) of 26 March 1968 should be borne in mind.

2. The preference-giving countries will consider, as far as possible, on a case-by-case basis, the inclusion in the generalized system of preferences of products of export interest mainly to the least developed among the developing countries, and as appropriate, greater tariff reductions on such products.

...

VI. DURATION

The initial duration of the generalized system of preferences will be ten years. A comprehensive review will be held some time before the end of the ten-year period to determine, in the light of the objectives of Conference resolution 21 (II), whether the preferential system should be continued beyond that period.

VII. RULES OF ORIGIN

...

VIII. INSTITUTIONAL ARRANGEMENTS

1. The Special Committee on Preferences agrees that there should be appropriate machinery within UNCTAD to deal with the questions relating to the implementation of Conference resolution 21 (II) bearing in mind Conference resolution 24 (II). The [appropriate UNCTAD body] should have the following terms of reference:

(a) It will review:

(i) The effects of the generalized system of preferences on exports and export earnings, industrialization and the rates of economic growth of the beneficiary countries, including the least developed among the developing countries, and in so doing will consider, *inter alia*, questions related to product coverage, exception lists, depths of cut, working of safeguard mechanisms (including ceilings and escape clauses) and rules of origin;

...

IX. LEGAL STATUS

1. The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with Conference resolution 21(II), and that the Contracting Parties to the General Agreement on Tariffs and Trade intend to seek the required waiver or waivers as soon as possible.

2. The Special Committee takes note of the statement made by the preference-giving countries that the legal status of the tariff preferences to be accorded to the beneficiary countries by each preference-giving country individually will be governed by the following considerations:

(a) The tariff preferences are temporary in nature;

(b) Their grant does not constitute a binding commitment and, in particular, it does not in any way prevent:

(i) Their subsequent withdrawal in whole or in part; or
(ii) The subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff accommodations;

(c) Their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade.

(6) The General Assembly took note of the unanimous agreement reached in the Special Committee on Preferences by including the following passage in the International Development Strategy for the Second United Nations Development Decade adopted in its resolution 2626 (XXV):

(32) Arrangements concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential treatment to exports of developing countries in the markets of developed countries have been drawn up in the United Nations Conference on Trade and Development and considered mutually acceptable to developed and developing countries. Preference-giving countries are determined to seek as rapidly as possible the necessary legislative or other sanction with the aim of implementing the preferential arrangements as early as possible in 1971. Efforts for further improvements of these preferential arrangements will be pursued in a dynamic context in the light of the objectives of resolution 21 (II) of 26 March 1968, adopted by the Conference at its second session.

Developments in GATT

(7) In the Special Rapporteur's second report a brief description was given of part IV of the General Agreement which was added to the original text in 1966 with the intention of satisfying the trade needs of developing countries.³¹² It did not take too long to detect that the provisions of part IV were insufficient. On the basis of the agreement reached at the second session of UNCTAD and in the Special Committee on Preferences, the Governments members of GATT have voted to authorize the introduction by developed member countries of generalized, non-discriminatory preferential tariff treatment for products originating in developing countries. The authorization takes the form of a waiver under the terms of article XXV of the General Agreement. The full text of the waiver reads as follows:

The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade,

Recognizing that a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development;

Recognizing further that individual and joint action is essential to further the development of the economies of developing countries;

Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

Considering that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries;

Noting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are temporary in nature;

Recognizing fully that the proposed preferential arrangements do not constitute an impediment to the reduction of tariffs on a most-favoured-nation basis,

Decide:

(a) That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties

Provided that any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;

(b) That they will, without duplicating the work of other international organizations, keep under review the operation of this

Decision and decide, before its expiry in the light of the considerations outlined in the Preamble, whether the Decision would be renewed and if so, what its terms should be;

(c) That any contracting party which introduces a preferential-tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES and furnish them with all useful information relating to the actions taken pursuant to the present Decision;

(d) That such contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the preferential arrangement;

(e) That any contracting party which considers that the arrangement or its later extension is not consistent with the present Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangement or its subsequent extension and that consultations have proved unsatisfactory, may bring the matter before the CONTRACTING PARTIES which will examine it promptly and will formulate any recommendations that they judge appropriate.³¹³

The functioning of the generalized system of preferences

(8) The Soviet Union was the first country which introduced as early as 1965 a unilateral system of duty-free imports from developing countries. Such duty-free treatment applies to all products. No conditions in respect of duration or the reimposition of duties are attached. As the Soviet representative in the Special Committee on Preferences explained, the USSR would, in addition to according tariff preferences, continue with a number of other measures designed to increase its imports from developing countries on the lines outlined in the Joint Declaration of the Socialist Countries of Eastern Europe.³¹⁴

(9) Australia followed suit in 1966 with a more restricted unilateral system, and Hungary announced its own system in 1968. According to the latter—as amplified and improved in 1971 and 1974—the Hungarian preferential list of products covers a wide range of products, both agricultural and industrial; it is based on requests of developing countries and includes items of special export interest for the least developed among the developing countries; the extent of tariff reductions is set forth by Government Decree; the preferential tariff rates are 50 to 90 per cent below the most-favoured-nation tariff rates and more than 100 products are accorded full duty exemption; beneficiary countries are those developing countries in Asia, Africa and Latin America whose *per capita* national income is less than Hungary's; which do not apply discrimination against Hungary; which maintain normal trade relations with Hungary and can give reliable evidence of the origin of products eligible for preferential tariff treatment; a pro-

³¹³ GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No.: GATT/1972-1), pp. 24-26.

³¹⁴ *Official Records of the Trade and Development Board, Tenth Session, Supplement No. 6A* (TD/B/329/Rev.1), part two, para 192. See R. Krishnamurti, "The Agreement on Preferences, A Generalized System in Favour of Developing Countries", *Journal of World Trade Law* (Twickenham), vol. 5, No. 3 (January-February 1971), pp. 56-57.

³¹² See *Yearbook... 1970*, vol. II, p. 232, document A/CN.4/228 and Add.1, para. 192.

duct shall be deemed to originate in a beneficiary country if it has been produced in that country or 50 per cent of its value has been added to it in that country; a safeguard mechanism consists in the possibility that the Ministers of Foreign Trade and of Finance can, in collaboration with the President of the National Board for Materials and Prices, increase, reduce or suspend the application of the tariff rates established in columns I, II and III (columns I and II of the customs tariff indicate "preferential" and "most-favoured-nation" tariff rates, respectively. The tariff rates in column III are applied to goods originating from those countries to which neither preferential nor most-favoured-nation treatment is applied.) This detailed regulation entered into force on 1 January 1971. In 1974, the number of beneficiary countries was enlarged, the product coverage of the system was also broadened and some tariff rates were reduced.³¹⁵ The Hungarian system allows preferences only provisionally for those countries which on 1 January 1972 extended special (reverse) preferences to certain developed countries.

(10) EEC also announced a scheme of generalized preferences in 1971 allowing the duty-free entry of manufactured and semi-manufactured products from a number of developing States. Firm limits are set for the quantities which may be imported in this way and certain sensitive items such as textiles and shoes are given less generous treatment. The generalized system of preferences of the United States of America is contained in title V of its Trade Act of 1974.³¹⁶ Its section 501 authorizes the President to extend preferences. Section 502 defines the notion of a "beneficiary developing country" excluding from that notion—with certain exceptions—"Communist countries" and others. Section 503 determines the articles eligible for preferential treatment, excluding some import-sensitive articles. Section 504 contains limitations on preferential treatment. Section 505 sets a 10-year time-limit for duty-free treatment under the title and provides for a comprehensive review of the operation of the whole preferential system after five years.

(11) It is perhaps too early to assess the results, success or failure, of the generalized system of preferences. Some voices of complaint have already been heard. According to the report of the Trade and Development Board on its fifth special session (April-May 1973):

The representatives of developing countries stated that, while some progress might have been achieved in the implementation of the generalized system of preferences, the system itself was far from adequate in terms of its objectives and its performance thus far was disappointing ... They observed that the actual benefits of the scheme were still meagre because of the limited coverage of the schemes in operation, ... the limitations imposed on preferential imports by ceilings and the application of non-tariff barriers on products covered by the system.

³¹⁵ See GATT, documents L/3301 and L/4106.

³¹⁶ Public Law 93-618; came into force on 3 January 1975. For text, see *U.S. Code Congressional and Administrative News* (Washington, D.C.), No. 13 (30 January 1975), p. 6956.

The representatives of several developing countries including the least developed among them felt that the generalized system of preferences was of little or no benefit, since their countries did not produce manufactures or semi-manufactures, but only supplied primary materials and semi-processed agricultural commodities which were not covered by the generalized system of preferences. In addition, they pointed out that the safeguard clauses presently embodied in the schemes allowed much leeway for limiting the scope of preferences and made such preferences disparate, while creating considerable uncertainty.³¹⁷

(12) The Charter of Economic Rights and Duties of States embodied in General Assembly resolution 3281 (XXIX) also contains provisions pertinent to the problems under consideration. Thus, articles 18 and 26, as regards the generalized system of preferences read as follows:

Article 18

Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour.

Article 26

All States have the duty to co-exist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

Article 12, paragraph 1, and article 21 on regional groupings read as follows:

Article 12

1. States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation and have full regard for the legitimate interests of third countries, especially developing countries.

...

³¹⁷ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 15 (A/9015/Rev.1)*, part one, chap. I, paras. 89-90.

Article 21

Developing countries should endeavour to promote the expansion of their mutual trade and to this end, may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

(13) There appears to be general agreement in principle, expressed within United Nations organs, that States should adopt a generalized system of preferences the characteristics of which are outlined above. There seems to be a general agreement also that States will refrain from invoking their rights to most-favoured-nation treatment with a view to obtaining in whole or in part the preferential treatment granted to developing countries by developed countries.³¹⁸ Accordingly, contracting parties to GATT have, under the conditions described above,³¹⁹ waived their rights to most-favoured-nation treatment under article I of the General Agreement.

(14) The Commission is aware that the usefulness of article 21 depends upon the permanence and the development of the generalized system of preferences. It is aware that the initial duration of the system has been set at ten years. It noted, however, that the General Assembly, in its resolution 3362 (S-VII) of 16 September 1975 expressed the wish that the generalized scheme of preferences should not terminate at the end of the period of ten years originally envisaged.

(15) It also took account of the fact that the countries establishing their own preferential system were free to withdraw their grants in whole or in part and that these grants were conditional upon the necessary waiver or waivers in cases where, as in the framework of the General Agreement on Tariffs and Trade, it is so prescribed.

(16) It is also evident that the advantages which the generalized system of preferences may yield to the benefit of developing countries may be diminished by a reduction of tariffs following international arrangements or unilateral action.

(17) The system is based upon the principle of self-selection, i.e., that the donor countries have the right to select the beneficiaries of their system and withhold preferences from certain developing countries. As may be seen from the examples given above,³²⁰ selections can be based on various considerations. One could argue that the individual, national generalized systems of preferences were in fact discriminatory and that the original idea of non-discriminatory preferences had not been reached. The principle

³¹⁸ See above, in para. (5) of this commentary, section IX ("Legal Status") of the agreed conclusions of the Special Committee on Preferences.

³¹⁹ See above, para. (7) of this commentary.

³²⁰ See above, paras. (9) and (10) of this commentary.

of self-selection is, however, part of the system from which it cannot be severed; but there is also the expectation that the right of self-selection will be exercised with reasonable restraint.

(18) The above-mentioned features are part and parcel of the generalized system of preferences which was adopted as a matter of compromise between developed and developing States.

(19) The Commission also took cognizance of the fact that there is at present no general agreement among States concerning the concepts of developed and developing States. The rule contained in article 21 applies to any State beneficiary of a most-favoured-nation clause irrespective of whether it belongs to the developed or to the developing category. The provision must apply also to developing beneficiary States because if it did not the basic principle of the generalized system of preferences—the principle of self-selection—could be circumvented.

(20) On the basis of the foregoing considerations the Commission adopted article 21, which states that a beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.

Article 22. — The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic

1. A beneficiary State other than a contiguous State is not entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.

2. A contiguous beneficiary State is entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State and relating to frontier traffic only if the most-favoured-nation clause relates especially to the field of frontier traffic.

Commentary

(1) One of the exceptions which is often included in commercial treaties containing a most-favoured-nation clause relates to frontier traffic. Thus, the General Agreement on Tariffs and Trade contains a cursory statement (article XXIV, para. 3) providing that:

The provisions of this Agreement shall not be construed to prevent:

(a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic; ...³²¹

³²¹ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 41.

The text of this provision is similar to that included in paragraph 7 of the 1936 resolution of the Institute of International Law:

The most-favoured-nation clause does not confer the right:

to the treatment which is or may thereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic;

...³²²

(2) The frontier traffic exception was already discussed in the League of Nations Economic Committee. The Committee stated in its conclusion, *inter alia*, that:

... in most commercial treaties, allowance is made for the special situation in these [frontier] districts by excepting the Customs facilities granted to frontier traffic from the most-favoured-nation régime ... In any case, it must be admitted that the exception concerning frontier traffic is rendered necessary, not merely by long-standing tradition but by the very nature of things, and that it would be impossible, owing to differences in the circumstances, to lay down precisely the width of frontier zone which should enjoy a special régime ...³²³

(3) Indeed, it seems to be quite general practice for commercial treaties concluded between States with no common frontier to except from the operation of the most-favoured-nation clause advantages granted to neighbouring countries in order to facilitate frontier traffic.³²⁴ Commercial treaties concluded between neighbouring countries constitute a different category inasmuch as the countries may or may not have a uniform regulation of the frontier traffic with their different neighbours.

(4) According to R. C. Snyder, there is almost universal agreement that free trade or freer trade must be allowed within a restricted (frontier) zone and that the generalization of this concession does not fall within the requirements of equality of treatment.³²⁵ Snyder quotes from a 1923 treaty between France and Czechoslovakia which exempts concessions granted within a 15-kilometre frontier zone "such régime being confined exclusively to the needs of the populations of that zone or dictated by the special economic situations resulting from the establishment of new frontiers".³²⁶

(5) Obviously, the expression "frontier traffic" is not quite unequivocal. It may mean the movement of goods or of persons or of both. It relates usually to persons residing in a certain frontier zone and to their movements to, and labour relations in, the op-

posite frontier zone, and also to the movement of goods between the two neighbouring zones, sometimes restricted to goods produced in these zones. The national regulations of frontier traffic are quite diverse, not only as to the width of the zone in question but on the conditions of the traffic between the two zones lying on both sides of the common frontier.

(6) The reason why the Commission felt that the frontier traffic exception should be codified does not lie in the frequency of the conventional stipulations. It seems that the rule is in conformity with the constant practice of States, which has not, to the best of the Commission's knowledge, produced any instance where a dispute has arisen over the essence of the rule. It seems to be founded on the basic philosophy of the most-favoured-nation clause and notably on the *ejusdem generis* rule, reflected in articles 11 and 12. It seems evident that a beneficiary State which has no common frontier with the granting State is not in a position to claim the same treatment for its nationals which the granting State extends in respect of those nationals of the contiguous third State who are residents of the frontier zone. It is equally evident that a non-contiguous beneficiary State cannot, on the basis of a general most-favoured-nation clause embodied in a commercial treaty, expect the same treatment for the movement of its goods as that extended by the granting State to a contiguous third State in respect of the movement of goods restricted to those produced in the frontier zone or to those serving the needs of the population of that zone.

(7) On the basis of this situation some members of the Commission thought that there was no need for inclusion of that exception in the draft articles because the exception would apply on the basis of articles 11 and 12. The majority of members, however, thought that the spelling out of this undisputed rule, which is based on the fundamental limitations of the clause, could be useful and accordingly *paragraph 1* of article 22 states that a beneficiary State which is not contiguous to the granting State is not entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State for the purpose of facilitating frontier traffic.

(8) The situation is different if the beneficiary of a most-favoured-nation clause is a State which is itself also contiguous to the granting State. In such a case it is quite possible that the most-favoured-nation clause in favour of that State covers the benefits extended by the granting State to another (third) contiguous State. Accordingly, *paragraph 2* of article 22 states that a contiguous beneficiary State is entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State, but again, in such a case, the most-favoured-nation clause attracts the relevant benefits only if the treatment conforms to the requirements of articles 11 and 12, i.e. if it is *ejusdem generis*. The Commission considered, however, that this requirement should be stated restrictively, and accordingly

³²² *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

³²³ *Ibid.*, pp. 178-179, annex I.

³²⁴ Basdevant, "Clause de la nation la plus favorisée" (*loc. cit.*), p. 476.

³²⁵ Snyder, *op. cit.*, quoting from R. Riedl and H. P. Whidden with the remark that the practice of States in this respect has changed little in 100 years.

³²⁶ Article 13 (League of Nations, *Treaty Series*, vol. XLIV, p. 21).

paragraph 2 of article 22 explicitly states that the most-favoured-nation clause in question must relate especially to the field of frontier traffic.

Article 23. — The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State

1. A beneficiary State other than a land-locked State is not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea.

2. A land-locked beneficiary State is entitled under the most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State and relating to its access to and from the sea only if the most-favoured-nation clause relates especially to the field of access to and from the sea.

Commentary

(1) In its report on the work of its twenty-seventh session the Commission briefly referred to the case of the land-locked States, that is, to the exception which the special position of those States requires in regard to the operation of the most-favoured-nation clause.³²⁷ This requirement was stated in a proposal submitted by Czechoslovakia to the Preliminary Conference of Land-locked States in February 1958. The proposal was explained as follows:

The fundamental right of a land-locked State to free access to the sea, derived from the principle of the freedom of the high seas, constitutes a special right of such a State, based on its natural geographical position. It is natural that this fundamental right belonging only to a land-locked State cannot be claimed, in view of its nature, by any third State by virtue of the most-favoured-nation clause. The exclusion from the effects of the most-favoured-nation clause of agreements concluded between land-locked States and countries of transit on the conditions of transit is fully warranted by the fact that such agreements are derived precisely from the said fundamental right.³²⁸

This proposal did not lead to the adoption of any rule on the matter in the 1958 United Nations Conference on the Law of the Sea.

(2) The United Nations Conference on Trade and Development adopted in 1964 principle VII relating to transit trade of land-locked countries in the following words:

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.³²⁹

(3) The preamble of the Convention on Transit Trade of Land-Locked States of 8 July 1965 reaffirms principle VII adopted by UNCTAD in 1964, and article 10 of the same Convention contains the following provision:

1. The Contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause. A land-locked State which is not a party to this Convention may claim the facilities and special rights accorded to land-locked States under this Convention only on the basis of the most-favoured-nation clause of a treaty between that land-locked State and the Contracting State granting such facilities and special rights.

2. If a Contracting State grants to a land-locked State facilities or special rights greater than those provided for in this Convention, such facilities or special rights may be limited to that land-locked State, except in so far as the withholding of such greater facilities or special rights from any other land-locked State contravenes the most-favoured-nation provision of a treaty between such other land-locked State and the Contracting State granting such facilities or special rights.³³⁰

(4) The Third United Nations Conference on the Law of the Sea—which had not terminated its work when this report was being drafted—considered the matter in question, and included in its revised single negotiating text of 6 May 1976 article 111, reading as follows:

Exclusion of application of the most-favoured-nation clause

Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.³³¹

(5) On the basis of the foregoing, the Commission found it advisable to adopt a provision on most-favoured-nation clauses in relation to treatment granted to land-locked States. The Commission did not propose to enter into the study of the rights and facilities which are needed by land-locked States³³² or which are due to them under general international law. It took into account that at present 29 sovereign States, constituting one fifth of the members of the international community, are land-locked, and that 20 of these are developing States, some of which belong to the least-developed countries.

³²⁷ See *Yearbook... 1975*, vol. II, p. 137, document A/10010/Rev.1, chap. IV, sect. B, paras. (9) and (10) of the commentary to article 14.

³²⁸ *Official Records of the United Nations Conference on the Law of the Sea*, vol. VII, *Fifth Committee (Question of Free Access to the Sea of Land-Locked Countries)* (United Nations publication, Sales No. 58.V.4, vol. VII), p. 77, document A/CONF.13/C.5/L.1, annex 6, commentary to article 8. See also the report of the Working Party to the Fifth Committee (*ibid.*, p. 84, document A/CONF.13/C.5/L.16, para. 13).

³²⁹ 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. 25.

³³⁰ United Nations, *Treaty Series*, vol. 597, p. 42.

³³¹ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. V (United Nations publication, Sales No. E.76.V.8), p. 170, document A/CONF.62/WP.8/Rev.1, document A/CONF.62/WP.8/Rev.1, Part II.

³³² On this point, see L. C. Caflisch, "The Access of Land-Locked States to the Sea" in *Iranian Review of International Relations*, Teheran, Nos. 5-6 (winter 1975-76), p. 53.

(6) The Commission is of the view that the rights and facilities extended to a land-locked State by a coastal State for the purpose of facilitating the access of the former to and from the sea cannot be attracted by a most-favoured-nation clause in favour of another coastal State. This seems to be now generally recognized, as seen from the developments enumerated above. Such an exception serves the legitimate interests of land-locked States which are in a disadvantageous position in respect of their access to the sea. The adoption of the rule will facilitate the extension of free access rights to those countries and relieve the coastal States in question from their obligations under most-favoured-nation clauses granted to other coastal States.

(7) The Commission found, however, that the exception thus constituted should not necessarily operate in respect of a clause the beneficiary of which is itself a land-locked State. If such State has a most-favoured-nation right *vis-à-vis* the coastal State, then it can avail itself of that right provided that the treatment is *ejusdem generis*, i.e. that it conforms to the requirements of articles 11 and 12 of the draft.

(8) Accordingly, *paragraph 1* of article 23 states that a beneficiary State other than a land-locked State is not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea. *Paragraph 2*, on the other hand, states that a land-locked beneficiary State is entitled to such favours under a most-favoured-nation clause. That paragraph, however, restricting somewhat the rules embodied in articles 11 and 12 of the present articles, allows for the entitlement of such favours only if the most-favoured-nation clause relates especially to the field of access to and from the sea.

(9) One member of the Commission drew attention to the fact that the Third United Nations Conference on the Law of the Sea may soon adopt other rules in favour of land-locked States. Reference was made to article 58 of the revised single negotiating text of 6 May 1976 in which the right of land-locked States to participate in the exploitation of the living resources of the exclusive economic zones of adjoining coastal States is mentioned.³³³ He proposed on this basis an extension of the article beyond the right of access to and from the sea to "any treatment accorded to a third State by virtue of the fact that it is land-locked or otherwise geographically disadvantaged, unless the beneficiary State is itself so land-locked or otherwise geographically disadvantaged...". The Commission believed however, that it would not be appropriate to pursue this question at the present time.

(10) The Commission noted that the Convention on

the High Seas (Geneva, 29 April 1958)³³⁴ does not use, in English, the expression "land-locked States" but speaks of "non-coastal States" in article 2 and of "States having no sea-coast" in article 3. It believed, however, that the use of the term "land-locked States" has become quite common since 1958, as is shown by the Convention on Transit Trade of Land-Locked States of 8 July 1965, mentioned above.³³⁵ It is also used in the documents of the Third United Nations Conference on the Law of the Sea and is defined in article 109 of the revised single negotiating text of that Conference as a "State which has no sea-coast".³³⁶ The Commission therefore believes that it can safely use this term without any risk of misunderstanding.

Article 24. — Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Commentary

(1) Article 24 reproduces, in substance, the text of article 73 of the Vienna Convention. It is intended to express the idea that cases of State succession, State responsibility, and outbreak of hostilities are not covered by the present articles. Doubts were expressed in the Commission whether an article of this type is really necessary among the articles on the most-favoured-nation clause. Owing to the fact that the present articles were conceived as an autonomous set and that the States bound by these articles will not necessarily be parties to the Vienna Convention, the view prevailed that the inclusion of an article based on article 73 of the Convention is warranted.

(2) Doubts were expressed concerning the use of the verb "prejudge" in relation to the international responsibility of a State. In the context of the Commission's work on State responsibility,³³⁷ the rules on the most-favoured-nation clause contained in these articles would constitute the "primary rules" to be observed by States. These primary rules would entail certain consequences, namely, the application of the "secondary rules" of international responsibility; therefore, the violation of the rules could be said, in a certain sense, to prejudice the consequences. These objections, which ultimately also relate to the language of the Vienna Convention, were not pressed,

³³³ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. V (*op. cit.*), p. 163, document A/CONF.62/WP.8/Rev.1, document A/CONF.62/WP.8/Rev.1, Part II.

³³⁴ United Nations, *Treaty Series*, vol. 450, p. 82.

³³⁵ See above, para. (3) of this commentary.

³³⁶ A/CONF.62/WP.8/Rev.1/Part II, p. 50. *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. V (*op. cit.*), p. 170, document A/CONF.62/WP.8/Rev.1 Part II.

³³⁷ See below, chapter III.

and it was found that a diversion from the language of the Convention would not be desirable. Similar language was used by the Commission in respect of State responsibility in article 38 of the draft which it prepared in 1974 on succession of States in respect of treaties.³³⁸

(3) As to the case of State succession, the Commission assumes that in respect of a treaty embodying a most-favoured-nation clause the general rules of State succession would apply. These rules apply obviously to any treaty which exists between the granting State and the beneficiary State. They apply also to treaties between the granting State and a third State serving as a basis for the beneficiary State's most-favoured-nation rights. If the rules of State succession will result in the extinction of this latter type of treaty, this may of course lead to the termination of the right of the beneficiary State to the relevant treatment under article 19 of the present articles. An obvious example of such a case is the uniting of the granting State and the third State.

(4) As to State responsibility, any violation of an obligation under a most-favoured-nation clause, whether such violation has been committed directly or indirectly, by circumvention of the obligations concerned,³³⁹ will entail the international responsibility of the granting State—the rules of such responsibility not being covered by the present articles. Similarly, the articles do not deal with the question of when and under what circumstances the granting State may suspend the application of most-favoured-nation treatment as a retortion or sanction for international wrongs committed against it.

(5) The articles, lastly, do not contain any provisions concerning the effect on the operation of the clause of an outbreak of hostilities between any of the States involved. It was thought that because the consideration of such situations was specifically omitted by the Commission in its study of the general law of treaties, it would be out of place to deal with them in the restricted field of the most-favoured-nation clause. A similar stand was adopted by the Commission in the context of its work on succession of States in respect of treaties (article 38).³⁴⁰

Article 25. — Non-retroactivity of the present articles

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses in treaties which are concluded by States after the entry into force of the present articles with regard to such States.

³³⁸ *Yearbook... 1974*, vol. II (Part One), p. 268, document A/9610/Rev.1, chapter II, section D.

³³⁹ See *Yearbook... 1969*, vol. II, pp. 171–172, A/CN.4/213, paras. 85–89.

³⁴⁰ See above, foot-note 338.

Commentary

(1) This article is based on article 4 of the Vienna Convention. Its purpose is the same as that of the said provision of the Convention, which is essentially to simplify and facilitate the acceptance of the articles by Governments.

(2) Members of the Commission who supported the inclusion of article 25 in the draft believed that it has the merit of placing the articles—as concerns their applicability—on the same footing as the Vienna Convention. Others wondered whether article 25 was really necessary in view of the general rule of international law—codified in article 28 of the Vienna Convention—concerning the non-retroactivity of treaties. It was agreed in this respect that the provision of article 25 operates *ex abundanti cautela*.

(3) The question was raised whether the articles contain anything which under the introductory words of article 28 of the Vienna Convention (“Unless a different intention appears from the treaty or is otherwise established...”) would counteract the principle of the non-retroactivity of treaties contained in that article. Because the view prevailed that the answer to that question is in the negative, the Commission decided to include article 25 in the draft.

Article 26. — Freedom of the parties to agree to different provisions

The present articles are without prejudice to the provisions to which the granting State and the beneficiary State may agree regarding the application of the most-favoured-nation clause in the treaty containing the clause or otherwise.

Commentary

(1) The purpose of this article is to express the residual character of the provisions contained in the present draft. As expressed by the Commission in the report on the work of its twenty-seventh session “the draft articles are in general without prejudice to the provisions which the parties may agree to in the treaty containing the clause or otherwise”³⁴¹. The Commission was unanimous in the view that the granting and beneficiary States may agree on most-favoured-nation treatment in all matters which lend themselves to such treatment: they may specify the sphere of relations in which they undertake most-favoured-nation obligations and they may restrict *ratione materiae* their respective promises. The Commission also agreed that States may in the clause itself or in the treaty containing the clause or otherwise reserve their right to grant preferences, i.e., to except from the application of the most-favoured-na-

³⁴¹ *Yearbook... 1975*, vol. II, p. 119, document A/10010/Rev.1, para. 117.

tion clause favours which they grant to one or more States.

(2) Most members thought that this practice, which was considered as being quite general, does not affect the nature of the most-favoured-nation clause. There was a view, however, that a reservation as to preferential treatment of one or more States, while always possible by agreement between States, changes the very nature of the clause as defined in articles 4 and 5 and article 2, paragraph (d). According to that view, clauses of this type would not properly fall under the present articles; the provisions of the present articles would apply only *mutatis mutandis* to such "restricted most-favoured-nation clauses".

Article 27. — The relationship of the present articles to new rules of international law in favour of developing countries

The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

Commentary

(1) The Commission noted the reaction of some representatives in the Sixth Committee of the General Assembly to article 21³⁴² (which had provisionally been adopted in the course of the Commission's twenty-seventh session) to the effect that however commendable it was that the Commission wished to embody a rule in favour of developing countries in its articles on the most-favoured-nation clause, article 21 might not be sufficient and further such rules should be developed. Some representatives in the Sixth Committee asked whether the Commission could not adopt at least one more article which would except from the operation of the most-favoured-nation clause any favours which developing countries grant each other for the promotion of their international trade. This question was closely examined by the Commission at its present session and the results of its consideration of the matter are as indicated in the following paragraphs.

(2) Trade expansion, economic co-operation and economic integration among developing countries—whether within organized economic groupings or otherwise—have been accepted as important elements of an "international development strategy" and as essential factors towards their economic development in a number of important international instruments. In these instruments, the establishment of preferences among developing countries has been acknowledged to be one of the arrangements best suited to contribute to trade among themselves. Some of these instruments testify to the willingness of the developed countries to promote this tendency by, *inter alia*, granting exceptions from their most-favoured-nation rights.

³⁴² See above, article 21 and commentary thereto.

(3) General Principle Eight, adopted at the first session of the United Nations Conference on Trade and Development, in 1964, states, *inter alia*, as follows:

... Developing countries need not extend to developed countries preferential treatment in operation amongst them ...³⁴³

In General Principle Ten, it is stated, *inter alia*, that:

Regional economic groupings, integration or other forms of economic co-operation should be promoted among developing countries as a means of expanding their intra-regional and extra-regional trade ...³⁴⁴

Recommendation A.III.8 states, *inter alia*, that:

... rules governing world trade should ... permit developing countries to grant each other concessions, not extended to developed countries ...³⁴⁵

(4) The second session of UNCTAD held at New Delhi in 1968 adopted without dissent, on 26 March 1968, a "Concerted declaration on trade expansion, economic co-operation and regional integration among developing countries" (declaration 23 (II)) which contains "declarations of support" by the developed market-economy countries and by the socialist countries of Eastern Europe. According to the former:

... The developed market-economy countries are ready, after examination and consultation within the appropriate international framework, to support particular trading arrangements among developing countries which are consistent with the objectives set out above. This support could include their acceptance of derogations from existing international trading obligations, including appropriate waivers of their rights to most-favoured-nation treatment ...³⁴⁶

According to the latter:

The socialist countries view with understanding and sympathy the efforts of the developing countries with regard to the expansion of trade and economic co-operation among themselves and, following the appropriate principles by which the socialist countries are guided in that respect, they are ready to extend their support to the developing countries.³⁴⁷

(5) A protocol relating to trade negotiations among developing countries drawn up under the auspices of

³⁴³ For the full text, 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 (reproduced in *Yearbook* ... 1970, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188).

³⁴⁴ *Ibid.*, p. 20.

³⁴⁵ *Ibid.*, p. 42. For a fuller treatment of the problems involved see annex I to the Special Rapporteur's second report, where the views of the UNCTAD secretariat on "Trade among developing countries" are reproduced (*Yearbook* ... 1970, vol. II, p. 238, document A/CN.4/228 and Add.1).

³⁴⁶ *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and 3 and Add.1 and 2, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), annex 1, pp. 51-53.

³⁴⁷ *Ibid.*

GATT, was done at Geneva on 8 December 1971.³⁴⁸ The objective of trade negotiations among developing countries being to expand their access on more favourable terms in one another's markets through exchanges of tariff and trade concessions, the Protocol includes rules to govern the necessary arrangements to achieve that objective, as well as a first list of concessions. The concessions exchanged pursuant to the Protocol are applicable to all developing States which become parties to it. The Protocol is open for acceptance by the countries which made offers of concessions in the negotiations and for accession by all developing countries. The Protocol entered into effect on 11 February 1973 for eight participating countries and, subsequently, for four additional participating countries. The contracting parties to GATT, desirous of encouraging trade negotiations among developing countries through their participation in the Protocol, adopted a decision³⁴⁹ authorizing the waiver of the provisions of paragraph 1 of article 1 of the General Agreement to the extent necessary to permit participating contracting parties to accord preferential treatment as provided in the Protocol to products originating in other parties to the Protocol, without being required to extend the same treatment to like goods when imported from other contracting parties. This decision was taken without prejudice to the reduction of tariffs on a most-favoured-nation basis.

(6) Article 21 of the Charter of Economic Rights and Duties of States³⁵⁰ was also noted. That article reads as follows:

Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

Article 23 of the same Charter seemed also relevant. It reads as follows:

To enhance the effective mobilization of their own resources, the developing countries should strengthen their economic co-operation and expand their mutual trade so as to accelerate their

³⁴⁸ See GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No. GATT/1972-1), p. 11.

³⁴⁹ *Ibid.*, p. 26.

³⁵⁰ General Assembly resolution 3281 (XXIX) of 12 December 1974.

economic and social development. All countries, especially developed countries, individually as well as through the competent international organizations of which they are members, should provide appropriate and effective support and co-operation.

(7) While all these developments show that there is a tendency among States to promote trade among developing countries, the conclusion of the Commission was that this tendency has not yet crystallized sufficiently to permit it to be embodied in a clear legal rule which could find its place among the general rules on the functioning and application of the most-favoured-nation clause. All the texts examined by the Commission and partially quoted above are subject to various conditions. The system of GATT, which excepts from the operation of its first article preferences designed to facilitate trade between developing countries, is also subject to the condition (similar to the condition included in article 21 of the charter of Economic Rights and Duties of States³⁵¹) that such treatment shall not "raise barriers to the trade of other contracting parties".³⁵² Moreover, the GATT system is subject to a procedure of consultations and the ultimate judgement of the contracting parties, and it is not a universal system but is restricted to the membership of GATT, however broad that may be.

(8) Under these circumstances it seemed to the Commission that at least at the present stage of development there is no agreement discernible which would warrant the inclusion in the articles of the present draft of rules other than that contained in article 21 in favour of the developing countries. Nor did the United Nations Conference on Trade and Development in its Fourth Session held at Nairobi in May 1976, provide the Commission with a definitive text upon which it could have based the adoption of a new rule. However, with a view to the possibility of the development of such new rules, the Commission decided to include in the draft articles a general reservation concerning the possible establishment of new rules of international law in favour of developing countries. Article 27 leaves the matter open for future development within the international community and accordingly states that the present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

³⁵¹ See above, para. (6).

³⁵² GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No. GATT/1972-1), p. 27.

Chapter III

STATE RESPONSIBILITY

A. Introduction

61. The object of the current work of the ILC on State responsibility is to codify the rules governing State responsibility as a general and independent top-

ic. The work is proceeding on the basis of the Commission's decisions: (a) not to limit its study of the topic to a particular field, such as responsibility for injuries to the person or property of aliens; and (b), in codifying the rules governing international respon-

sibility, not to engage in the definition and codification of the so-called "primary" rules whose breach entails responsibility.

62. The historical aspects of the circumstances in which the ILC came to resume the study of the topic of "State responsibility" from this new standpoint have been described in previous reports of the Commission.³⁵³ Following the work of the Sub-Committee on State Responsibility, the members of the Commission agreed, in 1963, on the following general conclusions: (a) that, for the purposes of codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there could nevertheless be no question of neglecting the experience and material gathered in certain particular sectors, especially that of responsibility for injuries to the person or property of aliens; and (c) that careful attention should be paid to the possible repercussions which recent developments in international law might have had on State responsibility.

63. These conclusions having been approved by the members of the Sixth Committee and adopted by the General Assembly, the ILC gave fresh impetus to the work of codifying the topic, in accordance with the recommendations of the General Assembly. In 1967, having before it a note on State responsibility submitted by Mr. Roberto Ago, the Special Rapporteur,³⁵⁴ the Commission, as newly constituted, confirmed the instructions given him in 1963.³⁵⁵ In 1969 and 1970, the Commission discussed the Special Rapporteur's first³⁵⁶ and second³⁵⁷ reports in detail. That general examination enabled the Commission to establish the plan for the study of the topic, the successive stages for the execution of the plan and the criteria to be adopted for the different parts of the draft. At the same time, the Commission reached a series of conclusions as to method, substance and terminology which were essential for the continuation of its work on State responsibility.³⁵⁸

64. It is on the basis of these directives, which were generally approved by the members of the Sixth Committee and adopted by the General Assembly, that the ILC is now preparing the draft articles under consideration. In its resolutions 3315 (XXIX) of 14 December 1974 and 3495 (XXX) of 15 December 1975, the General Assembly recommended the Com-

mission to continue its work on State responsibility on a high priority basis, with a view to completing the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts at the earliest possible time and to take up, as soon as appropriate, the separate topic of international liability for injurious consequences arising out of acts not prohibited by international law.

65. The draft articles under consideration—which are cast in such a form they can be used as the basis for concluding a convention if so decided³⁵⁹—thus relate solely to the responsibility of States for internationally wrongful acts.³⁶⁰ The Commission fully recognizes the importance, not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any harmful consequences arising out of certain lawful activities, especially those which, because of their nature, present certain risks. The Commission takes the view, however, that the latter category of questions can not be treated jointly with the former. Because of the entirely different basis of the liability 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.

66. Being obliged to accept any risks inherent in 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 sometimes used to designate both. The limitation of the present draft articles to the responsibility of States for internationally wrongful acts will not, of course, prevent the Commission from also undertaking, in due course, a study of the topic of international liability for injurious consequences of certain acts not prohibited by international law, as recommended by the General Assembly in its resolutions 3071 (XXVIII) of 30 November 1973, 3315 (XXIX) of 14 December 1974 and 3495 (XXX) of 15 December 1975. What the Commission should not do is to deal in one and the same draft with two matters which, in spite of certain common aspects and characteristics, are quite distinct.

67. For reasons of this kind the Commission considered it particularly necessary to adopt, for the definition of the principle stated in article 1 of the pres-

³⁵³ See in particular *Yearbook... 1969*, vol. II, p. 229, document A/7610/Rev.1, chap. IV.

³⁵⁴ *Yearbook... 1967*, vol. II, p. 325, document A/CN.4/196.

³⁵⁵ *Ibid.*, vol. II, p. 368, document A/6709/Rev.1, para. 42.

³⁵⁶ *Yearbook... 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1. In 1971, the Special Rapporteur submitted a second addendum to his first report (*Yearbook... 1971*, vol. II, p. 193, document A/CN.4/217/Add.2).

³⁵⁷ *Yearbook... 1970*, vol. II, p. 177, document A/CN.4/233.

³⁵⁸ See *Yearbook... 1969*, vol. II, p. 233, document A/7610/Rev.1, paras. 80–84 and *Yearbook... 1970*, vol. II, pp. 307–309, document A/8010/Rev.1, paras. 70–83.

³⁵⁹ The question of the final form to be given to the codification of State responsibility will obviously have to be settled later, when the Commission has completed the draft. The Commission will then formulate, in accordance with its Statute, the recommendation it considers appropriate.

³⁶⁰ The Commission does not underestimate the importance of studying questions relating to the responsibility of subjects of international law other than States, but the overriding need for clarity in the examination of the topic, and the organic nature of the draft, clearly make it necessary to defer consideration of these other questions.

ent draft,³⁶¹ a formulation which, while indicating that the internationally wrongful act is a source of international responsibility, cannot be interpreted as automatically ruling out the existence of another possible source of "responsibility". At the same time, the Commission, while reserving for later consideration the question of the final title of the present draft, wishes to emphasize that the expression "State responsibility", which appears in the title of the draft articles, is to be understood as meaning only "responsibility of States for internationally wrongful acts".

68. It is appropriate to point out once again that the purpose of the present draft articles is not to define the rules imposing on States, in one or another sector of inter-State relations, obligations the breach of which can be a source of responsibility and which can, in a certain sense, be described as "primary". In preparing the draft, the Commission is undertaking, on the contrary, to define other rules which, in contradistinction to those mentioned above, may be described as "secondary", inasmuch as they seek to determine the legal consequences of failure to fulfil obligations established by the "primary" rules. Only these "secondary" rules fall within the sphere of responsibility proper. A strict distinction in this sphere is essential if the topic of international responsibility is to be placed in its proper perspective and viewed as a whole.

69. This does not mean that the content, nature and scope of the obligations imposed on the State by the "primary" rules of international law are of no significance in determining the rules governing responsibility. As the Commission has had occasion to note, especially during this session, it is certainly necessary to distinguish, on these bases, between different categories of international obligations when studying the objective element of the internationally wrongful act. In order to be able to assess the gravity of the internationally wrongful act and to determine the consequences attributable to that act, it is undoubtedly necessary to take into consideration the fact that the importance attached by the international community to the fulfilment of some obligations—for example, those concerning the maintenance of peace and security—will be of quite a different order from that attached to the fulfilment of other obligations, precisely because of the content of the former. It is also necessary to distinguish some obligations from others according to their objectives and the results sought from them, if we are to be able to determine in each case whether or not there has been a breach of an international obligation and, if so, to fix the time of commission of the internationally wrongful act. The draft will not fail to bring out these different aspects of international obligations whenever it proves necessary for the purpose of codifying the rules governing international responsibility. But this

must not be allowed to obscure the essential fact that it is one thing to state a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what the consequences of the breach should be. Only this 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 the hope of successful codification.

70. The draft articles are thus concerned only with determination of the rules governing the international responsibility of the State for internationally wrongful acts: that is to say, the rules which govern all the new legal relationships to which an internationally wrongful act on the part of a State may give rise in different cases. They codify the rules governing the responsibility of States for internationally wrongful acts "in general", not only in certain particular sectors. The international responsibility of the State is made up of a set of legal situations which result from the breach of any international obligation, whether it is imposed by the rules governing one particular matter or by those governing another.

71. The general structure of the draft was described at length in the Commission's report on the work of its twenty-seventh session.³⁶² Under the general plan adopted by the Commission, *the origin of international responsibility* forms the subject of *part 1* of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. *Part 2* deals with the *content, forms and degrees of international responsibility*, that is to say, determination of the consequences an internationally wrongful act of a State may have under international law on the basis of different hypotheses (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may decide to add to the draft a *part 3* concerning the "*implementation*" ("*mise en œuvre*") of international responsibility and the *settlement of disputes*. The Commission also considered that it would be better to postpone a decision on the question whether the draft articles on State responsibility should begin with an article giving definitions or an article enumerating the matters excluded from the scope of the draft. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure of the draft. It is advisable to avoid definitions or initial formulations which might prejudice solutions to be adopted later.

72. Subject to subsequent decisions of the Commis-

³⁶¹ For the text of the articles adopted so far by the Commission, see below, sect. B, 1.

³⁶² *Yearbook... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

sion, *part I* of the draft (*The origin of international responsibility*) is, in principle, divided into five chapters. *Chapter I (General principles)* is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements, subjective and objective, of an internationally wrongful act. *Chapter II (The "act of the State" under international law)* is concerned with the subjective element of the internationally wrongful act, that is to say, with determination of the conditions in which particular conduct must be considered as an "act of the State" under international law. *Chapter III (Breach of an international obligation)* deals with the various aspects of the objective element of the internationally wrongful act constituted by the breach of an international obligation. *Chapter IV (Participation by other States in the internationally wrongful act of a State)* covers certain specific problems (incitement, complicity, assistance of another State, indirect responsibility) raised by the possible participation of other States in the internationally wrongful act of a State. Lastly, *chapter V (Circumstances precluding wrongfulness and attenuating or aggravating circumstances)* defines the circumstances which may have the effect either of precluding wrongfulness (*force majeure* and fortuitous event; state of emergency; self-defence; legitimate application of a sanction; consent of the injured State; etc.) or of mitigating or aggravating the wrongfulness of the State's conduct.

73. In 1973, at its twenty-fifth session, the Commission began the preparation of the draft articles on first reading. At that session it adopted, on the basis of proposals made by the Special Rapporteur in the relevant sections of his third report,³⁶³ articles 1 to 4 of *chapter I (General principles)* and the first two articles (articles 5 and 6) of *chapter II (The "act of the State" under international law)* of *part I* of the draft.³⁶⁴ In 1974, at its twenty-sixth session, the Commission continued its examination of the provisions of *chapter II* and, on the basis of proposals contained in other sections of the Special Rapporteur's third report,³⁶⁵ adopted articles 7 to 9 of that chapter.³⁶⁶ At its twenty-seventh session, in 1975, the Commission completed its examination of *chapter II*,

i.e. the provisions relating to the conditions for attribution to the State, as a subject of international law, of an act which can constitute a source of international responsibility, by adopting, on the basis of the proposals made by the Special Rapporteur in his fourth report,³⁶⁷ articles 10 to 15.³⁶⁸ The text of these articles and of the commentaries thereto has been reproduced in the reports of the Commission on the work of the sessions mentioned.

74. At the present session, the Commission had before it the fifth report by the Special Rapporteur (A/CN.4/291 and Add.1 and 2),³⁶⁹ which deals with matters relating to *chapter III (Breach of an international obligation)* of the draft. The report contains, first, a section comprising a series of preliminary considerations on general questions arising in connexion with the objective element of the internationally wrongful act. This section, which is similar to that appearing at the beginning of chapter II of the draft, is followed by three further sections in which the Special Rapporteur examines the following specific questions: (a) whether or not the source of the international obligation breached (customary rule, convention, etc.) has a bearing on the determination of the breach as an internationally wrongful act; (b) the requirement that the international obligation whose breach is denounced must have been in force at the time when the act constituting the breach occurred; and (c) whether it is now necessary to recognize a distinction based on the importance, for the international community, of the subject-matter of the obligation breached and hence to put forward, in contemporary international law, a separate and more serious category of internationally wrongful acts which may be characterized as international crimes.

75. On the basis of the Special Rapporteur's fifth report, the Commission was able at its present session (1361st to 1377th meetings) to take up, in the order in which they appear, the various questions raised by *chapter III* of the draft; it referred the articles contained in the report to the Drafting Committee. At its 1401st, 1402nd and 1403rd meetings, the Commission considered the texts of articles 16 to 19 proposed by the Drafting Committee and adopted them on first reading.

76. The Commission intends to resume its study of the topic at its twenty-ninth session, beginning where it left off at the present session. It proposes to examine, on the basis of the relevant sections of a sixth report now being prepared by the Special Rapporteur, the questions relating to *chapter III* of the

³⁶³ *Yearbook... 1971*, vol. II (Part One) p. 199, document A/CN.4/246 and Add.1-3. The sections of chapter I and sections 1-3 of chapter II of the third report were considered by the Commission at its 1202nd to 1213th and 1215th meetings (*Yearbook... 1973*, vol. I, pp. 5-59 and 65-66).

³⁶⁴ *Ibid.*, vol. II, p. 173, document A/9010/Rev.1, chap. II, sect. B. The Commission adopted the text proposed by the Drafting Committee for these articles at its 1225th and 1226th meetings (*ibid.*, vol. I, pp. 117-121).

³⁶⁵ Sections 4-6 of chapter II of the Special Rapporteur's third report (see foot-note 363 above). These sections were considered by the Commission at its 1251st to 1253rd and 1255th to 1263rd meetings (*Yearbook... 1974*, vol. I, pp. 5-61).

³⁶⁶ *Yearbook... 1974*, vol. II (Part One) p. 272, document A/9610/Rev.1, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1278th meeting (*ibid.*, vol. I, pp. 151-154).

³⁶⁷ *Yearbook... 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1. The Commission considered the sections contained in this report by the Special Rapporteur at its 1303rd to 1317th meetings (*Yearbook... 1975*, vol. I, pp. 3-72).

³⁶⁸ *Ibid.*, vol. II, pp. 61 et seq., document A/10010/Rev.1, chap. II, sect. B.2. The Commission adopted the text proposed by the Drafting Committee for these articles at its 1345th meeting (*ibid.*, vol. I, pp. 214-218).

³⁶⁹ Reproduced in *Yearbook... 1976*, vol. II (Part One).

draft which remain to be considered and which are listed below.³⁷⁰

77. Finally, the Commission wishes to emphasize that international responsibility is one of those topics concerning which the development of law can play a particularly important part, especially as regards the distinction between different categories of international offences and the content and degrees of responsibility. The roles to be assigned to progressive development and to codification of already accepted principles cannot, however, be planned in advance. They will depend on the specific solutions adopted for the various problems.

B. Draft articles on State responsibility³⁷¹

78. The texts of articles 1 to 19 adopted by the Commission at its twenty-fifth, twenty-sixth and twenty-seventh sessions and at the present session, together with the introductory commentary to chapter III of the draft and the texts of articles 16 to 19, with the commentaries thereto, adopted by the Commission at the present session, are reproduced below for the information of the General Assembly.

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

CHAPTER I

GENERAL PRINCIPLES

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.

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.

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.

³⁷⁰ See below, sect. B,2, introductory commentary to chap. III, para. 8 *in fine* and para. 9.

³⁷¹ As stated above (para. 65), the draft articles relate solely to the responsibility of States for internationally wrongful acts. The question of the final title of the draft will be considered by the Commission at a later date.

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.

CHAPTER II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

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.

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.

Article 7. — Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8. — Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

- (a) it is established that such person or group of persons was in fact acting on behalf of that State; or
- (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9. — Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall

be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Article 10. — Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11. — Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12. — Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13. — Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14. — Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement, which is established in the territory of a State or in any other territory under its administration, shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15. — Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

CHAPTER III

THE BREACH OF AN INTERNATIONAL OBLIGATION

Article 16. — Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Article 17. — Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18. — Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that ob-

ligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

*Article 19. — International crimes
and international delicts*

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict.

2. INTRODUCTORY COMMENTARY TO CHAPTER III OF THE DRAFT AND TEXT OF ARTICLES 16 TO 18, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-EIGHTH SESSION

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

(1) Article 3 of the draft lays down the two essential conditions for the existence of an internationally wrongful act.³⁷² The first of these two conditions, namely, the existence of conduct consisting of an action or omission attributable to the State under international law (*subjective element*), is the subject of chapter II of the draft, in which the Commission has tried to determine what kinds of "conduct" are regarded by international law as "acts of the State" for the purpose of establishing the possible existence of

an internationally wrongful act. It is to the second of these conditions, which it has been agreed to call the *objective element* of an internationally wrongful act, that the present chapter is devoted.

(2) This *objective element* consists—as is amply confirmed by the practice of States, international judicial decisions and doctrine—in the fact that the conduct attributed to the State as a subject of international law constitutes a failure by that State to comply with an international obligation incumbent upon it, or, to use the terms of article 3, subparagraph (b) of the draft, in the fact that such conduct constitutes "a breach of an international obligation of the State". The Commission has already stated³⁷³ its reasons for discerning the objective element of an internationally wrongful act in the "breach of an international obligation" and for preferring that term to others, such as the "breach of a rule" or of a "norm of international law". It has pointed out that the term selected was not only the one most commonly used in international judicial decisions and State practice, but also the most accurate. A *rule* is the objective expression of the law, whereas an *obligation* is a subjective legal situation by reference to which the conduct of the subject is judged, whether it is in compliance with the obligation or in breach of it. Moreover, an obligation does not necessarily and in all cases have its immediate origin in a rule, in the true sense of the term: it may have been imposed on a State by a unilateral legal act of that State, or by the decision of an international tribunal or an organ of an international organization authorized to do so. The Commission has also stated its reasons for preferring, in the French version, the term *violation* to other similar terms such as *manquement*, *transgression* and *non-exécution*; in particular, *violation* is the term used in the French text of article 36, paragraph 2(c) of the Statute of the International Court of Justice. The *objective element* which characterizes an internationally wrongful act being defined in this way, chapter III of the draft develops the specific notion of a "breach of an international obligation". The aim is to determine—as was done in chapter II for the notion of an "act of the State"—in what circumstances or on what conditions it must be concluded, in the various possible cases, that the State has committed such a breach.

(3) As the Commission has emphasized in its commentary to article 3³⁷⁴ the *objective element* is the element which distinguishes the internationally wrongful act from the other acts of the State to which international law attaches legal consequences. The very essence of the wrongfulness, the source as such of international responsibility, lies precisely in the conflict or, rather, the non-conformity, of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. In other words, it is to conduct attributed to the State by international law and repre-

³⁷² See *Yearbook...* 1973, vol. II, p. 179, document A/9010/Rev.1, chap. II, sect. B.

³⁷³ *Ibid.*, p. 184, para. (15) of the commentary to article 3.

³⁷⁴ *Ibid.*, p. 181, paras. (7) and (8) of the commentary.

senting a breach on its part of an international obligation incumbent upon it that international law ascribes the creation of these new legal situations unfavourable to the State in question, which are grouped under the common denomination of international responsibility. This relationship which international law establishes between the failure to fulfil an international obligation and the imposition of other obligations (or the application of sanctions as a consequence of that breach), demonstrates what the Commission has frequently pointed out: that the rules relating to the international responsibility of the State are, by their very nature, complementary to other rules of international law which give rise to the legal obligations that States may be led to breach.

(4) It should also be noted that in international law the idea of breach of an obligation can be regarded as the equivalent of the idea of infringement of a subjective right of another.³⁷⁵ Unlike the situation in municipal law, and particularly administrative law, the correlation between the breach of a legal obligation by the State committing the internationally wrongful act and the infringement of an international subjective right of another represented by that breach, admits of no exception in international law. In international law, there is always a correlation between the obligation of one subject and the subjective right of another, whether it be the subjective right of a particular subject, of a number of subjects or of all subjects. Of course, this does not mean that the relationship of responsibility which results, in international law, from the breach by a State of an existing obligation incumbent upon it is always and exclusively equivalent to a relationship between the State committing the offence and the State directly injured. On the contrary, this relationship may extend in various forms to States other than the State directly injured if the international obligation breached is one of those linking the State, not to a particular State, but to a group of States or to all States members of the international community.

(5) The Commission has also given its views, in its commentary to article 3 of the draft, on the question whether there should not be an exception to the principle that the characteristic of the *objective element* of an internationally wrongful act is that it consists in a breach by the State of an international obligation incumbent upon it.³⁷⁶ In the Commission's view, such a general definition of the *objective element* of an internationally wrongful act admits of no exceptions. If one admits the existence in international law of a rule limiting the exercise by a State of its rights and capacities and prohibiting their *abusive exercise*, then such abusive exercise would also represent a breach of an international obligation of the State: the obligation not to exceed certain limits in exercising its own right and not to exercise it with the some intention of harming others or of interfering with other subjects in their own sphere of

competence. In this case, the constitutive element of the internationally wrongful act would still be the breach of an obligation. The possible solution to the problem of the abusive exercise of a right thus has no effect on the definition of the objective element of an internationally wrongful act. In fact, this is a matter which concerns the framing of certain "primary" rules of international law, rather than rules governing responsibility.

(6) Chapter III therefore begins with a provision whose purpose is to specify when it may be considered that there is a "breach of an international obligation", and to state expressly the principle that the essence of the breach consists in the difference between the actual conduct of the State and the conduct required by the obligation incumbent upon it, in other words, the non-conformity of the "act of the State" with its duty under international law. The basic concept having been defined in this way, the other provisions of the chapter are devoted to specifying how this concept applies to the various possible situations and cases.

(7) In this context, an answer must first be found to the questions which arise concerning the formal aspects of the international obligation breached, and it must be considered whether the source from which an obligation derives—in other words its customary, conventional or other origin—does not affect the conclusion regarding the very existence of the internationally wrongful act and its characterization. In the same context, it must also be considered whether the fact that the international obligation breached was in force at the time when the State acted is, or is not, an essential condition for concluding that an international obligation has been breached.

(8) The chapter then takes up a range of questions relating to the way in which the subject-matter of the international obligation breached affects the existence and, especially, the characterization of an internationally wrongful act. The first problem encountered is one of the most delicate and important in the whole study, and one of the most decisive for the eventual determination of the type of responsibility that international law attaches to different kinds of internationally wrongful acts, namely, the problem of deciding whether a basic distinction should be made between internationally wrongful acts according to the degree of importance that fulfilment of the obligation in question has for the international community, precisely because of the content of the obligation, the subject-matter to which it relates, and, of course, according to the gravity of the breach committed. It will then have to be decided whether, in determining the existence of an internationally wrongful act, a distinction should be made between international obligations whose subject-matter is such that a breach occurs when a State simply engages in conduct different from that expressly required of it, and international obligations whose breach only takes place when the conduct of the State is accompanied by an external event which that State should have prevent-

³⁷⁵ *Ibid.*, p. 182, para. (9) of the commentary.

³⁷⁶ *Ibid.*, para. (10) of the commentary.

ed. Consideration will also have to be given to the difference between the breach of an international obligation of conduct, specifically requiring a particular action or omission on the part of the State machinery, and the breach of an obligation of result, which only requires the State to ensure the existence of a particular situation, without specifying the means and acts to be employed to secure it.

(9) Finally, the chapter will deal with the various problems involved in determining the time and duration of the breach of an international obligation, that is to say, what is known as the *tempus commissi delicti*, taking into account the different consequences which may follow, in various forms, from an immediate breach, a breach of a continuing nature, or a breach constituted by a series of conducts relating to separate situations or a succession of conducts relating to the same situations.

(10) The complications caused by the adoption of theoretical and *a priori* positions which were encountered when determining the *subjective element*, do not arise in the consideration of the various aspects of the *objective element*. Nevertheless, the difficulties to be overcome in the present chapter are no less great. The problem which arises at every stage in studying the *objective element* of an internationally wrongful act is essentially a problem of "boundaries": that of establishing how far certain aspects can be analysed without overstepping the limits of the sphere of legal wrongfulness in international law and the resultant responsibility. For example, it must be asked whether the breach of an international obligation having its origin in a specific source does or does not differ from a failure to comply with an obligation having a different origin; but the consideration of this question must not in any circumstances lead us to formulate a theory of the sources of international obligations in the context of the codification of the international responsibility of States. Similarly, the subject-matter of certain different categories of international obligations must be taken specifically into account in order to determine against what subjects, or at what time, a breach of a particular category of obligation allegedly took place; for it is only on that basis that certain characterizations and essential distinctions in the sphere of internationally wrongful acts can be made. But all that should not lead to a search for a specific definition of the international obligations which in one sphere or another are incumbent on States, and thereby to a departure from the purpose of the present draft articles: codification of the general rules on the international responsibility of States. There would be no chance of achieving a favourable result if, while ostensibly codifying international responsibility, the Commission in fact engaged in codifying the "primary" rules of international law. The failure of past attempts at codification in the sphere of responsibility for damage caused to the person or property of foreigners is a good example of the absolute necessity of not attempting to codify together, in the same draft, rules relating to international responsibility and

"primary" rules of international law, the breach of which entails State responsibility.

(11) Nor is it the purpose of the present chapter to settle aspects of the problems considered which belong rather to the subject-matter of other parts and chapters of the draft and which will be considered in the context of those other parts and chapters. Thus, for example, the existence of obligations of result, which are very common in international law, especially obligations relating to the treatment which the State should accord to individuals, constitutes the most acceptable explanation of a well-known principle, namely, the principle that initial recourse to available local remedies is a prerequisite for establishing, at the international level, the responsibility of a State accused of having acted towards individuals in a manner contrary to its international obligations. But it must be explicitly stressed, in order to avoid misunderstandings on the subject, that the rule of prior exhaustion of local remedies will only be taken into consideration in the present chapter from the point of view of its justification and its possible effect on the determination of whether or not a breach of certain obligations has been committed. The eventual formulation of such a rule, the description of the technique of its application, the analysis of its procedural aspects and the determination of the conditions of its application in accordance with general international law and certain treaties, will have to be examined in another context—that of the part of the draft relating to the implementation of international responsibility of the State.

(12) In the same context, it must also be borne in mind that the rules on the *objective element* of an internationally wrongful act stated in chapter III must be understood in the light of all the provisions which are to appear in the draft articles. The finding that a breach of an international obligation exists, which might result simply from the application of the provisions of chapter III, and its characterization as internationally wrongful, which might follow for an "act of the State", could be negated by the fact that one of the various circumstances excluding wrongfulness (*force majeure* and fortuitous event, state of emergency, self-defence, legitimate application of a sanction, consent of the injured State, etc.) to which chapter V of the draft will be devoted, applies in the case in point. Similarly, the particular characterization of a wrongful act and the determination of the régime of responsibility applicable could be altered by the existence, in the case in point, of one of the attenuating or aggravating circumstances which will also be dealt with in chapter V.

(13) Lastly, the Commission wishes to point out that, in preparing the material which is the subject-matter of this new chapter of the draft, it relies, as in the previous chapters, on the inductive method followed by the Special Rapporteur in his reports. Thus State practice and international judicial decisions are analysed and, on the basis of that analysis, the rules to be laid down are formulated. Neverthe-

less, account must be taken of the fact that, at least in regard to certain points, the wealth of precedents is not the same, for example, as it is for determining criteria for the attribution of an act to the State. Where necessary, therefore, this lack has to be made good by giving careful consideration, as a source of guidance for formulating certain rules, to the true requirements of the contemporary international community and to the more authoritative ideas and tendencies which are emerging. In other words, the progressive development of international law sometimes has to take precedence over codification in the strict sense.

Article 16. — Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Commentary

(1) As has been stated already,³⁷⁷ it is the breach of an international obligation of a State by an act of that State which constitutes, in the light of article 3 (b), the *objective element* of an internationally wrongful act. It is now necessary to specify what is meant by a "breach" by a State of an international obligation incumbent upon it, and on what grounds it may be concluded that such a breach exists.

(2) In deciding to meet this need by including in the draft the general wording employed in the text of the present article, the Commission primarily had in mind considerations of a logical and systematic nature relating to the general structure of the draft, but it also wished to emphasize, at the outset of the chapter devoted to the study of the objective element of an internationally wrongful act, the autonomy of international law in this matter. It is for international law, and more specifically the general rules governing State responsibility for internationally wrongful acts, to define what constitutes a breach of an international legal obligation; this is so despite the fact that such a notion is not essentially different, in international law, from the notion which exists in other legal orders of a "breach" of the obligations they impose on their respective subjects.

(3) Thus in international law, as in systems of internal law, a breach by a subject of a legal obligation consists in the fact that the subject engages in con-

duct which is not in conformity with what is required of it by the obligation in question. It is unanimously agreed that conduct of a State which is not in conformity with the conduct to be expected of it under a particular international obligation constitutes a breach of that obligation. The breach of the obligation in question lies in the fact that the conduct required of the State by the obligation and the conduct in which it actually engages do not coincide. To sum up, there is a breach of an obligation when it is established that the subject bound by the obligation has acted otherwise than it should have acted in order to comply with that obligation.

(4) The Commission therefore considered that the wording "is not in conformity with what is required of it by that obligation" was the most appropriate to indicate what constitutes the essence, in terms of the present draft articles, of a breach of an international obligation by a State. This wording was found preferable to other expressions such as "is in contradiction with" or "is contrary to", because it expresses more accurately the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it. For a breach to exist, it is by no means necessary for the act of the State to be in complete and total conflict with what is required of it by the international obligation in question; it is quite sufficient that one aspect or another of the conduct of the State should not be in conformity with what is required of it by that obligation. In every case, it is a comparison of the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation which makes it possible to determine whether or not there is a breach of the obligation by the State. If the act of the State is in conformity with the conduct *required of it* by the international obligation, there is no breach of the obligation and the act in question is perfectly lawful. If, on the other hand, it is found that the act of the State is not in conformity with the conduct *required of it* by that international obligation, a breach of the obligation exists and it must be concluded that the act of the State is internationally wrongful.

(5) It is obvious that the "international obligations" whose breach is envisaged in the present articles must be legal obligations incumbent upon the State under international law. Hence they are legal obligations which States assume in accordance with norms of international law, and not, for example, obligations of a moral nature or obligations of international courtesy. Nor are they legal obligations which may possibly be incumbent upon a State under a legal order other than the international legal order.

(6) For example, the obligations embodied in "contracts" which States conclude with foreign persons (and, sometimes, with another State) to govern economic matters are certainly legal obligations, but they are not legal obligations which derive from the international legal order; this is so regardless of whether such "contracts" are governed by the internal legal order of the State (or one of the States) which con-

³⁷⁷ See above, para. 1 of the introductory commentary to chapter III.

cludes them³⁷⁸ or by another legal order differing from both the internal legal order and the international legal order. Accordingly, the breach by a State of an obligation assumed under a "contract" of this kind cannot, as such, constitute a breach of an international legal obligation capable of engaging what, in the international legal order, is defined as the international responsibility of States.³⁷⁹ For that to be the case, the whole or at least part of the "contract" in question would, in fact, have to be an agreement concluded between States acting as subjects of international law, and therefore governed by international law. If this is true of certain clauses of the "contract" only, a breach of an obligation stipulated in the contract cannot be considered as a breach of an "international" obligation unless the obligation actually breached is among those incumbent upon the State under one of those clauses.

(7) Consequently, the failure of a State to discharge legal obligations governed by a legal order other than the international legal order does not constitute a breach of an "international obligation" within the meaning given to that expression in the present article and in other provisions of the draft articles. Yet it may *per se* give rise to a breach by the State of an obligation incumbent upon it under international law. In that case, however, it is the breach of that international legal obligation, and not the breach of the obligations governed by the other legal order, which constitutes the *objective element* of an internationally wrongful act. For example, the breach by a State of a private "contract" governed by a uniform law incorporated in the internal law of that State is and remains a breach of internal law, even if the uniform law was established and prescribed by a treaty. But if the breach of the "contract" results from the fact that the State party to the convention establishing the uniform law has not adapted its legal system to

³⁷⁸ According to certain writers, they are sometimes governed by another legal system: a "transnational law" (P. Jessup, *Transnational Law* (New Haven, Yale University Press, 1956); J.-F. Lalive, "Contracts between a State or a State agency and a foreign company", *The International and Comparative Law Quarterly*, (London), vol. 13 (July 1964), pp. 1006 *et seq.*); an "international law of contract" (P. Weil, "Problèmes relatifs aux contrats passés entre un Etat et un particulier", *Recueil des cours de l'Académie de droit international de La Haye, 1969-III* (Leiden, Sijthoff, 1970), vol. 128, pp. 189 *et seq.*); or a "quasi-international" law (H. Pazarci, *Responsabilité internationale des Etats en matière contractuelle* (Ankara, Political Science Faculty Publications, 1973 No. 350), pp. 49 *et seq.*).

³⁷⁹ The weaknesses of the few divergent opinions on this subject have been pointed out by the great majority of writers who have dealt with the matter. See, among many others, C. F. Amersinghe, *State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), p. 118: "The contract not being located in the international legal system, breach of such a contract would not *per se* be a breach of international law. At most, the breach would amount to a breach of transnational law." It should be noted, however, that confusion may arise from the expressions used by some writers to designate the responsibility incurred by a State in the event of a breach of obligations established by a "contract" not governed by international law. Thus expressions such as "the international responsibility of States with respect to contracts" and "the contractual responsibility of States" are somewhat ambiguous.

that law as it should have done, the non-performance of the contract gives rise to a breach of a true international obligation which engages the State's responsibility under international law. Similarly, although non-performance by a State of a private "contract" concluded with a foreign person constitutes a wrong only under the legal order which governs the "contract", that wrong may subsequently involve a denial of justice and thus give rise to a breach of an obligation under international law which engages the international responsibility of the State.

(8) In drafting the provision contained in the present article, as well as those appearing in the following articles, the Commission was mindful that, for there to be a breach by a State of an international obligation incumbent upon it, the conduct constituting the breach must be an "act of the State" under international law, in other words, it must be conduct consisting, as stated in article 3, subparagraph (a), of an action or omission attributable to the State under international law. That is why article 16 specifies that there is a breach of an international obligation by a State "when an act of that State" is not in conformity with what is required of it by the obligation. This phrase must be understood in the light of the provisions of chapter II of the draft, which concerns the *subjective element* of an internationally wrongful act and defines the conditions under which specific conduct is to be considered as an "act of the State" according to the rules of international law governing State responsibility.

(9) Lastly, the Commission wishes to stress that the general definition given in the present article is simply a basic provision confined to stating what constitutes the essence of a breach of an international obligation. In order to be able to conclude that there is a breach of an international obligation in a specific case, it is clearly necessary to take account of the other provisions of chapter III, including in particular those which specify other conditions relating to the existence of a breach of an international obligation; for example, the provisions of article 18, which lay down that, for a breach to exist, it is necessary and also sufficient for the obligation to be in force for the State when it engaged in the conduct complained of.

Article 17. — Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.
2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Commentary

(1) The subject-matter of this article is the bearing which the origin of the obligation breached may have on the wrongfulness of an act of a State which is not in conformity with what is required of it by that obligation, and on the régime of responsibility applicable to that act should its wrongfulness be established.

(2) In international law, and indeed in internal law, legal obligations may have diverse origins. An international obligation may, for example, be established by a customary rule of international law, by a treaty provision or, according to prevailing opinion, by a general principle of law applicable within the international legal order. In addition, States sometimes assume international obligations by a unilateral act. A given international obligation may also have at least its immediate origin in obligation-creating procedures stipulated in a treaty (a decision of an organ of an international organization competent in the matter by reason of its constituent instrument, a judgment given in certain circumstances by the International Court of Justice, an award made by an international arbitral tribunal, etc.). That having been said, it should be clear that the examples of the different ways in which international obligations can arise are not mentioned with any intention of including in article 17 a full statement of the various possible origins of an international obligation. The sole purpose of the examples given here is to draw attention to the problem which this difference in the origins of international obligations may create as regards the characterization of an act of the State as internationally wrongful and the determination of the régime of responsibility applicable to it.

(3) The fact that international obligations have differing origins raises two questions. The first, and by far the simplest, is whether the breach by a State of an international obligation always constitutes an internationally wrongful act, regardless of the origin of the obligation. The second is whether the origin, customary, conventional or other, of the obligation breached, or the fact that, for example, the obligation derives from a general normative treaty or from a treaty intended only to establish specific legal relationships, has or has not any effect, not on the characterization as internationally wrongful of the act breaching the obligation, but on the kind and forms of international responsibility engaged by the act. This second question derives particular pertinence from the fact that most systems of internal law distinguish between two different régimes of civil liability, one of which applies to the breach of an obligation assumed by contract, the other to the breach of an obligation having its origin in another source (custom, a statute or regulation, etc.);³⁸⁰ this makes it

possible to identify two different kinds of wrongful acts.

(4) It is clear, as indicated earlier, that to answer the above questions it is neither necessary nor useful to begin by trying to establish all the sources, i.e. all the possible origins of an international obligation. The multiplicity and diversity of these origins is only implicit in the problems which the present article is intended to solve. Speaking in general terms, it is not in the context of a codification of the rules concerning responsibility that the determination of all the possible origins of an international obligation should be undertaken, nor is it in this context that the content of the "primary" obligations whose breach may engage the responsibility of the State should be defined.

(5) On the other hand, it is appropriate to point out that, in seeking adequate answers to the questions raised by the present article, only the relevant provisions of general international law can be taken into account. Subject to the possible existence of peremptory norms of general international law concerning international responsibility, some States may at any time, in a treaty concluded between them, provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision.³⁸¹ Should such a breach occur, the State committing it would normally be subject to the special régime established by the treaty in question, rather than to the régime prescribed by general international law. But this clearly has nothing to do with the question answered by article 17, which is whether the origin of the obligation breached should or should not be taken into consideration for the purpose of determining the international responsibility incurred under general rules of international law, not under the provisions of a particular treaty. To be able to conclude that, in general international law, the breach of an obligation of conventional origin constitutes a wrongful act different in kind from the breach of an obligation which is of customary or other origin, it would be necessary to prove that the legal consequences attaching to the internationally wrongful act in the first case are *always* different legal consequences, even where the treaty imposing the obligation breached makes no special provision for responsibility. Similarly, in establishing whether a given system of internal law distinguishes between "contractual" and "extra-contractual" wrongs, reference is made to the consequences which that system usually attaches to breaches of obligations created by contracts and to those created by legislation or some other general law-making enactment. The special provisions of a particular contract are not taken into account for the purposes of this conclusion.

(6) Nevertheless, the fact that the present article,

³⁸⁰ In internal law, the contractual régime of civil liability differs from the extra-contractual régime, in particular as regards the determination of the burden of proof, forms of reparation, kinds of judicial action available, etc.

³⁸¹ For example, the constituent instruments of some international organizations provide for the possibility of suspension of the membership rights, and even expulsion, of a member State which fails to fulfil certain obligations stipulated in the instrument.

like other articles of the draft, is concerned exclusively with elucidating the pertinent rules of general international law, does not mean that the régime of responsibility provided for in particularly important multilateral treaties, such as the Charter of the United Nations, is to be ignored. The régimes prescribed by treaties of that kind sometimes reflect general international law on the subject or decisively influence its development. Where that is the case, account must be taken of them in the articles of the present draft; not, however, as régimes established by a particular treaty, but as régimes ascribable to general international law.

(7) The answer to the first of the two questions raised by the present article can hardly be in doubt on the level of pure logic alone. If an international obligation is incumbent upon a State and is a true legal obligation, its having this or that origin is a circumstance which cannot *per se* preclude the characterization as internationally wrongful of an act of that State which is not in conformity with what is required of it by the obligation. For it to be actually decided that an act of a State which conflicts with a supposed international obligation of that State is not wrongful, it would be necessary to conclude, rather, that the obligation did not exist, or at least that it was not a legal obligation. Accordingly, the real question raised when account is taken of the origin of the international obligation breached, is the second question: that of the possibility of a difference in the régime of responsibility applicable depending on whether the obligation has one origin rather than another. At all events, following our usual inductive method, we must consider whether and in what manner the two questions raised have been treated in international jurisprudence, in State practice and in the works of learned writers.

(8) International jurisprudence has not often had occasion to consider explicitly the question whether the formal origin of the international obligation breached by an act of the State has a bearing on the characterization of that act as "internationally wrongful". However, an examination of the enormous number of international decisions which recognize the existence of an internationally wrongful act (and, consequently, of the international responsibility of the State), is sufficient to show that the wrong attributed to the State in these decisions is in some cases the breach of an obligation established by a treaty, in others the breach of an obligation of customary origin, and more rarely the breach of an obligation arising from some other source of international law. This alone should be sufficient proof that, in the opinion of the judges and arbitrators who have made these decisions, a breach of an international obligation is always an internationally wrongful act, regardless of the origin of the obligation in question. Furthermore, there are even cases in which international adjudicators and arbitrators have stated explicitly the principle that the breach of an international obligation is always an internationally wrongful act regardless of the origin of the obligation in question.

(9) For instance, in reply to the question what should be understood by acts contrary to "the law of nations" in the *Goldenberg* case between Germany and Romania, where a claim was based on the provisions of paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles, R. Fazy, the sole arbitrator, made the following statement in the award rendered on 27 September 1928:

The expression "the law of nations" has a different meaning according to whether it is restricted to *written* international law or extended to cover all that falls within the wider notion of general international law.

In the interpretation of the clause in question, there is no possible doubt. First, as the Anglo-German arbitrator has already pointed out, the text of paragraph 4 contains nothing to suggest that the Treaty intended that the right to reparation should be confined to exceptional cases where the damage resulted from an act contrary to an express rule of written international law. Secondly, the third preambular paragraph of the Treaty makes a clear reference to the understandings of international law as a whole. Lastly, and most important of all, the fact that the Treaty left the settlement of so-called "neutrality" damages to a tribunal equivalent to the international arbitral tribunals usually set up to decide such questions, makes it clear that it tacitly accepted that the sole arbitrator should follow the practice of those tribunals in the application of the law of nations. That practice has always been based not only on the written rules of international law but also on international custom, the general principles recognized by civilized nations, and judicial decisions, the last-named as subsidiary means for the determination of rules of law.

An act contrary to the law of nations, for the purpose of the clause in question, ought therefore to be defined as follows: *any act which, in the pre-war relations between State and State, could, if submitted to an international arbitral tribunal, have entailed an obligation to make reparation, in accordance with the ordinary rules of general international law.*³⁸²

Mention may also be made in this connexion of the award rendered on 22 October 1953 in the *Armstrong Cork Company* case by the Italian-United States Conciliation Commission set up under article 83 of the Peace Treaty of 10 February 1947. Having endorsed a definition of internationally wrongful acts as all actions of a State which are in contradiction "with any rule whatsoever of international law", the Commission subsequently asserted that the responsibility of the State entailed the obligation to repair the damages suffered to the extent that they were the result "of the inobservance of the international obligation".³⁸³ The Conciliation Commission thus made it clear that it regarded *the breach of any obligation arising from any rule whatsoever of international law* as an internationally wrongful act. The principle in question is also sometimes explicitly stated when an international judicial or arbitral body acknowledges the right of a State to bring a case before it if the State can allege a breach of an obligation created by a rule of

³⁸² United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 908-909 (translation by the United Nations Secretariat).

³⁸³ *Ibid.*, vol. XIV (United Nations publication, Sales No. 65.V.4), p. 163.

international law, and when the body in question states at the same time that the rule concerned may equally well be a conventional rule or a rule of some other origin. A recent example of an express reference to this principle in such a context is to be found in the judgment delivered by the International Court of Justice on 5 February 1970 in the case concerning the *Barcelona Traction, Light and Power Company, Limited*, in which we read that "... the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law".³⁸⁴

(10) Silence may also be evidence of the same conviction on the part of international judicial and arbitral bodies. This is the case, for example, when an international judge or arbitrator gives a general definition of the conditions for the existence of an internationally wrongful act and State responsibility, and in so doing mentions the breach of an international legal obligation or, less correctly, the breach of a rule of international law, without expressing any restriction as to the origin of the obligation, or source of the rule, involved.³⁸⁵ For instance, the Mexico-United States General Claims Commission set up under the Convention of 8 September 1923, in its award of July 1931 concerning the *Dickson Car Wheel Company* case, indicated what it considered to be the conditions for attributing international responsibility to a State, by requiring 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".³⁸⁶

(11) It is therefore clear that international jurisprudence does not consider the origin of the international obligation breached to have any bearing on the characterization of the act of the State constituting the breach as internationally wrongful. That having been said, it now remains to be seen—and this is the more important question—whether, according to international jurisprudence, the origin of the international obligation breached by the act likewise has no bearing on the determination of the international responsibility arising from the act and does not require a distinction to be made, on the basis of that origin,

³⁸⁴ *I.C.J. Reports 1970*, p. 46.

³⁸⁵ In a number of awards concerning *Claims by Italian subjects residing in Peru* rendered on 30 September 1901, the arbitrator Gil de Urbarri, appointed by the Italian-Peruvian Commission of 25 November 1899, said that "... it is a universally recognized principle of international law that a State is responsible for breaches of public international law committed by its agents..." (United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 399 (*Chiessa* claim), p. 401 (*Sessarego* claim), p. 404 (*Sanguinetti* claim), p. 407 (*Vercelli* claim), p. 408 (*Queirolo* claim), p. 409 (*Roggero* claim) and p. 411 (*Miglia* claim)) [translation by United Nations Secretariat].

³⁸⁶ *Ibid.*, vol. IV (United Nations publications, Sales No. 1951.V.1), p. 678. In another award of July 1931, relating to the case of the *International Fisheries Company*, the same Commission affirmed that it held States responsible for any conduct which violated "some principle of international law" (*ibid.*, p. 701).

between different categories of internationally wrongful acts. This too is a question which does not seem to have been brought directly to the attention of an international tribunal. But a comprehensive review of international decisions leads to the conclusion that, once again, the origin of the various obligations has played no part in the matter. No such distinction can be noted in any determination of the consequences of an internationally wrongful act. The customary, conventional or other origin of the obligation breached is not invoked to justify the choice of one form of reparation in preference to another for instance, or to determine what subject of law is authorized to invoke responsibility.

(12) State practice does not give other answers to the questions with which the present article is concerned. It will suffice to mention the opinions expressed by Governments during the preparatory work for the Conference for the Codification of International Law, held at The Hague in 1930 and, subsequently, in the discussions in the Third Committee of that Conference. The request for information addressed to Governments by the Preparatory Committee of the Conference contained no proposals specifically designed to sound out the views of the countries invited to the Conference as to whether the breach of a treaty obligation should have consequences different from those following from the breach of a customary or other obligation. However, this question was implicit in the wording of Points II, III and IV of the request for information.

(13) In Point II, Governments were asked whether they agreed with the contents of a proposal which first stated that membership of "the community governed by international law" implied an obligation for the States concerned to conform to certain "standards of organization" and "rules of conduct" of the community, and then drew the conclusion "that a State which fails to comply therewith... incurs responsibility",³⁸⁷ all the replies were in the affirmative. They include a number which distinguished, according to source between three different categories of rules of international law that imposed obligations on States concerning the treatment of foreigners (treaty provisions, special rules of customary law and general norms of customary law); at the same time they stated that the infringement of any obligation deriving from these three sources directly entailed State responsibility.³⁸⁸ Affirmative replies were also given by governments to the question whether the State became responsible by virtue of having enacted legislation (Point III, No. 1),³⁸⁹ or having taken judicial decisions (Point IV, No. 2)³⁹⁰ incompatible with

³⁸⁷ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, *Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 20.

³⁸⁸ See the reply by Austria (*ibid.*, p. 21). For the other replies, see *ibid.*, pp. 20 *et seq.*; and *Supplement to vol. III* (C.75(a).M.69(a).1929.V), pp. 2 and 6.

³⁸⁹ League of Nations, *Bases of Discussion...* (*op. cit.*), p. 25.

³⁹⁰ *Ibid.*, p. 41.

its "treaty obligations" or its "other international obligations", or by virtue of having failed to take action to implement those obligations. None of the replies proposed that a distinction should be made, as regards the existence of State responsibility, between the breach of a treaty obligation and the breach of an obligation having some other origin, whatever it might be.³⁹¹

(14) Taking into account the replies received, the Preparatory Committee drafted bases of discussion which mentioned international obligations of the State "resulting from treaty or otherwise"³⁹² and "treaty obligations" or "other international obligations of the State".³⁹³ When the Third Committee of the Conference studied these bases of discussion, there was general agreement that a breach of any international obligation engaged the international responsibility of the State. The only divergencies were as to what the origins of international obligations were.³⁹⁴ It was finally agreed to mention three: treaties, custom and the general principles of law. Approval was thus given to the text of article 1, which established that any breach of an international obligation entailed an international responsibility of the State, and of article 2, which specified that:

The expression "international obligations" in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.³⁹⁵

We may leave aside the question—which does not concern us—whether this article determined, fully and exhaustively, the possible origins of international obligations relating to the subject-matter covered by the draft convention.³⁹⁶ What seems beyond doubt, however, is that the Committee intended to give equal status, as regards the responsibility engaged by a breach, to all existing international legal obligations

³⁹¹ *Ibid.*, pp. 25 *et seq.*, 41 *et seq.*, and *Supplement to vol. III...* (*op. cit.*), pp. 2, 6 *et seq.*

³⁹² Bases of Discussion Nos. 2 and 7 concerning legislation and acts of the executive power (League of Nations, *Bases of Discussion...* (*op. cit.*), pp. 30 and 55 respectively). Text reproduced in *Yearbook...* 1956, vol. II, p. 223, document A/CN.4/96, annex 2.

³⁹³ Basis of Discussion No. 5 (*ibid.*, p. 48). Text reproduced in *Yearbook...* 1956, vol. II, p. 223, document A/CN.4/96, annex 2.

³⁹⁴ The Third Committee's insistence on dealing with the question of sources was probably connected with the fact that the draft convention was supposed to cover all substantive aspects of the obligations of States with regard to the treatment of foreigners. The discussion dealt mainly with the question whether general principles of law could be adduced to establish the international obligations of States in that matter. See League of Nations, *Acts of the Conference for the Codification of International Law*, vol. IV, *Minutes of the Third Committee* (C.351(c).M.145(c) 1930.V.) pp. 32 *et seq.*, 112, 116, 159 *et seq.*

³⁹⁵ The text of the article is reproduced in *Yearbook...* 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

³⁹⁶ Here we find once again the error criticized in the introductory commentary to chapter III, which is, in defining the rules on responsibility, to seek to specify the sources of international law instead of simply stipulating that the breach of any international legal obligation, whatever its origin, engages the responsibility of the State.

relating to the treatment of foreigners, without making any distinction between the formal origins of such obligations.

(15) The conclusions which follow from the work of the 1930 Hague Conference as regards the question whether the origin of the obligation breached could have a bearing on the international responsibility attached to an internationally wrongful act are also negative. In the Preparatory Committee's request for information a single form of responsibility, the obligation to make reparation for the injury caused, was envisaged for all breaches of international obligations concerning the treatment of foreigners. None of the Governments which replied expressed a different view.³⁹⁷ Moreover, in Point XIV of the request for information, which deals with reparation itself, various forms of reparation were provided for, but the choice between them in no way depended on the origin of the obligation breached.³⁹⁸ Nor did origin play any part in the distinction made in Basis of Discussion No. 29 between the various kinds of consequence following from the breach of international obligations causing injury to foreigners.³⁹⁹ During the debate on this Basis of Discussion in the Sub-Committee and then in the Third Committee, no one suggested that different kinds of responsibility should apply according to whether the origin of the obligation breached was conventional, customary or other.⁴⁰⁰ Article 3, adopted by 32 votes to none, read as follows:

The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.⁴⁰¹

Read in conjunction with article 2,⁴⁰² this text shows that, in the view of the Conference participants, the breach of an international obligation concerning the matters proposed for codification always had the same effects with respect to international responsibility, regardless of whether that obligation originated in a treaty, a custom or a general principle of law.

(16) It would also seem useful to mention in this connexion that, when the reports of the ILC have been discussed in the Sixth Committee of the General Assembly, it has never been suggested that breaches of obligations having as their origin a treaty, custom or other source of law should be subject to different régimes of responsibility. Although mem-

³⁹⁷ League of Nations, *Bases of Discussion...* (*op. cit.*), pp. 20 *et seq.* and *Supplement to vol. III* (*op. cit.*), pp. 2 and 6.

³⁹⁸ For point XIV and the replies of Governments, see *ibid.*, respectively pp. 146 *et seq.*, and pp. 4, 24 *et seq.*

³⁹⁹ See League of Nations, *Bases of Discussion...* (*op. cit.*), p. 151 and *Yearbook...* 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

⁴⁰⁰ See League of Nations, *Acts of the Conference...* (*op. cit.*), pp. 111, 129 *et seq.*

⁴⁰¹ *Ibid.*, p. 237, *Yearbook...* 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

⁴⁰² See para. 14 above.

bers of the Sixth Committee have sometimes recommended that the ILC should devote particular attention to the consequences of the breach of obligations deriving from certain principles of the Charter of the United Nations or certain resolutions of the General Assembly,⁴⁰³ these suggestions seem to have been prompted by the particularly important content of the obligations concerned rather than by their origin.

(17) The codification drafts relating to State responsibility drawn up by private bodies and those prepared under the auspices of international organizations are both based on the same criteria as are to be found in State practice and international jurisprudence. Most of these drafts attach international responsibility to the breach of an international obligation regardless of the origin of the obligation.⁴⁰⁴ In a few rare cases, the proposition that a breach of an international obligation engages the responsibility of the State is followed by an indication of what are deemed to be the origins of international obligations. But although these indications suggest that the authors of the drafts consider that the only international obligations concerning the matters they deal with are those whose origins are enumerated, there can be no doubt that they also believe that the breach of an international obligation, regardless of whether it has one or another of these origins, always constitutes an internationally wrongful act and always entails international responsibility.⁴⁰⁵ It is of particular interest to note that some drafts expressly provide that international obligations whose breach engages the responsibility of the State are those "resulting from any of the sources of international

⁴⁰³ Suggestions of the kind were made, for example, by the representative of Jamaica in 1970 (*Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee*, 1188th meeting, para. 35), and by the representative of Romania in 1973 (*ibid.*, *Twenty-eighth Session, Sixth Committee*, 1405th meeting, para. 18).

⁴⁰⁴ See, for example, article 1 of the draft prepared in 1926 by the Japanese branch of the International Law Association and Kokusaiho Gakkwai (International Law Association of Japan) (*Yearbook... 1969*, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II); article 1, para. 1 of the resolution adopted by the Institute of International Law in 1927, (*Yearbook... 1956*, vol. II, p. 227, document A/CN.4/96, annex 8); article 1, para. 1 of the 1930 draft of the Deutsche Gesellschaft für Völkerrecht (*Yearbook... 1969*, vol. II, p. 149, document A/CN.4/217 and Add.1, annex VIII); article 1, para. 1 of the 1927 draft by K. Strupp, (*ibid.*, p. 151, document A/CN.4/217 and Add. 1, annex IX); article 1 of the 1932 draft prepared by A. Roth (*ibid.*, p. 152, document A/CN.4/217 and Add.1, annex X) and article 1 of the very recent draft prepared by B. Gräfrath and P. Steiniger, "Kodifikation der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), No. 8 (1973), p. 227. Among the drafts prepared under the auspices of international associations, see Basis No. 1, para. 1 of the Bases of discussion prepared by F. V. García Amador (*Yearbook... 1956*, vol. II, p. 219, document A/CN.4/96, para. 241).

⁴⁰⁵ See conclusions 1 and 3 of the "Guerrero report" of 1926 to the League of Nations (*Yearbook... 1956*, p. 222, document A/CN.4/96, annex 1); articles I, II and III(b) of the opinion prepared by the Inter-American Juridical Committee in 1965 on "Principles of international law that govern the responsibility of the State in the opinion of the United States of America" (*Yearbook... 1969*, vol. II, pp. 153-154, document A/CN.4/217 and Add.1, annex XV); and section 165 of the *Restatement of the Law* prepared by the American Law Institute (*Yearbook... 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2).

law".⁴⁰⁶ In addition, none of the drafts referred to provides for the application of different régimes of responsibility according to whether the obligation breached has one origin rather than another.

(18) The works of writers devote but little space to the question of the possible bearing of the origin of the international obligation breached. Many writers merely affirm that there is an internationally wrongful act and, hence, international responsibility, when there has been a breach of an international obligation. This silence on the part of writers is tantamount to implicit recognition of the fact that the origin of the obligation, its formal source, has no bearing on the characterization of an act of the State as internationally wrongful, or on the consequences which international law attaches to such an act as regards responsibility.⁴⁰⁷ It is of interest to note, moreover, that there are also writers who expressly draw attention to the point that international law makes no distinction between internationally wrongful acts according to the origin of the obligation breached, some of whom formulate this conclusion in very clear terms.⁴⁰⁸ Finally, it should be added that those

⁴⁰⁶ Article 2, para. 2 of the revised draft submitted by Mr. García Amador in 1961 (*Yearbook... 1961*, vol. II, p. 46, document A/CN.4/134 and Add.1, addendum). The same wording appears in article 1, para. 2 of the draft that Mr. García Amador submitted in 1957 (*Yearbook... 1957*, vol. II, p. 128, document A/CN.4/106, annex).

⁴⁰⁷ This is the conclusion reached by the following writers, for example, in works dealing with the international responsibility of States in general: Ch. de Visscher, "La responsabilité des États", *Bibliotheca Visseriana* (Leiden, Brill, 1924), vol. II, in particular, pp. 91, 118 and 119; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 3 *et seq.* and 182 *et seq.*; R. Ago, "Le délit international" *Recueil des cours... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 419 *et seq.* and in particular pp. 441 *et seq.*; H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours... 1959-I* (Leiden, Sijthoff, 1960), vol. 96, pp. 353 *et seq.* and 413 *et seq.*; D. B. Levin, *Orvetstvinnost gosudarstv v sovremennom mezhdunarodnom prave* (Moscow, Mezhdunarodnye Otnosheniya, 1966), in particular, p. 19; E. Jiménez de Aréchaga, "International Responsibility" in M. Sørensen, ed., *Manual of Public International Law* (London, Macmillan, 1968), p. 531 *et seq.*, in particular pp. 533 and 534. Among the works confined to the study of the consequences of internationally wrongful acts, see: J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939). Among general works on international law, see C. C. Hyde, *International Law chiefly as Interpreted and Applied by the United States*, 2nd ed. rev. (Boston, Little, Brown, 1951), vol. 2, p. 882; H. W. Briggs, *The Law of Nations*, 2nd ed. (London, Stevens, 1953), in particular, pp. 615-616; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 347; State Institute of Law of the Soviet Academy of Sciences, *Kurs mezhdunarodnogo prava*, F. I. Kozhevnikov *et al.* eds. (Moscow, Nauka, 1969), vol. V, in particular, p. 50.

⁴⁰⁸ See K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, (Stuttgart, Kohlhammer, 1920), vol. III, sect. 4, p. 9 *et seq.*; L. Oppenheim, *International Law: A Treatise*, 8th ed. Lauterpacht) (London, Longmans, Green, 1955), p. 343; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), p. 171 *et seq.*; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, p. 582 ("...the breach of any international obligation, whether it rests on *lex inter partes* of a treaty, a rule of international customary law or a general principle of law recognized by civilized nations, constitutes an international tort"); C. F. Amerasinghe, *op. cit.*, p. 43; A. Verdross, *Völkerrecht*, 5th ed., (Vienna,

authors who have expressly questioned, in the light of the logic of the principles involved, whether it is advisable to extend to international law the distinction, characteristic of internal legal orders, between contractual and extra-contractual responsibility, have generally answered in the negative.⁴⁰⁹

(19) A study of State practice, international jurisprudence and doctrine leads to two conclusions: (a) that the origin of the international obligation breached by an act of the State has no bearing on the characterization of that act as internationally wrongful; and (b) that the origin of the international obligation breached has no bearing either, as such, on the régime of the international responsibility generated by the internationally wrongful act. It might certainly be asked, and the Commission has done so, whether there are any valid reasons for changing this state of affairs *de jure condendo*. The Commission, however, considers that this is not the case. There would be no justification for a differentiation, according to the origin of the obligation breached, of the international responsibility attaching to internationally wrongful acts—a differentiation which might be based, for example, on the distinction between international obligations originating in a treaty and international obligations originating in custom, or on the distinction between international obligations established by a treaty-contract and international obligations established by a normative treaty. The idea of making a distinction in international law between contractual and extra-contractual responsibility could only be the result of a mistaken assumption that the situation existing in international law is the same as the situation in internal law, which is in fact quite different.

(20) Any attempt to equate internal law with international custom, or contracts in internal law with international treaties, is a false parallel. Only some of the vast mass of international treaties show characteristics resembling those of contracts in private law. In the international legal order, the task of establish-

ing common rules of conduct devolves not only on international custom, but also on international treaties, in particular multilateral treaties, for in the international community there is no authoritative instrument, like legislation, for establishing rules of objective law.⁴¹⁰ Nor should it be forgotten that many rules of international customary law have now been codified by multilateral treaties so that the same obligation is sometimes covered by a customary rule and by a rule codified conventionally. In such a situation, it would not be logical to attach different legal consequences, in the matter of international responsibility, to two identical wrongful acts, simply because in one instance the State which breached the obligation was a party to the codification convention in question, and in the other, it was only subject to a customary rule.⁴¹¹ As regards the distinction between normative treaties and treaty-contracts, it should be noted that it is not easy to make that distinction in practice. There is nothing to prevent States from using one and the same treaty to perform both normative and contractual functions, and there is thus too large a grey area between treaties that are clearly law-making treaties and those which unquestionably fall within the category of treaty-contracts for it to be possible to establish, on such a basis, distinctions relating to the consequences of internationally wrongful acts as regards international responsibility. In practice, any differentiation of the legal consequences of internationally wrongful acts according to whether the obligation breached is embodied in a normative treaty or in a treaty-contract, would merely introduce dangerous uncertainties in regard to international responsibility, which should be avoided at all costs.⁴¹²

(21) The existence of what are called "constitutional" or "fundamental" principles of the international legal order might perhaps be regarded as a more solid foundation for establishing a distinction between international responsibility incurred in consequence of the breach of an obligation deriving from one of those principles, and responsibility resulting from a breach of other international obligations. There is no denying that the obligations imposed on States by some of these principles sometimes affect the vital interests of the international community, so that their breach merits, in some cases, a stricter régime of responsibility than that applied to other internationally wrongful acts. But the pre-eminence of these obligations over others is determined by their content, not by the process by which they were created. Once again, it is only by erroneously equating the

Springer, 1964), p. 373; A. Schüle, "Delikt, völkerrechtliches", *Wörterbuch des Völkerrechts*, (Berlin, de Gruyter, 1960), vol. I, pp. 329 and 320; I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt am Main, Keppler, 1963), p. 136. L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938), p. 213, also considers that the origin of the obligation breached does not entail differences in the forms of responsibility, but he stresses that, where a "treaty" is breached by one of the contracting parties, the other party is entitled to denounce the treaty, even without first having tried to obtain reparation.

⁴⁰⁹ See, for example: M. Scerni, "Responsabilità degli Stati", *Nuovo Digesto Italiano* (Turin), vol. XI, (1939) pp. 472-473; P. Reuter, "La responsabilité internationale", *Droit international public* (cours) (Paris, Les Nouvelles Institutes, 1955-1956), p. 55; A. P. Sereni, *Diritto Internazionale*, (Milan, Guiffre, 1962), vol. III, p. 1515; L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), pp. 352-353; G. I. Tunkin, *Droit international public: problèmes théoriques* (Paris, Pédone, 1965), pp. 192-193; I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1966), pp. 355-356; E. Vitta, "Responsabilità degli Stati", *Novissimo Digesto Italiano* (Turin), vol. XV (1968), pp. 736-737; R. Monaco, *Manuale di diritto internazionale pubblico*, 2nd ed. (Turin, Unione tipografico-editrice torinese, 1971), pp. 549-550.

⁴¹⁰ There are still writers today who regard international custom as a tacit treaty. For those who hold this view it is impossible to conceive of the application of different régimes of responsibility to breaches of obligations having origins which, to their way of thinking, are of the same nature.

⁴¹¹ See, for example, Tunkin, *op. cit.*, pp. 192-193.

⁴¹² In this connexion, it has been said that although the theory which distinguishes between law-making treaties and treaty-contracts embodies a certain amount of truth "it is impossible to derive from it any difference with respect to the régime of international responsibility" (P. Reuter, *op. cit.*, p. 55).

situation under international law with that under internal law that some lawyers have been able to see in the "constitutional" or "fundamental" principles of the international legal order an independent and higher "source" of international obligations. In reality there is, in the international legal order, no special source of law for creating "constitutional" or "fundamental" principles. The principles which come to mind when using these terms are themselves customary rules, rules embodied in treaties, or even rules emanating from bodies or procedures which have themselves been established by treaties. Consequently, the view that international responsibility generated by a breach of certain obligations established by those principles is more grave, cannot be justified on the basis of their "origin", but rather by taking account of the undeniable fact that the international community has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligations in question. It is therefore left to another article of the draft—article 19—to make the necessary distinction between internationally wrongful acts consisting in a breach of obligations of fundamental importance to the international community and internationally wrongful acts consisting in a breach of other international legal obligations.

(22) Similar considerations led the Commission to conclude that a reference to the Charter of the United Nations was not necessary in article 17 either. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The very special importance of the Charter in connexion with the preparation of chapter III of the draft does not derive from any kind of higher formal source of law considered to be the origin of the obligations stated there, but from the fact that some, especially, of these obligations are essential to the life of the international community. Once again, therefore, it is within the framework of article 19 of the draft that account must be taken of the particularly important obligations embodied in the Charter, and of any other international obligation having the same vital importance for the international community as a whole.

(23) The Commission also considered whether article 17 should not contain an express reservation concerning the provision in Article 103 of the Charter; but it decided against such a reservation. Without prejudging in any way the interpretation of Article 103 of the Charter, or its effects on relations between Member States and relations between Members of the United Nations and non-member States, it seems to the Commission that the consequences of applying the principle stated in that Article do not relate to international responsibility arising from a breach of international obligations, but rather to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter. As a result of the provision in Article 103, an obligation under an agreement in force

between two States Members of the United Nations, which is in conflict with an obligation under the Charter, becomes ineffective to the extent of the conflict: consequently, it cannot be the subject of a breach entailing international responsibility. And if an obligation in conflict with those laid down by the Charter binds a Member State to a non-member State, the problem created will be that which normally arises in the event of conflict between obligations contracted by one State with several other States: that is to say, unless the rule in the Charter establishing a certain obligation has meanwhile become a peremptory rule of general international law binding, as such, on all States. Thus there is no special problem of responsibility to be solved. The reasons justifying the reservation in Article 103 of the Charter in article 30 of the Vienna Convention⁴¹³ do not, therefore, appear to impose a similar solution in the present draft article.

(24) Having regard to the foregoing considerations, *paragraph 1* of article 17 provides that an act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation. The principle of the irrelevance of the origin of the international obligation in question for the purposes of characterizing as internationally wrongful an act of the State which is not in conformity with what is required of it by that obligation, is thus clearly affirmed. It may be maintained that this principle is already implicit in the wording of article 3, sub-paragraph (b), of the draft, but the Commission takes the view that it should be stated expressly in article 17. It is preferable for the injured State to be able to base its legitimate reaction on a clear and explicit text, so as to be protected against any interpretations or pretexts which the State committing the offence may invoke in order to evade its international responsibility.

(25) In adopting the formula "regardless of the origin, whether customary, conventional or other" of the international obligation, the Commission really means to refer to all possible "sources" of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. Some members of the Commission considered that the word "source" was more suitable than the word "origin" and invoked, in support of their position, the fact that the preamble to the Charter of the United Nations uses the formula "treaties and other sources of international law". Other members pointed out, however, that the Preamble to the Charter refers to the sources of rules of law, not to the obligations imposed by those rules on States, as does the present article. Furthermore, they noted that the word "origin" rendered the desired meaning, without any risk of creating the doubts to which a term such as "source"—sometimes used to denote not only a "formal source", but also a "material source" of law—might give rise. The Commission as a whole

⁴¹³ See foot-note 42 above.

finally adopted the word "origin", but qualified it by adding, by way of example, the adjectives, "customary, conventional or other", so as to leave no ambiguity.

(26) *Paragraph 2* of the article states the rule that the origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State. The fact that the international obligation breached was established, for example, by a customary rule, by a treaty provision or by a general principle of law applicable in the international legal order, or by any other process recognized by international law, does not, as such, justify different legal consequences being suffered by the State which committed the breach.

(27) By the expression "... does not affect the international responsibility ..." the Commission intends, precisely, to refer to the consequences which ensue for the author of the internationally wrongful act of breaching the international obligation, both as to the forms of responsibility applicable (reparation, satisfaction, sanctions, etc.) and as to determining the subject of international law entitled to assert its claim (State directly injured, other States, all the States making up the international community, etc.). As the origin of the international obligation breached "does not affect" all this, there is no *raison d'être* in general international law for a distinction between different types of internationally wrongful act according to the origin of the obligation. The expression "the international responsibility" seemed preferable to others which were also considered, as being the most comprehensive and at the same time the best calculated to avoid misunderstandings and confusion with other notions.

Article 18. — Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity

with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Commentary

(1) Article 16 of the draft articles states the general principle that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation. The present article amplifies that provision by specifying at what time the international obligation must have been in force for the act of the State to be considered a "breach" of that obligation and consequently to be characterized as "internationally wrongful".

(2) This provision is needed because the rules of international law, and consequently the obligations they impose on States, are not immutable; they are born and they die. And since an act of the State takes place at a given time or during a given period, there are three possible cases: (a) the act in question is not in conformity with what was required of the State by an obligation which came into existence but which also ceased to exist for that State before it committed the said act; (b) the act is not in conformity with what is required of the State by an obligation which came into existence for that State before it committed the act, but which was still incumbent upon it at the time when it committed the act;⁴¹⁴ (c) the act is not in conformity with what is required of the State by an obligation which was not laid on that State until after it had committed the said act.

(3) Taking these three possibilities into account, *paragraph 1* of the present article states the basic rule on the subject. This rule embodies the following general principle: for an act of the State which is not in conformity with what is required by an international obligation to be characterized as a "breach" of that obligation by that State, it is necessary—and at the

⁴¹⁴ As is pointed out later on in this commentary, case (b) may become complicated if the act of the State, not being instantaneous but spread over a period, begins, but does not end during the period for which the obligation is in force for the State, or vice versa.

same time sufficient—that the obligation should have been incumbent on the State at the time when the act took place.

(4) *Paragraph 2* provides for an exception to the basic rule stated in paragraph 1. This exception concerns a very special case in which it must be accepted that a specific act which, at the time it was performed, was not in conformity with an international obligation then incumbent on the State performing the act, subsequently ceases to be considered an internationally wrongful act on the part of that State and consequently ceases to entail its international responsibility. This case arises when the obligation which was in force at the time when the act was performed, and in the light of which the act was found to be wrongful, has since been replaced by a peremptory obligation to the opposite effect, which not only allows the State to act in the manner previously prohibited, but goes so far as to require it to adopt the conduct prohibited by the earlier obligation.

(5) *In paragraphs 3, 4 and 5* the Commission has specified how the general basic rule stated in paragraph 1 of the article, applies to cases in which the act of the State not in conformity with an international obligation happens to be an act which extends over a period of time and coincides only partly with the period during which the obligation is in force for that State: that is to say, either the act began before the obligation came into force for the State and continued thereafter, or, conversely, the act began when the obligation was in force for the State and continued after it had ceased to exist for the State. Accordingly, three different cases are treated separately in the three paragraphs mentioned: that of a single State act of a continuing character extending over a period of time (continuing act); that of an act consisting of a systematic repetition of actions or omissions relating to separate cases (composite act); and that of an act consisting of a plurality of different actions or omissions by State organs relating to a single case (complex act).

(6) The text of the article having been thus paraphrased as an aid to the reader, it is now necessary to explain and justify the solution applied by the Commission to the questions considered in the various paragraphs.

(7) To establish the *basic rule* stated in paragraph 1, the Commission, as usual, turned first to the practice of States and international jurisprudence. First of all it noted that certain opinions are to be found which, though not directly concerned with determining the existence of a breach of an international obligation, might nevertheless be applied for that purpose also. The most famous statement of this kind appears in the award rendered on 4 April 1928 by the arbitrator, Max Huber, in the *Island of Palmas* case between the Netherlands and the United States of America. The arbitrator noted that

Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the

law in force at the time when a dispute in regard to it arises or falls to be settled.⁴¹⁵

The Commission also noted that there were opinions concerned more specifically with determining the existence of a breach of an international obligation. It found, for example, that the arbitration agreements relating to certain disputes specify that the arbitrator shall apply the rules of international law in force at the time when the acts alleged to be wrongful took place;⁴¹⁶ and it seems beyond doubt that these stipulations are made by way of explicit confirmation of a generally recognized principle, not as a departure from that principle.

(8) The opinions mentioned above state a criterion which is applicable in general to the determination of the existence or non-existence of a breach in the three cases set out.⁴¹⁷ However, the validity of this criterion can be verified more concretely in each of those cases. In the first case, namely, that in which the international obligation requiring certain conduct of the State was incumbent on it only for a period preceding the time when it adopted conduct not in conformity with that required, it is clear that only a negative solution is possible. If, at the time when the act of the State takes place, the obligation is no longer in force for that State, there can be no question of attributing to it "a breach of an international obligation" within the meaning of article 3(b). Moreover, whenever the problem has arisen in this form in a specific case, it has been settled, either by diplomacy or judicially, in accordance with this rule. The Commission sees no valid reason to depart from that solution.

⁴¹⁵ United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 845. The arbitrator had to decide whether the fact that Spain had discovered the island of Palmas in the sixteenth century was or was not sufficient to establish Spain's sovereignty over the island. He took the view that the rules governing the acquisition of territories which were *res nullius* had changed since the time when the island was discovered. What he had to decide first, therefore, was whether the question should be settled on the basis of the rules in force at the time of the discovery, or on the basis of the rules in force at the time when the dispute arose or at the time it was settled by the arbitral award.

⁴¹⁶ For example, in the declarations exchanged between the Government of the United States and the Russian Government on 26 August (8 September) 1900, for the submission to arbitration of certain disputes involving the international responsibility of the Russian Empire for the seizure of American ships, the stipulation relating to the applicable principles of the law of nations is accompanied by the following proviso:

"It is understood that this stipulation shall have no retroactive effect and that the Arbitrator will apply to the cases in dispute the principles of the law of nations and the international treaties which were in force and binding on the Parties involved in the dispute at the time when the seizure of the above ships took place" (United Nations, *Reports of International Arbitral Awards*, vol. IX, United Nations publication, Sales No.: 59.V.5) p. 58 (translation by the United Nations Secretariat).

See also article 4 of the arbitration agreement of 24 May 1884 between the United States of America and Haiti in the *Pelletier* case (J. B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party* (Washington (D.C.), U.S. Government Printing Office, 1898), vol. II, p. 1750.

⁴¹⁷ See para. (2) above.

(9) In the second case, the State performs an act not in conformity with what is required of it by the international obligation at a time when the obligation is still in force for it: that is to say, after the obligation has been laid on it and before it has ceased to exist for it. A positive solution to this problem might seem just as obvious as the negative solution to the previous one. This conclusion is irrefutable where, in addition, the obligation is still in force for the State at the time of settlement of the dispute; no international practice or jurisprudence need be cited in support of it. But the conclusion may not appear so obvious where the obligation ceases to exist for the State between the time the act was committed and the time when the dispute falls to be settled. If we refer, for a comparison, to most systems of internal law, we find that the principle generally applied in cases of civil liability is that reparation can be claimed for damage caused by an act committed in breach of an obligation which was incumbent on the person committing it at the time of the act, regardless of whether that obligation has ceased by the time judgment is given. In criminal law, on the other hand, the principle is that no criminal liability attaches to a person who commits an act in breach of an obligation which was incumbent on him at the time when he committed the act, but which has ceased to exist at the time when judgment is given. This follows the general principle that, where there is a succession of criminal laws, it is always the law most favourable to the accused that is applied. In the Commission's view, however, there is no reason to extend to international law the internal criminal law principle of applying the law most favourable to the accused. Such a principle may be justified in a relationship in which the individual is opposed to society as represented by the State, but it seems out of place in a relationship in which one State is opposed to another State. To apply, on principle, the law most favourable to the State which has committed an internationally wrongful act would mean applying, on principle, the law most unfavourable to the State which is injured by the act.

(10) Moreover, the attitude adopted by arbitrators and State representatives in specific cases bears out this conclusion. First, we may cite the conclusions reached by J. Bates, umpire of the United States-Great Britain Mixed Commission set up under the Convention of 8 February 1853, concerning the conduct of British authorities who had seized American vessels engaged in the slave trade and had freed the slaves, who belonged to American nationals. The incidents referred to the Commission had taken place at different times, and the umpire therefore set out to establish whether or not, at the time each incident took place, slavery was "contrary to the law of nations". On that basis he found, as regards the earliest incidents, dating back to a time when in his view the slave trade was lawful, that the conduct of the British authorities was a breach of the international obligation to respect and protect the property of foreign nationals and therefore engaged the international re-

sponsibility of Great Britain.⁴¹⁸ The later incidents, on the other hand, he found to have occurred when the slave trade had been "prohibited by all civilized nations" and when, consequently, the obligation of Great Britain to respect and protect such property had ceased to exist; he therefore held that no responsibility could attach to Great Britain.⁴¹⁹ Thus the umpire made it a condition for establishing that there had been a breach of an international obligation, that the act of the State must have been contrary to an obligation *in force* at the time when the act took place. Where he found that the obligation had still existed at that time, the fact that it had later ceased to exist and was no longer in force at the time of the award was, in his opinion, irrelevant. The same attitude is found in the awards of T.M.C. Asser, who was appointed arbitrator between the United States of America and Russia under the arbitration agreement of 26 August (8 September) 1900. The arbitrator had to decide whether or not the seizure and confiscation by the Russian authorities, outside Russia's territorial waters, of United States vessels engaging in seal-hunting should be considered as "unlawful acts". On this subject the arbitrator, in his award in the *James Hamilton Lewis* case, rendered on 29 November 1902, observed:

Considering that this question should be settled according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel;

That at that time there was no Convention between the two Parties providing for a derogation, in the special case of seal-hunting, from the general principles of the law of nations relating to the breadth of the territorial sea;

...

Considering that any agreements concluded between the Parties after the date of the seizure and confiscation of the *James Hamilton Lewis* cannot affect the consequence resulting from the principles of law generally recognized at the time of these acts;...

And since the arbitrator held that, according to the principles in force at the time of the acts complained of, Russia had no right to seize the American vessel, he concluded that the seizure and confiscation of the vessel should be considered unlawful acts for which Russia must pay damages.⁴²⁰ More recently, we find

⁴¹⁸ This is what happened in the case of the *Enterprize* (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Les Editions internationales, 1957), vol. I, pp. 703 *et seq.*). See also the *Hermosa* and *Créole* cases (*ibid.*, pp. 704 and 705). The English texts of these awards are published in J. B. Moore, *op. cit.*, pp. 4373 *et seq.*

⁴¹⁹ He made this award in the case of the *Lawrence* (A. de Lapradelle and N. Politis, *op. cit.*, p. 741). For the English text see J. B. Moore, *op. cit.*, pp. 2824 *et seq.* See also the *Volusia* case (A. de Lapradelle and N. Politis, *op. cit.*, p. 741).

⁴²⁰ United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No: 59.V.5), pp. 69 *et seq.* (English translation of quoted passage by the United Nations Secretariat). The arbitrator developed the same arguments in his award in the *C. H. White* case (*ibid.*, pp. 74 *et seq.*). The importance of these decisions is somewhat diminished by the fact that in these cases the arbitrator was bound by the arbitration agreement itself to apply the law in force at the time the acts were per-

the same principle stated once again in the award rendered on 5 October 1937 by arbitrator J. C. Hutcherson in the "*Lisman*" case⁴²¹ and in the judgment of 2 December 1963 of the International Court of Justice in the *Northern Cameroons* case.⁴²²

(11) In the third case contemplated, the State commits an act at a time when that act is not contrary to any international obligation incumbent upon it. It is only in the light of a new obligation laid upon the State subsequently that such an act could be characterized as wrongful. The point to be settled, therefore, is whether an act committed by the State at a time when the obligation did not yet exist for it could constitute a breach of that obligation. On this point the Commission found that the principle that an individual cannot be held criminally liable for an act which was not prohibited at the time when he committed it (*nullum crimen sine lege praevia*) is a general rule of all legal systems. The same principle is stated in article 11, paragraph 2, of the Universal Declaration of Human Rights, of 10 December 1948;⁴²³ in article 7, paragraph 1, of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950;⁴²⁴ and in article 15, paragraph 1, of the International Covenant on Civil and Political Rights of 16 December 1966.⁴²⁵ In matters of civil liability the principle in question is less often expressly stated, but there is no doubt that here too it is the general rule. The reasons for its existence are obvious: first, since the main function of rules imposing obligations on subjects of law is to guide their conduct in one direction and divert it from another, this function can only be discharged if the obligations exist before the subjects prepare to act; secondly, and more important, the principle in question provides a safeguard for these subjects of law, since it enables them to establish in advance what their conduct should be if they wish to avoid a penal sanction or having to pay compensation

formed (see foot-note 416 above); consequently his awards are primarily the reflection of a conventional rule. Nevertheless, all the indications are that, once again, by expressly embodying the principle in the arbitration agreement, the parties simply wished to confirm the application of the general principle in question, not to establish an exception to a different principle hallowed by custom.

⁴²¹ Before examining the facts of the complainant's claim, the arbitrator ruled that these facts:

"are to be read, examined, and interpreted in the light of the applicable principles of international law, as that law existed in 1915, when the acts complained of are alleged to have transpired, the wrongs complained of to have been inflicted, and the claim, if ever, arose." (United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No: 1949.V.2) p. 1771).

⁴²² The Court found that:

"... if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust" (*I.C.J. Reports 1963*, p. 35).

⁴²³ General Assembly resolution 217A (III).

⁴²⁴ United Nations, *Treaty Series*, vol. 213, p. 221.

⁴²⁵ General Assembly resolution 2200 A (XXI), annex.

for damage caused to others. As this is a general principle of law universally accepted and based on reasons which are valid for every legal system, it ought necessarily to apply in international law also.

(12) Moreover, an examination of international practice and jurisprudence shows that this principle has hitherto been constantly applied, being either explicitly mentioned or implicitly followed. In affirming or denying the existence of responsibility of a State, reference has always been made to an international obligation in force at the time when the act or omission of the State took place. No significance has ever been attached, for the purpose of reaching a conclusion on the basis of general international law, to the fact that an obligation has subsequently arisen and was thus incumbent on the State at the time of settlement of the dispute. The European Commission of Human Rights is probably the body which has had occasion to state this principle most often. The clearest statement on the subject is to be found in its decision on application 1151/61. A Belgian national, relying on article 5, paragraph 5, of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, claimed compensation from the Government of the Federal Republic of Germany for the damage caused him by the detention and death of his father in a German concentration camp in 1945. The Commission rejected his claim, pointing out that:

while it is true that article 5, paragraph 5, of the Convention, relied on by the applicant, provides that "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation", the Commission has nevertheless found, on a number of occasions, that only a deprivation of liberty subsequent to the entry into force of the Convention for the respondent State can be effected "in contravention of" the aforesaid article 5...; and that the arrest and detention of the applicant's father, however blameworthy they may have been from the standpoint of morality and fairness, took place at a time when the Convention did not yet exist and to which the Contracting States have not made it retroactively applicable.⁴²⁶

(13) Lastly, the writers on international law who have dealt, however briefly, with the question covered by this article all recognize that the lawfulness or wrongfulness of an act must be established on the basis of obligations in force at the time when the act was performed.⁴²⁷ The draft codifications of

⁴²⁶ Council of Europe, European Commission of Human Rights, *Recueil des décisions de la Commission européenne des droits de l'homme* (Strasbourg) No. 7, (March 1962), p. 119 (translation by the United Nations Secretariat).

⁴²⁷ See in particular the monograph by P. Tavernier, *Recherche sur l'application dans le temps des acts et des règles en droit international public (Problèmes de droit intertemporel ou de droit transitoire)* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119 *et seq.*, 135 *et seq.*, and 292 *et seq.*; the reports of M. Sørensen to the Institute of International Law on "Le problème dit du droit intertemporel dans l'ordre international", *Annuaire de l'Institut de droit international*, 1973 (Basle) vol. 55, pp. 1 *et seq.* and in particular pp. 38, 56 *et seq.*; the articles of J. T. Woodhouse ("The principle of retroactivity in international law", *The Grotius Society, Transactions for the Year 1955* (London),

the international responsibility of States do not touch upon this question. It is, however, considered in the resolution on "the intertemporal problem in public international law" adopted by the Institute of International Law in 1975. The solution adopted there is essentially the same as that set out in paragraph 1 of article 18.⁴²⁸

(14) On the basis of the considerations briefly stated above, the Commission therefore came to the conclusion that the fundamental principle in the matter can only be that there is no breach of an international obligation unless the obligation in question was in force for the State at the time when it performed the act not in conformity with what was required of it by that obligation. Having formulated the rule, the Commission nevertheless wondered whether the principle it embodied ought not to be subject to certain *exceptions*. It noted that neither the practice of States, nor international jurisprudence, nor the literature provide examples of such exceptions, save in certain cases prescribed by treaty law, which will be examined later. But is this fact sufficient to warrant the outright conclusion that there is no reason to provide for any exceptions to the fundamental principle stated? Before answering this question, the Commission considered it necessary to examine certain hypothetical cases which do not happen to have arisen in the past and are likely to arise only very rarely in the future, but which nevertheless cannot be ruled out.

(15) The cases in question are those in which the changes that have occurred in the law are due essentially to moral influence. Where an act of the State appeared, at the time of its commission, to be wrongful from the formal legal point of view, but turns out to have been dictated by moral and humanitarian considerations which have since resulted in a veritable reversal of the relevant rule of law, it is difficult not to see retrospectively in that act the action or omission of a forerunner. And if the settlement of

the dispute caused by that act comes after the change in the law has taken place, the authority responsible for the settlement will be loath to continue treating the earlier action or omission as internationally wrongful in spite of everything, and to attach international responsibility to it.

(16) In this connexion we may refer back to the cases of freeing of slaves already mentioned.⁴²⁹ In a first series of cases, the umpire condemned as wrongful the freeing of slaves found aboard a United States vessel by the British authorities: he did this in the light of the rules in force at the time when the act took place, and acknowledged that, if the same act had been committed at the time when the award was rendered, the decision would have been different. But the change in the attitude of international law towards slavery did not stop at the stage noted by umpire Bates. The slave trade has now become a practice banned by a humanitarian rule of international law which is considered peremptory by the international community as a whole. States are required not only to abstain from such a practice and to prohibit it for their subjects, but also to combat it by every means at their disposal. The authorities of a State who lay hands on a ship carrying slaves today and free them, certainly no longer breach an international obligation as they did at the time of the first cases adjudicated by umpire Bates. But neither do they perform a merely lawful act, as they would have done at the time when Bates made his award. They do much more than exercise a right; they perform a duty. If, therefore, by one of those chances which are not unknown in history, it should fall to an arbitral tribunal of today to judge the former actions of the British authorities condemned by Bates, it seems inconceivable that the tribunal would still regard those actions as internationally wrongful acts entailing responsibility. In principle, therefore, the Commission concluded that a State cannot be held responsible for an act which, although contrary to what was required of it by an obligation incumbent on it at the time when it committed the act, has been made not only lawful, but obligatory by a rule of *jus cogens* existing at the time of settlement of the dispute.

(17) Although certainly rare, concrete cases in which the exceptional principle considered here would apply, can by no means be ruled out. While it is difficult to imagine an arbitrator being appointed today to settle a dispute arising out of conduct adopted at a time when action to put down the slave trade came under the prohibition of interference with the property of foreigners, other situations less remote in time can be envisaged. For instance, it is not inconceivable that an international tribunal might now be called upon to settle a dispute concerning the international responsibility of a State which, being bound by a treaty to deliver arms to another State, had refused to fulfil its obligation, knowing that the arms were to be used for the perpetration of aggression or genocide or for maintaining by force a policy of

vol. 41, (1956), pp. 69 *et seq.*, H. W. Baade ("Intertemporales Völkerrecht". *Jahrbuch für internationales Recht* (Hamburg), vol. 7, Nos. 2-3 (January 1958), pp. 229 *et seq.*, in particular p. 245 *et seq.*) D. Bindschedler-Robert ("De la rétroactivité en droit international public", *Recueil d'études de droit international public en hommage à Paul Guggenheim* (Geneva, Faculté de droit, Institut universitaire de hautes études internationales, 1968, pp. 184 *et seq.*) and M. Sørensen ("Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pédone, 1968), pp. 304 *et seq.*); the manuals of international law of P. Guggenheim (Geneva, Georg, 1967), pp. 215 *et seq.*, Ch. Rousseau, *Droit international public* (Paris, Sirey, 1970) vol. 1, pp. 198 *et seq.* and R. Monaco, *op. cit.*, pp. 173 *et seq.*)

⁴²⁸ The resolution provides that:

"1. Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of rules of law that are contemporaneous with it.

"2. in application of this principle:

...

(f) any rule which relates to the licit or illicit nature of a legal act, or to the conditions of its validity, shall apply to acts performed while the rule is in force;" (*Rivista di diritto internazionale* (Milan), vol. LIX, fasc. 1, (1976), p. 217).

⁴²⁹ See para. (10) above.

apartheid and had done so before the rules of *jus cogens* outlawing genocide and aggression had been established, thus making the refusal not only lawful, but obligatory. Similarly, if it were accepted that, as some maintain, a peremptory rule is in process of formation, which requires States to give assistance to a people struggling to free itself from foreign domination, it would be impossible to continue to treat as internationally wrongful assistance rendered under those conditions at a time when the right to self-determination was not yet recognized and such assistance constituted internationally wrongful interference in the domestic affairs of the country against which the struggle was directed.

(18) In thus accepting the existence of the exception in question, the Commission has sought to avoid any undue extension of that exception which might weaken the general rule. The scope of the exception should be kept within strict limits. If it is to apply, and prevent the application of the general rule laid down in paragraph 1 of this article, it is necessary—as we have seen—that the act of the State prohibited by a rule of international law in force at the time of its commission, should since have become not only lawful but obligatory, and that this should have come about, not in consequence of any ordinary customary or conventional rule, but under a peremptory norm of general international law. It must also be emphasized that, if this dual condition is met, the act of the State is not retroactively considered as lawful *ab initio*, but only as lawful from the time when the new rule of *jus cogens* came into force.⁴³⁰ Hence, if the dispute concerning the consequences of the act of the State in question has been settled before the new rule of *jus cogens* supervenes, and if the State has been held responsible for that act, the settlement remains final and is in no way affected by the exceptional rule laid down in paragraph 2. For example, there can be no claim for restitution of the sum paid as reparation in execution of the settlement. It is only if the dispute concerning such an act has still to be settled after the rule of *jus cogens* supervenes that it will no longer be possible to plead wrongfulness of the act committed earlier, and to impute international responsibility to the State which committed it.

(19) On the other hand the Commission did not consider it advisable to allow any exceptions to the basic principle in the other two cases considered.⁴³¹ In reality, in the case in which the obligation ceased to exist before the State committed the act, no exception is even theoretically conceivable. On the other hand, in the case in which the obligation came into force for the State after it committed the act, an exception is not theoretically inconceivable. Even in in-

⁴³⁰ Some members of the Commission wondered whether, in the cases considered in this paragraph, it would not be better to speak of exclusion of responsibility or lack of jurisdiction, rather than non-existence of the breach and the wrongful act. But it was pointed out that what might seem shocking in the cases considered would be not so much that a particular act should have to be redressed, but that an act which had become obligatory should continue to be regarded as wrongful.

⁴³¹ See para. (2) above.

ternal law, and even, in particular, in regard to the criminal liability of the individual, this principle is sometimes subject to exceptions. Nevertheless, the Commission sees no valid reason to apply to international law certain “precedents” furnished by internal criminal law, where acts which were previously permitted, and which took place before the adoption of the new law, have been retroactively held to be punishable. The situation in international law is too radically different.⁴³² The principle of the nonretroactivity of international legal obligations and, in particular, of the impossibility of considering *ex post facto* as wrongful acts which were not wrongful at the time when they were committed, should not, it seems, be weakened, even if the new rule prohibiting such acts in the future is a rule of *jus cogens*. For it would not then, as in the case of the exception provided for in paragraph 2 of this article, be a matter of providing retroactively that an act regarded as wrongful at the time of its commission does not entail responsibility; it would mean attributing wrongfulness retroactively to an act which at the time of its commission was not wrongful, and this would strain the basic principle much further. An effect of such magnitude would not seem to be acceptable to the legal conscience of members of the international community.

(20) What holds good for the position in general international law does not, of course, preclude the possibility that a treaty may apply different criteria. There is nothing to prevent a particular treaty from providing expressly that certain acts, although contrary to international obligations in force at the time of their commission, shall henceforth cease to be regarded as wrongful acts entailing responsibility or, conversely, from providing that certain acts committed by one of the parties at a time when there was no obligation to refrain from them shall be regarded as wrongful and as entailing responsibility.⁴³³ The ar-

⁴³² Furthermore, in internal criminal law there are sometimes special punitive provisions which, in particular circumstances, introduce severer penalties for certain crimes, or even make new crimes where none existed before, all with retroactive effect. Even in internal law, however, it is inconceivable that the criminal law should exclude in principle, for the future, the application of the general rule of non-retroactivity to certain classes of obligation, as would have to be done in international law if this course were adopted.

⁴³³ Of course great caution must be exercised before affirming that, under a given treaty, certain acts must be regarded as wrongful even though they were committed at a time when there was no obligation to refrain from them. A treaty sometimes provides that the obligations it imposes on the parties shall themselves be retroactive obligations. This is expressly permitted by article 28 of the Vienna Convention. But the fact that the clauses of a treaty provide that the treaty provisions shall have retroactive effect does not necessarily mean that they are intended to characterize as wrongful, and as entailing responsibility, an act of the State which is not in conformity with what is required of it by the treaty, and which was committed before the treaty entered into force. The Convention of 17 October 1951 between Italy and Switzerland concerning social insurance has been cited as an example in this connexion. This Convention provides that it shall enter into force on the date of its ratification (which took place on 21 December 1953), but with retroactive effect from 1 January 1951. Obviously this provision in no way implies that a State which is bound by

guments for accepting the principle stated in paragraph 1 of this article lose much of their force if the parties concerned agree to derogate from that principle.⁴³⁴ The Commission considered, however, that there was no need to provide expressly in this article for the possibility of making exceptions, by special agreement, to the rule stated in paragraph 1. In principle, derogations from all the rules in the present draft articles may be made by special agreement, subject to the existence of any rules of *jus cogens*. After completing its draft, the Commission will decide whether it should be stated in a special article that derogations may be made from the provisions of the future convention—and possibly which provisions—by special agreement.

(21) Having thus established the content of the basic rule and of what, in its opinion, should be the only exception allowed, the Commission turned, as already indicated,⁴³⁵ to determining the specific criteria for application of the rule in the case of *acts of the State which extend over a period of time and coincide only partly with the period during which the obligation is in force for the State*. In regard to the simplest case, that of an act of the State which can be characterized as a *continuing act*—that is to say, one which is a single act but extends over a period of time and is of a lasting nature (the maintenance in force of a law which the State is internationally required to repeal or, conversely, failure to pass a law which it is internationally required to enact; unjustified occupation of the territory of another State; unlawful blockade of foreign coasts or ports, etc.)—the Commission took the view that the solution to any problem is bound to be self-evident. There will be a breach of the obligation with which the act is in conflict in so far as, at least for a certain period, the act of the State and the obligation incumbent on it are contemporaneous, and the breach will, of course, occur during that period only. The European Commission of Human Rights recently applied this criterion: it declared that applications claiming a “continuing violation” of the European Convention for the Protection of Human Rights and Fundamental Freedoms are admissible if the act constituting the violation, although it began before the entry into force of the Convention, continued thereafter, and in so

the treaty to provide certain insurance benefits and which did not provide those benefits before the entry into force of the treaty, is therefore to be considered as having committed an internationally wrongful act. The provision in question merely imposes on the State concerned the obligation to provide, after the entry into force of the treaty, the requisite benefits for the two previous years also.

⁴³⁴ The only problem that might arise in this connexion is that there might be a rule of *jus cogens* to the effect that a State could not be held responsible for acts which were not wrongful at the time it committed them. If there were such a rule, any treaty provision derogating from it would be void. But it is doubtful whether the principle of the non-retroactivity of international obligations can be regarded as a principle of *jus cogens*. In any event, that is a question which should not be settled in the context of the present draft articles.

⁴³⁵ See para. (5) above.

far as the applications relate to the latter period.⁴³⁶ It is appropriate to point out that, from the standpoint which concerns us here, a “continuing” act of the State must not be confused with “an instantaneous act producing continuing effects”, for example, an act of confiscation. In this case, the act of the State as such ends as soon as the confiscation has taken place, even if its consequences are lasting. In the latter event, the existence of a breach of an international obligation will be established solely on the basis of an obligation which was in force for the State at the time when the instantaneous act occurred, and the conclusion reached cannot be altered by the fact that the effects of the act continue after an obligation to refrain from such an act has entered into force.⁴³⁷

(22) The situation is more complicated in the case of a *composite* act of the State, that is, an act made up of a series of separate actions or omissions which relate to separate situations but which, taken together, meet the conditions for a breach of a given international obligation. The distinctive characteristic of such an act of the State is thus the systematic repetition of actions having the same purpose, content and effect, but relating to specific cases which are independent of one another. For example, if the purpose of the international obligation is to prohibit the State from engaging in a “discriminatory practice” with regard to the admission of nationals of a given country to a particular profession, the rejection of an application by a national of that country for permission to practise that profession does not in itself con-

⁴³⁶ The *de Becker* case provides the clearest expression of the Commission's judicial practice. The applicant complained that, as a result of a conviction in 1947, he had *ipso jure* been deprived for life of certain rights, including the right to practise the profession of journalist and writer. He argued that this deprivation constituted a violation of the right to freedom of expression recognized by article 10 of the Convention. The respondent Government objected that the act had occurred before the entry into force of the Convention. However the Commission stated that it was called upon to examine whether the applicant's claim concerned facts which, “although prior in origin to the date on which the Convention came into force in respect of the respondent Government, might constitute a *continuing violation*” of the Convention extending after that date”. The Commission therefore disregarded the period prior to the date on which the Convention had come into force for the respondent; so far as the period following that date was concerned, however, it found that the applicant was placed “in a continuing situation” in respect of which he claimed to have been the victim of a “violation of the right to freedom of expression guaranteed by Article 10 of the Convention”. Accordingly, it ruled that the application was admissible in so far as it concerned “this continuing situation” (*Yearbook of the European Convention on Human Rights, 1958–1959* (The Hague), vol. II (1960), p. 232 *et seq.*).

⁴³⁷ Once again, it is the judicial practice of the European Commission of Human rights which has brought out the distinction between a “continuing violation” and an “act producing lasting effects”. In various cases in which the applicants complained of such acts (confiscation of property, theft of works of art, etc.), the Commission rejected the applications, observing that the acts dated back to a period prior to the entry into force of the Convention for the respondent Contracting Party and could *ipso facto* be classified as instantaneous acts; their consequences, although lasting, were nevertheless no more than simple effects. (See *Yearbook of the European Convention... (op. cit.)*, vol. I, p. 159, pp. 246 *et seq.*; *ibid.*, vol. II, pp. 412 *et seq.*; and Council of Europe, *op. cit.*, p. 128).

stitute an act which is not in conformity with what is required of the State by the obligation in question. But if the applications of nationals of that country have been rejected by the authorities of the State in a whole series of cases, that conduct, taken as a whole, clearly constitutes a "discriminatory practice" and therefore conflicts with what is required of the State by the obligation.⁴³⁸ In the case here considered, the problem of intertemporal law may arise, since some of the actions or omissions which in the aggregate would probably constitute an act conflicting with what is required by the international obligation invoked, may have occurred before the obligation was laid on the State. It is also possible that some of these actions or omissions may have occurred after the obligation ceased to be incumbent on the State. In both cases, the solution is manifestly the same: the only actions or omissions to be taken into consideration are those which occurred while the obligation was incumbent on the State. If these actions or omissions, taken together, although less than the whole are nevertheless sufficient by themselves to constitute an act prohibited by the obligation, it must be concluded that the obligation has been breached; if not, the opposite conclusion must be reached. To revert to the example of an obligation which prohibits the State from engaging in a discriminatory practice with regard to the admission of foreign nationals to certain professions, it seems evident that if, during the period for which the obligation was in force, foreigners have been denied admission to those professions in only one or two cases, there can be no question of a "discriminatory practice" and, consequently, no breach of the obligation. This holds good even if a great many such cases occurred before the entry into force of the obligation for the State or, conversely, after its extinction with respect to that State.

(23) Lastly, the conditions for application of the general rule where the act of the State is a *complex act* coinciding only partly with the period during which the obligation was in force, may perhaps call for some more detailed explanations. A complex internationally wrongful act can be said to exist where the act is the aggregate of a series of actions or omissions on the part of a single organ or, more frequently, of various organs, relating to a single matter and

⁴³⁸ In this context it may be of interest to note that, in the practice of the United Nations Economic and Social Council, *consistent violation* of human rights and fundamental freedoms has come to be established as an offence in itself, distinct from the offence constituted by an isolated violation of those rights and freedoms. The Sub-Commission on Prevention of Discrimination and Protection of Minorities has set up a special supervisory system designed solely to detect and follow up "situations" characterized by "a consistent pattern of gross violations" (see in particular Economic and Social Council resolutions 1235 (XLII) of 6 June 1967, 1503 (XLVIII) of 27 May 1970 and 1919 (LVIII) of 5 May 1975; Commission on Human Rights, decision 3 of 6 March 1974 and decision 7 (XXXI) of 24 February 1975 and resolution 1 (XXIV) of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Obviously, an isolated case of State conduct that infringes the rights or freedoms in question is not sufficient to justify imputing to the State a "situation" falling within the above provisions; such a situation will not exist unless the State in question can be charged with a whole course of conduct of this kind.

not, as in the case of a composite wrongful act, to a series of separate and independent situations. It is, precisely, the aggregate of these actions or omissions which constitutes the complex wrongful act. To understand this phenomenon clearly, it must be borne in mind that international obligations often require, not a specific action or omission, but the achievement of a certain result, leaving it to the State to decide how it should set about achieving that result and, especially, allowing it to do so by extraordinary means if the desired result cannot be achieved by ordinary means. In this case, the fact that an organ or even several organs, of the State engage in conduct different from that which would directly achieve the result required by the international obligation, is not sufficient to warrant a definite finding that the State has breached that obligation. For such a breach to be certain, it must be complete: even the last organs which could still have rectified the situation and brought about the result required by the international obligation must, in their turn, have failed to do so. Each and every one of the successive actions or omissions of organs of the State in the case in question will then form part of a single whole which, as such, constitutes the complex act by which the international obligation is breached. For example, if an international obligation of conventional origin requires the State to allow the nationals of a given foreign country to practise a particular profession, and if the administrative authority dealing with an application to practise that profession rejects the applications, the rejection is not in itself a definite breach of the international obligation in question. It will not be possible to conclude that such a breach exists so long as the result required by the obligation can still be achieved, either by review of its initial decision by the same authority, or by rescission or alteration of that decision by a higher authority. It is only if the competent higher authorities successively approached by the foreigner concerned have all confirmed the decision of the first organ, and only then, that refusal to allow that foreigner to practise the profession covered by the international obligation will become an internationally wrongful act definitely committed. Only then can the State to be rightfully accused of not having achieved, by any one of the means at its disposal, the result required by the international obligation, and then alone will the breach of that obligation, begun by the first organ which acted in the matter, be completed by the last organ having the power to remedy the consequences of the action taken by the first.

(24) Such being the notion of a complex act of the State, it is natural to provide, once again, for the possibility that only some of the actions or omissions constituting such an act took place while an obligation requiring a result different from that produced by the complex act was in force for the State. For the obligation in question may have been laid on the State after the initial action or omission had taken place. To revert to the example given above, it may be supposed that the foreigner seeking to practise a certain profession met with a refusal by a competent

administrative authority, but that this occurred before the international obligation concerning the practice of that profession was laid upon the State. In that case, what was done before the obligation existed obviously cannot be regarded as even the beginning of a breach of the obligation in question. If, subsequently, after that obligation has entered into force for the State, the foreigner concerned appeals to a higher authority, that authority will in no sense be called upon to censure or rescind the decision taken previously by the local authority, since that decision was perfectly legitimate at the time. The fact that it is not retrospectively rescinded after the obligation comes into effect is not such as to constitute, in itself, an internationally wrongful act, or to complete an act which has not even begun to exist. It is, however, possible that, on approaching the higher authority, the foreigner may renew his application for admission to the profession he wishes to practise. In that case, if the higher authority is itself competent to deal with the application, it must grant the desired permission, so that its decision may conform to the result required by the international obligation which has now entered into force; otherwise it will have to send the applicant back to the lower competent authority, which will then have to take a decision different from the one it took on the first application. A fresh refusal by either of these authorities would set in train the process of a new complex act, which would then be carried out from the beginning within the scope of the international obligation and would therefore probably constitute an internationally wrongful act in so far as it was confirmed and not set aside by the decision of another State authority—for example, a judicial authority—which took up the case later.

(25) Conversely, however, the international obligation may have been in force for the State when the decision of the first State organ acting in the case was taken, and have ceased to exist before the organs, or at least the last organs, competent to rectify the initial decision have had an opportunity to act. In that case it seems undeniable that the process of a complex breach of the international obligation has been started, and if no action is taken to stop it, either before or after the obligation ceases to exist for the State, the mere cessation of the obligation cannot eliminate the fact that the previous action of the State has made it impossible to achieve the result required by the obligation when it was in force. In other words, the extinction of the obligation—for example, as a result of denunciation of a treaty in the meantime—may have the effect of precluding any future breach, but it cannot eliminate the breach which has been started. If the other organs which act in the matter later should wish to prevent the breach from hardening, becoming definitive and thus producing its effects in terms of international responsibility, they will have to act in such a way as to make the situation conform *ab initio* to the result required by the obligation, and must not be deterred by the fact that, in the meantime, the obligation has ceased to be incumbent on the State. For example, if an in-

ternational obligation of conventional origin requires the State to refrain unconditionally from expropriating certain foreign property, and an expropriation measure is nevertheless taken while the obligation is in force, the higher State authorities to which the dispossessed foreigner applies after the extinction of the obligation will be required to rescind the measure taken and to make good the damage.⁴³⁹ If they fail to do so, the breach of the international obligation will be definitively completed.

(26) In order to take into account the different aspects of the possible influence of the intertemporal factor on a complex act of the State, the Commission has accordingly formulated, in paragraph 5 of article 18, the rule that there is a breach of an international obligation only if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for the State, and then even if that act is not completed until after that period.

Article 19. — International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

⁴³⁹ This does not mean, of course, that a new expropriation measure—possibly accompanied by adequate compensation—cannot be taken later, when the conventional obligation to refrain from expropriation has ceased to be incumbent on the State.

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict.

Commentary

(1) Article 19 is concerned with the question of the possible bearing of the subject-matter of the international obligation breached on the characterization as internationally wrongful of the act of the State committing such a breach, as well as on the régime of responsibility applicable to that act if its wrongfulness should be established. The question presents certain analogies with that examined in article 17, but in the present article the criterion for the distinction is no longer, as in article 17, a purely formal one, namely the origin or the source of the international obligation breached, but a substantive one: the content or subject-matter of the obligation in question, the matter to which the conduct required of the State by the obligation relates.

(2) The purpose of the present article is therefore to establish: (a) whether it should be recognized that, regardless of the subject-matter of an international obligation incumbent upon a State, a breach of that obligation always constitutes an internationally wrongful act; and (b) whether it must be concluded that, regardless of the subject-matter of an international obligation incumbent upon a State and of how essential the obligation is to the international community, a breach of that obligation always gives rise to one and the same category of internationally wrongful acts and, consequently, justifies the application of a single régime of international responsibility, or whether, on the contrary, a distinction should be made on the above basis between different types of internationally wrongful acts and different régimes of international responsibility.

(3) No long exposition is needed to show what the answer must be to the first of these two questions. The breach by a State of an international obligation incumbent upon it is an internationally wrongful act regardless of the subject-matter of the international obligation breached. There can be no restriction in that regard. This conclusion, which derives implicitly from the wording of article 3, sub-paragraph (b)—and which cannot give rise to any doubt even on a purely logical basis, for reasons similar to those already indicated⁴⁴⁰—is unanimously confirmed by international jurisprudence, State practice and the opinions of learned writers. In specific cases, the exact content of

an obligation imposed on a State by international law is often discussed in order to determine whether, in the particular instance concerned, there has been a breach of the obligation; it has never been contended, however, that only breaches of international obligations relating to a given field, or requiring the State to behave in some particular way, entail international responsibility.

(4) There is not a single judgment of the Permanent Court of International Justice or of the International Court of Justice, or a single international arbitral award, that recognizes either explicitly or implicitly the existence of international obligations the breach of which would not be a wrongful act and would not entail international responsibility. Furthermore, the international awards specifying in general terms the conditions for the existence of an internationally wrongful act and the creation of international responsibility speak of the breach of an international obligation without placing any restriction on the subject-matter of the obligation breached,⁴⁴¹ despite the fact that, in the different cases in question, the judges and arbitrators were concerned with obligations having the most widely different content. The same conclusions are reached when considering the positions taken by States. It is true that the work of codification of State responsibility done under the auspices of the League of Nations, and the first work done by the United Nations, was confined to responsibility entailed by the breach of obligations relating to the treatment of foreigners. But this was because interest at the time centred mainly on that particular subject, and not because it was ever considered that only the breach of obligations relating to that matter constituted an internationally wrongful act which was a source of responsibility. The replies by States to the request for information addressed to them by the Preparatory Committee of the 1930 Conference⁴⁴² and the positions taken by the representatives of Governments at the Conference itself⁴⁴³ show that, in their opinion, a breach of an international obligation, whatever its content, was an internationally wrongful act and engaged the responsibility of the State. The same conviction is evident in the views expressed by the representatives of States in the Sixth Committee of the United Nations General Assembly during the

⁴⁴¹ See, for example, the judgments of the Permanent Court of International Justice in the *Chorzów Factory* case (26 July 1927 (Jurisdiction) (*P.C.I.J.*, Series A, No. 9, p. 21) and 13 September 1928 (Merits) (*ibid.*, No. 17, p. 29)); and the advisory opinion of the International Court of Justice concerning *Reparation for injuries suffered in the service of the United Nations* (*I.C.J. Reports 1949*, p. 184). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also the advisory opinion of the International Court of Justice concerning the *Interpretation of peace treaties with Bulgaria, Hungary and Romania* (second phase) (*I.C.J. Reports 1950*, p. 228), and the judgments and arbitral awards mentioned in paragraph (9) of the commentary to article 17.

⁴⁴² See, in particular, the replies to point II of the request for information (League of Nations, *Bases of Discussion...* (*op. cit.*), pp. 20 *et seq.*; and *Supplement to vol. III* (*op. cit.*), pp. 2 and 6).

⁴⁴³ See League of Nations, *Acts of the Conference...* (*op. cit.*), pp. 26-59 and pp. 159-161.

⁴⁴⁰ See above, para. (7) of the commentary to article 17.

discussions on the codification of international responsibility.⁴⁴⁴

(5) Among the writers who have dealt with the international responsibility of States, it is generally taken for granted that a breach by a State of an international obligation incumbent upon it is an internationally wrongful act regardless of the subject-matter of the obligation breached. This is clearly implied in their writings, either because the characterization as internationally wrongful of the act of the State committing the breach of an international obligation is not made subject to any restriction as regards the subject-matter of the obligation,⁴⁴⁵ or because they are careful to specify that a breach of *any* international obligation may be involved.⁴⁴⁶ Many writers have, it is true, paid special attention to the consequences of breaches of international obligations in a given sector, for example, the treatment of foreigners and, more recently, the safeguarding of international peace and security. But it would be absurd to conclude that this proves that, in their opinion, only a breach of obligations in these sectors is wrongful and entails the responsibility of the State. Nor do the codification drafts on State responsibility which cover the entire subject of State responsibility for internationally wrongful acts in general, or those which deal only with international responsibility for the breach of obligations concerning the treatment of foreigners, place any restrictions on the subject-matter of the international obligation breached.

(6) The second of the two questions mentioned above⁴⁴⁷ namely, whether there is any justification for drawing a distinction between different types of

internationally wrongful act on the basis of the subject-matter of the international obligation breached and, more particularly, of the importance which the international community attaches to obligations relating to certain matters, represents one of the most difficult aspects of the task of codifying the general rules of international law relating to State responsibility. Formerly, the view was generally shared that the rules of general international law relating to State responsibility provided for a single régime of responsibility applying to all internationally wrongful acts of the State, whatever the content of the obligations breached by such acts. Today this view is far from having wide support. In the period between the two world wars, doubts were already expressed in different quarters concerning the validity of the "traditional" view. But it was only after the Second World War that a real trend of opinion emerged in favour of a different view, a trend which is now gaining in strength. According to this view, general international law provides for two completely different régimes of responsibility. One would apply in the case of a breach by a State of one of the obligations whose fulfilment is of fundamental importance to the international community as a whole: for example, the obligations to refrain from any act of aggression, not to commit genocide and not to practise *apartheid*. The other régime, on the other hand, would apply in cases where the State had merely failed to fulfil an obligation of lesser and less general importance. On this basis, there is a growing tendency to distinguish between two different categories of internationally wrongful acts of the State: a limited category comprising particularly serious wrongs, generally called international "crimes", and a much broader category covering the whole range of less serious wrongs.

(7) It need hardly be said that the reason for the adoption of such a distinction in the text of draft articles likely to become an international convention on State responsibility is, precisely, that the value to be attached to the distinction in question is not purely descriptive or didactic, but "normative". The fact of establishing, in the context of the present chapter, a possible distinction between "international crimes" and other international wrongs is justified only because of our conviction that contemporary international law requires the application of different régimes of international responsibility to these different categories of internationally wrongful acts, and that this difference should in due course be reflected in the rules to be formulated in subsequent chapters of the draft. In other words, it should be known now that the establishment of a distinction between internationally wrongful acts, based on the difference in importance—for the international community as a whole—of the subject-matter of the obligations breached, and at the same time of the extent of the breaches, will necessarily be reflected in the legal consequences attached to the internationally wrongful acts falling into one or the other of the two categories, and in the determination of the subject or subjects of international law authorized to implement (*mettre en œuvre*) those consequences. That being

⁴⁴⁴ There is no reason to assume that there was any doubt about the principle in question because some representatives on the Sixth Committee at times expressed dissatisfaction at the fact that every breach of an international obligation should be regarded as internationally wrongful. They considered that some of these obligations were not "just" and, consequently, that it was not always wrong to breach them. In reality, such opinions cast doubt on the very existence of certain "primary" obligations, rather than on the validity of the principle of the wrongfulness of a breach of any obligation recognized as existing, regardless of its subject-matter.

⁴⁴⁵ See, for example, K. Strupp, *loc. cit.*, pp. 6 and 60; D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), p. 386; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), p. 274; Ch. Rousseau, *Droit international public* (Paris, Sirey, 1953), p. 361; B. Cheng, *op. cit.*, p. 170; P. Reuter, *loc. cit.*, p. 52; A. Schüle, *loc. cit.*, p. 329; G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. rev. (Milan, Giuffrè, 1962), p. 245; G. Morelli, *op. cit.*, p. 347; E. Jiménez de Aréchaga, *loc. cit.*, p. 534; P. M. Kuris, *Mezhdunarodnye pravonarushenia i otvetstvennost gosudarstva* (Vilnius, Mintis, 1973), pp. 110–111 and 124 *et seq.*

⁴⁴⁶ See, for example, L. Oppenheim, *op. cit.*, vol. I, pp. 337 and 343; C. C. Hyde, *op. cit.*, vol. II, p. 882; G. Schwarzenberger, *op. cit.*, p. 563. Other writers, such as C. Eagleton, H. Accioly, P. Guggenheim, J. H. W. Verzijl and G. Ténékidès, have emphasized the link existing between any international obligation, the wrongful act and responsibility. According to Ténékidès ("Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 783), "to compile a list of cases of breaches giving rise to responsibility is tantamount to specifying the content of all the rules of international law".

⁴⁴⁷ See para. (2) above.

said, it is obvious that respect for the general structure of the draft requires that we should not go beyond the scope of the present article by encroaching on matters which will form the specific subject of part 2 of the draft, which will be concerned, precisely, with the content, forms and degrees of international responsibility. We must confine ourselves here to mere references to these topics, in so far as they are necessary for defining and understanding the subject-matter of the present article.

(8) *International judicial and arbitral bodies* seem never to have considered explicitly the question whether or not the subject-matter of the international obligations breached in particular cases, and the importance attached by the international community to the fulfilment of those obligations, justified a distinction between different types of internationally wrongful act. Their decisions do not show that they have deliberately examined questions regarding a possible difference in régimes of responsibility to be made between the internationally wrongful acts of States on the basis of these factors. It may be asked, however, whether an opinion of the judges and arbitrators concerned is not, nevertheless, implicit in their decisions. As to forms of responsibility, it will be found that, except perhaps in a few marginal cases, which in any event can be interpreted in different ways,⁴⁴⁸ the responsibility applied by international tribunals always derives from the same general concept, that of "reparation". Nor has the choice between the different possible types of reparation been based on the subject-matter of the obligation breached, though this does not justify any hasty conclusions. International tribunals have always recognized that a State which has committed an internationally wrongful act has an obligation to make reparation, and they have always recognized that obligation only, but this is no justification for deducing that in their view the State could never be subject to any form of responsibility other than that of making reparation,⁴⁴⁹ or that a pos-

sible difference in régimes of responsibility could not be linked with the difference in the subject-matter of the international obligations breached.

(9) It is easy, moreover, to explain why international judicial and arbitral bodies have not had occasion to determine whether a form of responsibility other than the obligation to make reparation can be applied to internationally wrongful acts. While it may be assumed that, in certain circumstances, international law authorizes recourse to "sanctions" against a State which breaches certain obligations, States which intend to avail themselves of that authorization in a given case have not usually applied to an international tribunal to ask whether or not the application of such a form of international responsibility was justified in the case in question. The jurisdiction of international tribunals always has its origin in consent, and sovereign States have so far been reluctant to submit to the judgment of a third party in a matter of the above kind. Consequently, the treaties establishing international tribunals, the statutes of these tribunals and the clauses or *compromis* setting out the conditions for recourse to them often stipulate that, where the tribunals are called upon to rule on the breach of an international obligation by a State, they are empowered solely to determine whether reparation is due and in what amount.⁴⁵⁰ However, there is no justification for believing that, in adopting these texts, the parties wished to rule out the possibility that the breach of an international obligation might have legal consequences in international law other than the obligation to make reparation; they simply wished to exclude the possibility that the tribunal in question might have to pronounce on those other

⁴⁴⁸ The decisions referred to here are a number of awards in which international arbitral tribunals have required States to pay what are known as "penal damages". The question raised by the application of these "penal damages" will be considered in more detail in the chapter to be devoted specially to the forms of State responsibility. For the purposes of this analysis, it is enough to indicate that these so-called "penalties" have in any case never been imposed on a State because of the particular subject-matter of the obligation it failed to respect. On this basis, therefore, international jurisprudence cannot be viewed as endorsing the theories of those who distinguish between two different categories of internationally wrongful acts on the basis of the subject-matter of the obligation breached.

⁴⁴⁹ This is not invalidated by the fact that some decisions of the Permanent Court of International Justice and of arbitral tribunals and conciliation commissions have explicitly affirmed that the breach of any international obligation entails the obligation to make reparation. The judges and arbitrators who made this affirmation were expressly requested to determine, in connexion with a given case, whether or not there was an obligation to make reparation for the injury. Their reply, based on what the Permanent Court defined as "a principle of international law" as well as a "general conception of law", was that if an obligation had been breached there was also an "obligation to make reparation in an adequate form". But they had not been asked to establish also that the latter obligation was, in any case, the sole consequence

of the breach. Confirmation of these remarks may be found in the analysis of some well-known decisions: the two judgments of the Permanent Court on the *jurisdiction* and the *merits* in the *Chorzów Factory* case, of 26 July 1927 (*P.C.I.J.*, Series A, No. 9, p. 21) and 13 September 1928 (*ibid.*, No. 17, p. 29) respectively; the award by the arbitrator Max Huber concerning the *British claims in Spanish Morocco*, of 1 May 1925 (United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*, p. 641); and the award made in the *Armstrong Cork Company* case on 22 October 1953 by the Italian-United States Conciliation Commission established under article 83 of the Treaty of Peace of 10 February 1947 (*ibid.*, vol. XIV (*op. cit.*), p. 163).

⁴⁵⁰ In the Memorial submitted to the International Court of Justice by the United Kingdom on 1 October 1947 in the *Corfu Channel* case, the action of Albania was defined as an "international delinquency" and, given the particular circumstances of the case, an "offence against humanity" which most seriously aggravated the breach of international law and the "international delinquency" committed by that State (*I.C.J. Pleadings, 1949, p. 40, para. 72(a) and (b)*). The form of responsibility which the United Kingdom was seeking to have applied to Albania was solely the obligation to "make reparation", an obligation which Albania had *vis-à-vis* the Government of the United Kingdom "in respect of the breach of its international obligations". However, a limitation was imposed by article 36, paragraph 2(d), of the Statute of the Court, which empowers the Court to determine only the nature or extent of the reparation to be made for the breach of an international obligation. The United Kingdom had brought the case before the International Court of Justice after the adoption of the draft resolution which it had earlier submitted to the Security Council—and which had described the laying of mines in peacetime without notification as an "offence against humanity"—had been blocked by the veto of a permanent member of the Council (*ibid.*, p. 369).

possible consequences. Moreover, it has happened that an international arbitral tribunal has expressed an opinion nonetheless on the lawfulness of the application by the injured State of a sanction, which in the cases in question took the form of acts of armed reprisal. This was in the award on the *Responsibility of Germany arising out of damage caused in the Portuguese colonies of southern Africa* (Naulilaa incident), rendered on 31 July 1928 by the arbitral tribunal established under articles 297 and 298, paragraph 4 of the annex to the Treaty of Versailles,⁴⁵¹ and in the award made by the same tribunal on 30 June 1930 on the *Responsibility of Germany arising out of acts committed after 31 July 1914 and before Portugal took part in the war* (Cysne case).⁴⁵² In the cases in question, the tribunal considered that it was lawful to apply a sanction in the form of reprisals, on two conditions: that the reprisals taken must be proportionate to the wrongful act and that the injured State must first have attempted unsuccessfully to obtain reparation for the injury sustained. Thus the tribunal did not question the existence of different forms of responsibility. On the other hand, what is not distinctly clear from these awards is whether, in the opinion of the tribunal, refusal by the guilty State to make reparation should really be considered the only case in which the application of a sanction could be deemed legitimate.

(10) In the cases directly submitted for their ruling, and excepting those in which a different conclusion has been explicitly or implicitly provided for in a particular treaty, international judicial and arbitral bodies have acknowledged only that the State directly injured, in its own "legal interests", has the right to bring a claim invoking the responsibility of a State committing an internationally wrongful act. When required to pronounce on this point, the International Court of Justice, in its judgment of 18 July 1966 on the *South West Africa* cases refused to allow that contemporary international law recognized "the equivalent of an 'actio popularis', or right resident in any member of a community to take legal action in vindication of a public interest".⁴⁵³ However, in a subsequent judgment, that of 5 February 1970 given in the *Barcelona Traction* case, the Court added a clarification of great importance for the question at present under consideration. Referring to the determination of the subjects of international law having a legal interest in the performance of international obligations, the Court declared:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

⁴⁵¹ United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), pp. 1025 *et seq.*

⁴⁵² *Ibid.*, pp. 1056 *et seq.*

⁴⁵³ *South West Africa* (second phase), judgment, *I.C.J. Reports* 1966, p. 47.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.⁴⁵⁴

This passage has been the subject of differing interpretations; but it seems undeniable that the Court intended by such affirmations to draw a fundamental distinction between international obligations and hence between the acts committed in breach of them. And it implicitly recognized that this distinction should influence the determination of the subjects of international law entitled to invoke the responsibility of the State. In the Court's opinion, there are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are—unlike the others—obligations in whose fulfilment all States have a legal interest. It follows, according to the Court, that the responsibility engaged by the breach of these obligations is engaged not only in regard to the State which was the direct victim of the breach; it is also engaged in regard to all the other members of the international community, so that, in the event of a breach of these obligations, every State must be considered justified in invoking—probably through judicial channels—the responsibility of the State committing the internationally wrongful act.

(11) The foregoing analysis of the opinions of international tribunals shows that in principle these bodies do not deny the existence of different régimes of State responsibility for internationally wrongful acts. On the contrary, they seem in some instances to support the idea that, at least in certain circumstances, another form of responsibility could be substituted for the obligation to make reparation, and subjects of international law other than the one directly injured could be entitled to invoke the responsibility flowing from the wrongful act. What cannot always be deduced from these opinions is whether, even disregarding refusal to make reparation, the application of a form of responsibility other than reparation, and obviously more serious than reparation, would be justified by reason of the specific subject-matter of the international obligation breached and its importance for the international community. Nevertheless, however isolated the expression of such an opinion in an international judgment may still appear to be, the passage quoted from the judgment of the International Court of Justice in the *Barcelona Traction* case and, in particular, the conclusions that can be drawn from it as regards the subject of international law entitled to invoke responsibility, seem an important argument in support of the theory that there are

⁴⁵⁴ *Barcelona Traction, Light and Power Company, Limited*, judgment, *I.C.J. Reports* 1970, p. 32.

two separate regimes of international responsibility depending on the subject-matter of the international obligation breached, and consequently that, on the basis of that distinction, there are two different types of internationally wrongful acts of the State.

(12) *State practice* in this matter has undeniably evolved during the twentieth century. Two successive stages must be distinguished: that preceding the Second World War and that beginning after the War. During the first period, the dominant idea of States seems to have been that the subject-matter of the obligation breached had no bearing on the régime of responsibility applicable to an internationally wrongful act—yet a few examples of a trend towards a different view are already to be found in this period. The States which, under the auspices of the League of Nations, participated in the work of codifying the responsibility of States for damage caused to foreigners never expressed, in the course of that work, the view that the subject-matter of the obligation breached should have a bearing on the régime of responsibility attaching to the breach. On the other hand, although the replies of Governments to the request for information addressed to them by the Preparatory Committee of the 1930 Hague Conference,⁴⁵⁵ and the discussions which took place at the Conference itself,⁴⁵⁶ certainly justify the conclusion that, at that time, States unanimously recognized that the breach of any international obligation entailed an obligation to make reparation, they nevertheless fail to indicate that, in the view of those same States, the obligation to make reparation was the *only* form of responsibility engaged by an internationally wrongful act. It also appears from the work in question, although indirectly, that Governments recognized the faculty of the injured State to take reprisals against the State which had breached an international obligation relating to the treatment of foreigners,⁴⁵⁷ generally on the condition that the injured State had first vainly attempted to obtain reparation. They also agreed in recognizing that there were several forms of “reparation”, which could be applied “according to the cir-

cumstances”.⁴⁵⁸ But the positions of Governments do not suggest that they regarded the subject-matter of the international obligation breached—or its greater or lesser importance for the international community—as having any bearing on the applicability of one form of reparation rather than another, or on the legitimacy or illegitimacy of taking reprisals. Nor was the subject-matter of the obligation breached considered as having a bearing on the determination of the subject of international law entitled to invoke the responsibility of the State which committed an internationally wrongful act.⁴⁵⁹ No distinction between two or more categories of internationally wrongful acts according to the subject-matter of the obligation in question was in fact possible on these grounds. It could, of course, be objected that the limited field of the 1930 codification work (treatment of foreigners) perhaps offered less opportunity than other fields for singling out exceptionally important obligations, breaches of which could have very serious consequences for the international community as a whole. However, leaving aside the possibility that internationally wrongful acts in that category can occur in this field as well, it would seem unjustifiable to assume that the positions of Governments would have been different in regard to other fields. It should be borne in mind that these positions were often formulated in very general terms and thus did not refer solely to the field in which codification was being attempted.

(13) The attitude adopted by States in specific situations confirms what has just been said. In disputes resulting from the breach of a particular international obligation, the parties concerned were often greatly at variance as to whether the State committing the breach was obliged to restore the injured State to the condition it had enjoyed before the breach, or to make a payment as compensation or as penal damages. Another seriously disputed issue was whether the injured State was justified in imposing a sanction on the State committing the internationally wrongful act. Lastly, the parties discussed the amount of reparation due or the limits of the sanction authorized under international law. However, there was no question of relying on the subject-matter of the obligation breached and maintaining that the choice between the different possible forms of responsibility should be made on the basis of that subject-matter; nor was the latter referred to in justification of any conclu-

⁴⁵⁵ Point II of the request stated that a State which failed to comply with its obligation “incurred responsibility and must make reparation in such form as may be appropriate”. (See League of Nations, *Bases of discussion...* (*op. cit.*), p. 20; also for the replies of Governments, *ibid.*, pp. 20 *et seq.*, and *Supplement to vol. III* (*op. cit.*), p. 2).

⁴⁵⁶ For these discussions, see League of Nations, *Acts of the Conference...* (*op. cit.*), pp. 129 *et seq.* Article 3, adopted on first reading by the Third Committee of the Conference, was drafted as follows: “The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation” (*ibid.*, p. 237 and *Yearbook...* 1956, vol. II, p. 225, document A/CN.4/96, annex 3).

⁴⁵⁷ The request for information dealt with reprisals not from the standpoint of the consequences of the breach of an international obligation, but from that of the circumstances excluding responsibility. For the replies of Governments, see League of Nations, *Bases of discussion...* (*op. cit.*), pp. 128 *et seq.*, and *Supplement to vol. III* (*op. cit.*), pp. 4 and 22. Basis of discussion No. 25, which was drafted in accordance with the replies of Governments, recognized the legitimacy of reprisals in certain circumstances.

⁴⁵⁸ Point XIV of the request for information listed a series of forms of reparation, ranging from performance of the obligation whose fulfilment had initially been refused, to pecuniary and other kinds of reparation, including indemnities due by way of a penalty for the breach. Basis No. 29, drawn up by the Preparatory Committee in the light of the replies of Governments, mentioned, along with the obligation to make good the damage caused by non-fulfilment of the obligation, that of affording “satisfaction to the State which has been injured in the person of its national, in the form of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons” (League of Nations, *Bases of discussion...* (*op. cit.*), p. 151).

⁴⁵⁹ See the replies to point XIII of the request for information (League of Nations, *Bases of discussion...* (*op. cit.*), pp. 140 *et seq.*, and *Supplement to vol. III* (*op. cit.*), pp. 4, 23 *et seq.*).

sions with respect to the determination of the subject of international law authorized to invoke the international responsibility.

(14) However, as indicated above, there were already signs of a change in the period preceding the Second World War. Between the two world wars, the principle prohibiting recourse to war as a means of settling international disputes was progressively affirmed, on a par, in the legal thinking of the members of the international community, with the belief that a breach of that prohibition could not be treated as a wrong "like any other". It may seem superfluous to mention in this connexion the decisive influence which certain important multilateral treaties, particularly the Covenant of the League of Nations and the General Treaty for the Renunciation of War as an Instrument of National Policy known as the "Pact of Paris" or the "Briand-Kellogg Pact") exerted during this period on the evolution of the general attitude of the international law of the time towards the lawfulness of the use of force to settle international disputes. During the same period, the draft "Treaty of Mutual Assistance" prepared in 1923 by the League of Nations already characterized a war of aggression as an "international crime".⁴⁶⁰ The preamble to the 1924 Geneva Protocol for the Pacific Settlement of International Disputes defined a war of aggression as a violation of the solidarity of the members of the international community and as "an international crime";⁴⁶¹ the resolution adopted on 24 September 1927 by the League of Nations confirmed that definition;⁴⁶² and lastly the resolution adopted on 18 February 1928 by the Sixth Pan-American Conference declared that a war of aggression constituted "an international crime against the human species".⁴⁶³ Admittedly, nothing is said in these texts about the régime of responsibility to be applied in the event of a breach of the prohibition of acts of aggression; however, it is unthinkable that States could have believed that such a breach, unhesitatingly qualified as a "crime", would entail no consequences other than those which normally followed from internationally wrongful acts that were much less serious. As soon as the use of force as an instrument of international policy is prohibited, it has to be accepted, as a logical consequence, that the breach of such a

⁴⁶⁰ See League of Nations, *Official Journal*, Fourth Year, No. 12, December 1923, p. 1521. It was only because of the difficulty of reaching agreement on the meaning of the term "aggression" that the draft was not adopted. However, the Contracting Parties were in agreement in regarding a war of aggression as an "international crime".

⁴⁶¹ See League of Nations, *Official Journal*, Special Supplement No. 21, October 1924, Geneva, 1924, p. 21. The Protocol was adopted unanimously by the 48 States Members of the League of Nations. Although signed by 19 States, it obtained only one ratification.

⁴⁶² See League of Nations, *Official Journal*, Special Supplement No. 53, October 1927, Geneva, 1927, p. 22. The resolution was adopted unanimously.

⁴⁶³ The resolution was adopted unanimously by the 21 States present at the Conference. (For text, see Carnegie Endowment for International Peace, *The International Conferences of American States, 1889-1928* (New York, Oxford University Press, 1931), p. 441.)

prohibition necessarily entails the application of penalties which are themselves coercive and the possibility that subjects of international law other than the State directly attacked may act to that end. It should also be borne in mind that the Covenant of the League of Nations already provided for a special régime of responsibility for any breach of the obligation, imposed by the Covenant, not to resort to force in order to settle international disputes until the available procedures for peaceful settlement had been utilized. Articles 16 and 17 provide for a régime of responsibility consisting of subjecting the aggressor to penalties which all Member States were bound to apply.

(15) The need to distinguish, in the general category of internationally wrongful acts of States, a separate category comprising exceptionally serious wrongs has in any case become more and more evident since the end of the Second World War. Several factors have no doubt contributed to this accentuation of the trend. The terrible memory of the unprecedented ravages of the Second World War, the frightful cost of that war in human lives and in property and wealth of every kind, the fear of a possible recurrence of the suffering endured earlier and even of the disappearance of large fractions of mankind, and every trace of civilization, which would result from a new conflict in which the entire arsenal of weapons of mass destruction would be used—all these are factors which have implanted in peoples the conviction of the paramount importance of prohibiting the use of force as a means of settling international disputes. The feeling of horror left by the systematic massacres of millions of human beings perpetrated by the Nazi régime, and the outrage felt at utterly brutal assaults on human life and dignity, have both pointed to the need to ensure that not only the internal law of States but, above all, the law of the international community itself should lay down peremptory rules guaranteeing that the fundamental rights of peoples and of the human person will be safeguarded and respected; all this has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, *apartheid* and other inhuman practices of that kind. The solidarity of broad strata of the world's population in the liberation struggle carried on by the peoples subject to colonial domination, and the firmness with which those peoples have resolved to defend the supreme treasure of liberty which is now theirs, are the decisive elements in the assertion and recognition of the right of every people to become an independent political entity and in the general prohibition of any action which challenges the independence of another State. More recently, the requirements of economic and social development on all sides and the marvellous achievements, but also the terrible dangers, of scientific and technological progress have led States to realize the imperative need to protect the most essential common property of mankind and, in particular, to safeguard and preserve the human environment for the benefit of present and future generations. New rules of international law have thus appeared, others in course of emergence

have become firmly established and yet others, already existing, have acquired new vigour and more marked significance; these rules impose upon States obligations which are to be respected because of an increased collective interest on the part of the entire international community. Furthermore, there has gradually arisen the conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach "like any other" but that it necessarily represents an internationally wrongful act which is far more serious, a wrong which must be differently characterized and therefore be subject to a different régime of responsibility.

(16) As direct or indirect evidence of this conviction, three facts seem, in the Commission's view, to be of considerable significance: (a) the distinction, recently established among the rules of international law, of a special category of rules known as "peremptory" rules or rules of "*jus cogens*"; (b) the development of the principle that an individual who is an organ of the State and by his conduct has breached international obligations of specific content must himself, even though he acted as an organ of the State, be regarded as personally punishable, and punishable under particularly severe rules of internal penal law; and (c) the fact that the United Nations Charter attaches specific consequences to the breach of certain international obligations.

(17) With regard to the first point, it is hardly necessary to review here the entire process that has led to the formal distinction, among the general rules of international law, of the particular category of rules of "*jus cogens*". It is important to emphasize that the appearance of rules of this kind at the international level proves that, in the legal thinking of the members of the international community, the subject-matter of the obligations imposed upon States by the law of nations is taken into consideration for the purposes of a differentiation between two kinds of rules and, hence, of legal obligations—a differentiation entailing the application of different legal consequences to breaches of the two different kinds of obligations. The content of the rules of international *jus cogens* is so important to the community of States that derogation from those rules by special agreement between two or more of its members has been prohibited, as stipulated in article 53 of the Vienna Convention.⁴⁶⁴ Of course, the prohibition of any derogation from certain rules does not necessarily and automatically imply that a breach of the obligations arising therefrom should be subject to a régime of responsibility different from that associated with the breach of the obligations created by the other rules. But it is unlikely that the development of the legal

⁴⁶⁴ The article reads as follows: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

thinking of States as regards the idea of the inadmissibility of a derogation from certain rules should not have been accompanied by a parallel development in the sphere of State responsibility. Indeed, it would seem contradictory if the same consequences continued to be applied to the breach of obligations arising out of the rules defined as "peremptory" and to the breach of obligations arising out of rules from which derogation by special agreement is permitted. Similarly, it would seem contradictory if, in the case of a breach of a rule so important to the entire international community as to be described as a "peremptory" rule, the relationship of responsibility was established solely between the State which committed the breach and the State directly injured by it.

(18) Article 53 of the Vienna Convention gives a general definition of the norms which must be considered to be of a peremptory character (*jus cogens*), one of the elements of the definition being that a rule of this kind must be "accepted and recognized" as such "by the international community of States as a whole". The purpose of this definition is to serve as a criterion for States and international tribunals⁴⁶⁵ in identifying these norms *in concreto*. Consequently neither the Convention, nor indeed the International Law Commission's draft articles which served as a basis for its preparation, give specific examples of peremptory norms of general international law. During the discussions which took place in the Sixth Committee of the General Assembly before the United Nations Conference on the Law of Treaties, as well as at the Conference itself, representatives of States did, however, sometimes mention a few examples of norms which they regarded as having that character. Generally speaking, most of the examples mentioned can be said to correspond, in essence, to those put forward by the members of the International Law Commission during the debate on the draft articles on the law of treaties, where the following treaties are described as "void" because they constitute derogations from a peremptory norm of international law:

... (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate ... treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples ...⁴⁶⁶

(19) The second point seems no less significant for

⁴⁶⁵ Article 66 of the Vienna Convention lays down the procedure for the adjudication by the International Court of Justice, or the arbitration, of disputes concerning the application or interpretation of the articles of the Convention that relate to *jus cogens*.

⁴⁶⁶ *Yearbook... 1966*, vol II, p. 248, document A/6309/Rev.1, part II, chap. II, "Draft articles on the law of treaties with commentaries", para. (3) of the commentary to article 50. It is interesting to note that, in giving these examples, some members emphasized that the scope of the notion of "peremptory" norms of international law should not be equated with that of "crimes under international law", which they considered to be more limited.

the purposes considered here. It is known that today international law imposes upon States the obligation to punish crimes known as "crimes under international law" ("*crimes de droit international*"); this single category includes "crimes against peace", "crimes against humanity" and "war crimes" in the strict sense.⁴⁶⁷

⁴⁶⁷ The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal were confirmed by the General Assembly in resolution 95 (I) of 11 December 1946. In resolution 177 (II) of 21 November 1947, the General Assembly directed the International Law Commission to formulate those principles and prepare a draft code of offences against the peace and security of mankind. In 1950, the International Law Commission drew up a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (*Yearbook... 1950*, vol. II, p. 374, document A/1316, part III). Principle I provides that any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment, and principle VI lists the following crimes under international law:

a. Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

The revised text of the draft Code of Offences against the Peace and Security of Mankind was submitted by the International Law Commission to the General Assembly in 1954 (*Yearbook... 1954*, vol. II, p. 149, document A/2693, chap. III). Article 1 of the draft Code states that "offences against the peace and security of mankind", as defined in the Code, are "crimes under international law, for which the responsible individuals shall be punished". Article 2 lists the various acts which, under the Code, are "offences against the peace and security of mankind". The draft is limited to "offences" which jeopardize or endanger the maintenance of international peace and security, in 1957, the General Assembly postponed examination of the draft Code until it resumed consideration of the definition of aggression. In 1968, it was decided not to reconsider this question or that of international criminal jurisdiction and to defer consideration of them to a later session, when work on the preparation of a definition of aggression would be further advanced. Specific international conventions concerning "crimes under international law" were nevertheless concluded under the auspices of the United Nations. Some examples are the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (United Nations, *Treaty Series*, vol. 78, p. 277), the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, of 26 November 1968 (*ibid.*, vol. 754, p. 73) and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 (not yet in force; for the text, see General Assembly resolution 3068 (XXVIII), annex). A conference of plenipotentiaries convened in pursuance of Economic and Social Council resolution 608 (XXI) adopted the Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, of 7 September 1956 (United Nations, *Treaty Series*, vol. 266, p. 3), supplementary to the Slavery Convention signed at Geneva on 25 September 1926 (League of Na-

(20) The system of prevention and punishment of these "crimes" as so considered under the international law of the period after the Second World War is characterized, as indicated above, by the fact that individuals who have engaged in wrongful conduct in their capacity as organs of the State are regarded as "punishable", but also by the fact that the courts of States other than the State to which the organs in question belong are regarded as having the right—which is often also a duty—to judge and punish that conduct.⁴⁶⁸ The derogations which this entails from the usual principles of international law are obvious. Moreover, "principles of international co-operation" have been proclaimed for the detection, arrest and extradition of "persons guilty of war crimes and crimes against humanity".⁴⁶⁹ These principles exclude the possibility of granting territorial asylum to "any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity",⁴⁷⁰ they also exclude the possibility of a refusal to extradite such persons on the ground of the "political" nature of the crimes they have committed.⁴⁷¹ Lastly, States have subscribed to the obligation to regard statutory limitations as not being applicable to the crimes concerned.⁴⁷²

(21) That being said, it must be added at once that it would be wrong to identify the right-duty of certain States to punish individuals who have committed such crimes with the "special form" of international responsibility applicable to the State in cases of

tions, *Treaty Series*, vol. LX, p. 253). It is pointed out in the preamble to the Supplementary Convention that the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations as a common standard of achievement for all peoples and all nations, states that no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms.

⁴⁶⁸ The right-duty to punish the perpetrators of these crimes is generally recognized as resting with the State in whose territory the crimes were committed, whether or not that State is the same as the State whose organs the individuals are. See, for example, resolution 3 (I) on the extradition and punishment of war criminals, adopted on 13 February 1946 by the United Nations General Assembly; article VI of the Convention on Genocide (for reference, see above, foot-note 467); and paragraph 5 of General Assembly resolution 3074 (XXVIII), of 3 December 1973, stating the "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity". Sometimes the jurisdiction of the State in whose territory the crimes were committed is supplemented by that of an international criminal court that may be established (article VI of the Convention on Genocide). Lastly, it is possible that in certain cases the perpetrators of international crimes may be punished by any State having jurisdiction over them under its own internal law (article V of the Convention on Apartheid, for reference, see above, foot-note 467).

⁴⁶⁹ See paras. 2, 4, 5, 6, 8 and 9 of General Assembly resolution 3074 (XXVIII) of 3 December 1973.

⁴⁷⁰ Para. 7 of General Assembly resolution 3074 (XXVIII) and article I, para. 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967 (resolution 2312 (XXII)).

⁴⁷¹ See, for example, article VII of the Convention on Genocide and article XI of the Convention on Apartheid.

⁴⁷² See the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (for reference, see above, foot-note 467).

this kind.⁴⁷³ The obligation to punish personally individuals who are organs of the State and are guilty of crimes against the peace, against humanity, and so on does not, in the Commission's view, constitute a form of international responsibility of the State, and such punishment certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs. Punishment of those in charge of the State machinery who have started a war of aggression or organized an act of genocide does not *per se* release the State itself from its own international responsibility for such acts. Conversely, as far as the State is concerned, it is not necessarily true that any "crime under international law" committed by one of its organs for which the perpetrator is held personally liable to punishment, despite his capacity as a State organ, must automatically be considered not only as an internationally wrongful act of the State concerned, but also as an act entailing a "special form" of responsibility for that State. For the purposes of the subject-matter of the present article, the fact that State organs which have committed certain acts have been found liable to personal punishment is mainly important because it testifies unquestionably to the exceptional importance now attached by the international community to the fulfilment of obligations having a certain subject-matter. It is, moreover, no accident that the obligations described in the foregoing paragraphs, whose breach entails the personal punishment of the perpetrators, correspond largely to the obligations imposed by certain rules of *jus cogens*. The specially important content of certain international obligations and the fact that their fulfilment affects the realities of life in the international community are factors which, at least in many cases, have precluded any possibility of derogation by special agreement from the rules imposing those obligations. These are also the factors which make a breach of these obligations appear quite different from failure to comply with other obligations. The need to prevent the breach of obligations which are so essential would indeed appear to warrant both that the individual-organ committing such a breach should be held personally liable to punishment, and that concurrently the State to which the organ belongs should be subject to a special régime of "international responsibility".

⁴⁷³ It seems clear that it would be wrong to refer to a "criminal" responsibility of the State in connexion with the applicability of penalties to certain persons who are its organs, whether in one country or another. Furthermore, even if it were desirable that the responsibility for applying manifestly repressive and punitive measures should more correctly be represented as a criminal responsibility of the State, it is doubtful whether there would be any point in extending to international law the specific legal categories of internal law. For the purposes contemplated here, the essential question is not so much whether the responsibility incurred by a State by reason of the breach of specific obligations entails "criminal" international responsibility, but whether such responsibility is "different" from that deriving from the breach of other international obligations of the State.

(22) The third point referred to above⁴⁷⁴ has an obvious bearing on the question at issue. It derives from the fact that in formulating the "primary" obligation, which must today be considered as the most essential obligation—or set of obligations—under international law, the United Nations Charter combines the formulation with an explicit indication of the consequences attendant upon any breach. It may be useful to summarize briefly the system which exists under the Charter in this respect. Article 2, paragraph 3, provides that the Members of the United Nations "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".⁴⁷⁵ This principle is supplemented by the one laid down in Article 2, paragraph 4, which stipulates that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

To ensure respect for this obligation by Member States and even by non-member States,⁴⁷⁶ Chapter VII of the Charter provides for the possibility of "preventive measures" against a threatened breach of the peace or "enforcement action" to restore international peace and security where a breach has been committed.⁴⁷⁷ Competence to determine "the existence of any threat to the peace, breach of the peace, or act of aggression" is attributed under Article 39 to the Security Council which, after making such a determination, "shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security". As regards these measures, whose eminently "collective" nature is borne out by several provisions,⁴⁷⁸ Article 41 enumerates measures not involving the use of armed force⁴⁷⁹ and Article 42 enumerates measures involving the use of force which may be undertaken if the measures provided for in Article 41 would be or have proved to be inadequate.⁴⁸⁰ Moreover, until such time

⁴⁷⁴ See above, para. (16)(c) of this commentary.

⁴⁷⁵ This provision is at the origin of the whole set of provisions set out in Chapter VI of the Charter (Pacific Settlement of Disputes).

⁴⁷⁶ Article 2, para. 6, provides that "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".

⁴⁷⁷ Article 5 speaks of "preventive or enforcement action".

⁴⁷⁸ Article 2, para. 5, provides that: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action." The provisions demonstrating the collective nature of the measures which the Security Council may take are those in Articles 43, 45, 48, 49 and 50.

⁴⁷⁹ These may include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

⁴⁸⁰ The action which the Security Council is empowered to take "may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".

as the Security Council is able to take the necessary steps to organize and implement such collective enforcement action, the possibility of immediate enforcement action, "individual or collective", is also provided for in Article 51 which, for the specific use of force in "self-defence", allows the temporary suspension of the general prohibition on the use of force. This temporary exception applies to a Member State which is the victim of an armed attack, as well as other Members which consider themselves threatened by the acts of the aggressor or are merely associated with the victim of the aggression by collective security agreements, especially under one of the regional arrangements referred to in Chapter VIII (Articles 52-54) of the Charter.⁴⁸¹ Articles 5 and 6 complete the Charter provisions concerning the consequences of a breach of one of the legal obligations established by the Charter with respect to the pursuit of the institutional purposes of the United Nations.⁴⁸² Article 5 provides for the possibility that a Member "against which preventive or enforcement action has been taken by the Security Council" may be suspended from "the exercise of the rights and privileges of membership". Article 6 provides for the possibility of expelling from the Organization a Member which has "persistently violated" the principles contained in the Charter.

(23) The Commission does not consider it necessary, for the purposes of formulating the present article, to embark on a theoretical analysis of the various measures which might be taken under the United Nations system in order to establish, in particular, which of them may be characterized, from the strictly legal angle, as "sanctions". Nor does it find it neces-

⁴⁸¹ These arrangements and, in general, the whole system of safeguards provided for in Article 51 have acquired increased importance as a result of the impossibility of concluding the agreements which should have been reached in pursuance of Article 43, and even of implementing the transitional security arrangements provided for in Article 106 (Chapter XVII).

⁴⁸² At first sight, Article 94, para. 2, of the Charter would appear to extend indirectly to all international legal obligations the safeguards specifically established with respect to fulfilment of the obligations imposed on Member States in connexion with the pursuit of the institutional purposes of the Organization. In fact, however, there is only one obligation which this provision safeguards through the possibility of Security Council action, namely, the obligation incumbent upon Members pursuant to Article 94, para. 1, "to comply with the decision of the International Court of Justice in any case to which it is a party". The right conferred by Article 94, para. 2, upon the State concerned to call for action by the Security Council is to some extent the counterpart, in the United Nations legal system, of what under traditional general international law used to be the right to take reprisals against a State which refused to comply with its obligation to make reparation for an internationally wrongful act. In this connexion, it should also be noted that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in resolution 2625 (XXV), of 24 October 1970, proclaims, as a corollary of the principle that States shall refrain in their international relations from the threat or use of force, that States have a duty to refrain from acts of reprisal "involving the use of force". Further, with respect to the British military action at Harib (Yemen Arab Republic) on 28 March 1964, the Security Council, in resolution 188 (1964) of 9 April 1964, condemned the reprisals "as incompatible with the purposes and principles of the United Nations".

sary to retrace the history of the circumstances which have prevented, at least partially, the establishment of the system provided for in Chapter VII of the Charter, or to consider here to what extent the Security Council's power to take action by means of decisions that are binding on Members has been partially made good through use of the Council's power to act by recommendation, or the power of the General Assembly to make recommendations on the basis, for example, of its resolution 377 (V) of 3 November 1950—the "Uniting for peace" resolution. Lastly, there is no question of examining here the procedures followed in practice in regard to peace-keeping operations. On the other hand, what is of undoubted importance for the purposes of formulating the present article is the question of how to identify the broad categories of legal obligations for which the Charter is specifically intended to ensure respect and whose breach entails the application of special measures of repression.

(24) In the Commission's view, the basis for replying to this question is provided by the abovementioned requirement of Article 2, paragraph 4, of the Charter, that Member States shall refrain from the threat or use of force, and by the provisions of Article 1 stating the purposes of the United Nations, namely the prevention and removal of threats to the peace and ... the suppression of acts of aggression or other breaches of the peace, and the ensurance of respect for the principle of equal rights and self-determination of peoples and for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. As regards these enactments, it is also necessary to mention that according to the *communis opinio* the obligations established in these provisions of the Charter have become part of international customary law and are binding upon all States, whether they are Members of the United Nations or not.⁴⁸³

(25) The Charter establishes a link between the possibility of enforcement action against a State, initiated and organized by the United Nations itself, and the pursuit of the first of the Organization's purposes (Article 1, paragraph 1), the one which the draftsmen of the Charter unquestionably considered as the most essential for the life and survival of international society. The internationally wrongful acts which it was intended to prevent and suppress by this exceptional possibility of resort to collective enforcement action are covered by the three terms "threat to the peace", "breach of the peace" and "act of aggression",

⁴⁸³ This is exemplified by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. The universal and unconditional validity of the purposes and principles of the Charter of the United Nations "as the basis of relations among States", irrespective of their size, geographical location, level of development or political, economic and social systems has also been solemnly reaffirmed by other texts, such as the Declaration on the Strengthening of International Security, adopted by the General Assembly in resolution 2734 (XXV), of 16 December 1970, which declares that "the breach of these principles cannot be justified in any circumstances whatsoever".

which are also mentioned in the opening article of Chapter VII (Article 39). Intensive efforts have been made within the United Nations to arrive at a definition of the notion of aggression, a process recently crowned with success by the adoption, on 14 December 1974, of the Definition of Aggression established in General Assembly resolution 3314 (XXIX). The definition describes aggression as "the most serious and dangerous form of the illegal use of force" and calls a war of aggression "a crime against ... peace", giving rise to "international responsibility". It enumerates a long list of acts, any of which "qualify as an act of aggression"; and it specifies that the acts enumerated are not exhaustive and that the Security Council may determine that other acts constitute aggression under the provisions of the Charter, inasmuch as "the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case".

(26) The link established by the Charter between the possibility of collective enforcement action being taken under the auspices of the Organization and the condition that a "threat to the peace", a "breach of the peace", or an "act of aggression" must exist also explains other developments which have taken place in the United Nations. This link is at the origin of the efforts made by many States to win acceptance for the view that the condition in question is fulfilled even in cases in which the actions complained of are not strictly covered by the traditional idea of the threat or use of force in international relations. The conduct taken into consideration for this purpose is, primarily, the forcible maintenance of colonial domination or the forcible maintenance of a régime of *apartheid* or racial discrimination within a State.⁴⁸⁴ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations echoes Article 1, paragraph 2, of the Charter in mentioning, as an application of "the principle that States shall refrain in their international relations from the threat or use of force", the duty of every State "to refrain from any forcible action

which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence". The Declaration further lays down, as a specific application of "the principle of equal rights and self-determination of peoples", the duty of every State "to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence".⁴⁸⁵ Moreover the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly in its resolution 1904 (XVI-II), of 20 November 1963, affirms in article 1 that: "Discrimination between human beings on the ground of race, colour or ethnic origin ... shall be condemned ... as a fact capable of disturbing peace and security among peoples".

(27) As regards the forcible maintenance of *colonial domination*, the General Assembly, over a ten-year period, formulated a series of resolutions whose tenor is more or less the same, referring in them to the Declaration on the granting of independence to colonial countries and peoples adopted in its resolution 1514 (XV) of 14 December 1960. The Assembly declared that the continuation of colonial rule "threatens international peace and security" or represents a "serious impediment" to the maintenance of international peace and security.⁴⁸⁶ After 1970, the Assembly resolutions describe "the waging of colonial wars to suppress national liberation movements in southern Africa" as "incompatible with the Charter of the United Nations" and as posing a "threat to international peace and security".⁴⁸⁷ The General Assembly invites Member States directly, in increasingly insistent terms, to "provide ... moral and material assistance ... to national liberation movements";⁴⁸⁸ in addition, it recognizes the "legitimacy of the struggle of the colonial peoples ... to exercise their right to self-determination and independence by all the necessary

⁴⁸⁴ The essence of the argument advanced by the representatives of the countries in question in various organs of the United Nations is that, on the basis of Article 1, paragraphs 2 and 3, of the Charter, the resort to force by a State in order to keep under a régime of *apartheid* or colonial domination a people living in the territory of that State or in a territory administered by it must be characterized as a use of force "inconsistent with the Purposes of the United Nations". Accordingly, they consider such a use of force to be prohibited under the final phrase of Article 2, para. 4, of the Charter. The fact remains, however, that this paragraph prohibits the threat or use of force by Members "in their international relations" only. The countries concerned then contend, in some cases, that the peoples subjected to the régimes in question should be regarded as separate subjects of international law before they become independent States, and even before they attain international status as insurgents. These countries further maintain that the resort to force by a State in order to maintain colonial domination or a régime of *apartheid* should be regarded as an act capable of having dangerous consequences in international relations in the true sense of the term, and consequently as an act covered by the general notion of a "threat to the peace" and therefore justifying the use of enforcement measures.

⁴⁸⁵ The Declaration adds: "In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter". The Declaration also proclaims the duty of every State to promote, through joint and separate action, "realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".

⁴⁸⁶ See General Assembly resolutions 2105 (XX) of 1965, 2189 (XXI) of 1966, 2326 (XXII) of 1967, 2465 (XXIII) of 1968, 2548 (XXIV) of 1969 and 2621 (XXV) of 1970.

⁴⁸⁷ Resolution 2878 (XXVI), of 20 December 1971. This resolution refers to "the continuation of colonialism in all its forms and manifestations", including racism, *apartheid* and also economic colonialism. Resolutions 2908 (XXVII) of 1972, 3163 (XXVIII) of 1973 and 3328 (XXIX) of 1974 are identical in tenor.

⁴⁸⁸ Various resolutions, including resolution 2708 (XXV), of 14 December 1970, address the same invitation to the specialized agencies and other organizations within the United Nations system.

means at their disposal".⁴⁸⁹ The General Assembly has also adopted a series of resolutions relating to specific cases. In the case of the former *Territories under Portuguese administration*, for example, the Assembly⁴⁹⁰ recommends Member States to break off diplomatic relations with the metropolitan Power, close their ports, boycott trade, refrain from giving the Portuguese Government any assistance, prevent the sale or supply of arms, and so forth.⁴⁹¹ In 1967, in resolution 2270 (XXII), the General Assembly strongly condemned the colonial war being waged by the Portuguese Government of the day against the peaceful peoples of the Territories under its domination, a war which the Assembly described as constituting a crime against humanity and "a grave threat to international peace and security". In the case of *Namibia*, after the termination of South Africa's mandate over the Territory, the General Assembly called upon that State to withdraw from the Territory all its military and police forces, its administration, and so on. The Assembly declared that the continued presence of South African authorities was a flagrant violation of the territorial integrity of Namibia.⁴⁹² Besides recognizing the legitimacy of the struggle being waged "by all means" by the people of Namibia against "the illegal occupation of their country", and inviting States and international organizations to assist the Namibian people in their struggle, the General Assembly noted that the situation in that Territory "constitutes a threat to international peace and security".⁴⁹³ It therefore invited the Security Council to take the measures provided for under Chapter VII of the Charter.⁴⁹⁴ Both the Assembly and the Council have invited Member States to take a series of measures to force South Africa to withdraw its administration from the Territory. The International Court of Justice, called upon in its turn to pronounce on the subject, in its advisory opinion of 21 June 1971, affirmed the obligation on South Africa to withdraw its administration from the Territory of Namibia, pointing out that "By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international

obligation".⁴⁹⁵ The Court also stated that it was for the Security Council to determine the measures to be taken to end the illegal presence of South Africa in Namibia; and it affirmed the duty even of non-member States to give assistance in the action which had been taken by the United Nations with regard to that Territory. In the view of the Court, "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".⁴⁹⁶ Lastly, there is the case of *Southern Rhodesia*, which has given rise to the most outspoken pronouncements of all. When the question was referred to the Security Council, the Council did not hesitate to recognize that the Rhodesian situation represented "a threat to international peace and security"; it therefore decided to apply certain measures on the basis of Article 41 of the Charter.⁴⁹⁷ Both the Council and the General Assembly have requested Member States to take measures against the Rhodesian régime; in particular the General Assembly has reiterated its customary request for material, moral, political and humanitarian assistance to the people of Zimbabwe in their "legitimate" struggle for freedom and independence.⁴⁹⁸

(28) As regards *apartheid* and racial discrimination in countries mentioned by name, the General Assembly and the Security Council, from 1960 onwards, adopted resolutions in which the situation in South Africa was described as "endangering" or "seriously disturbing" international peace and security.⁴⁹⁹ From 1965 onwards, the General Assembly regularly drew the attention of the Security Council to the fact that the situation in South Africa constituted a "threat", or even a "grave threat", to international peace and security and that economic and other measures of the kind envisaged in Chapter VII of the Charter were essential in order to solve the problem of *apartheid*.⁵⁰⁰ At the same time the General Assembly appealed directly to Member States, first inviting them to adopt measures designed to induce South Africa to abandon its policy of *apartheid* and urging them to sever diplomatic, consular, economic, political and military relations with that country,⁵⁰¹ and

⁴⁸⁹ These General Assembly resolutions merely develop the principle laid down in paragraph 1 of the Declaration on the granting of independence to colonial countries and peoples, that "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation".

⁴⁹⁰ For the recognition of the legitimacy of the struggle waged by "the peoples of the ... Territories under Portuguese domination", or waged by them "by all necessary means at their disposal", see *inter alia* resolutions 2107 (XX) of 1965, 2270 (XXII) of 1967, 2707 (XXV) of 1970 and 3113 (XXVIII) of 1973. The 1973 resolution was the last to be adopted concerning Portugal, since the change of régime and of policy towards the colonial Territories took place shortly afterwards.

⁴⁹¹ See in particular resolution 2107 (XX) mentioned above, resolution 2795 (XXVI) of 1971 and resolution 3113 (XXVIII), also mentioned above.

⁴⁹² Resolution 2325 (XXII) of 1967.

⁴⁹³ Resolution 3399 (XXX) of 1975. See also resolution 2678 (XXV) of 1970.

⁴⁹⁴ Resolution 2678 (XXV).

⁴⁹⁵ Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), advisory opinion, *I.C.J. Reports 1971*, p. 54.

⁴⁹⁶ *Ibid.*, p. 56.

⁴⁹⁷ See resolutions 232 (1966), 253 (1968), 277 (1970), 320 (1972), 328 (1973) and 333 (1973).

⁴⁹⁸ See, *inter alia*, General Assembly resolutions 2022 (XX) of 1965, 2652 (XXV) of 1970 and 3396 (XXX) of 1975.

⁴⁹⁹ See Security Council resolutions 134 (1960), 181 (1963) and 191 (1964) and General Assembly resolutions 1598 (XV) of 1961, 1663 (XVI) of 1961, 1761 (XVII) of 1962, and 1881 (XVIII) of 1963.

⁵⁰⁰ See General Assembly resolutions 2054 (XX) of 1965, 2202 (XXI) of 1966, 2307 (XXII) of 1967, 2396 (XXIII) of 1968, 2506 (XXIV) of 1969, 2671 F (XXV) of 1970, 2775 F (XXVI) of 1971, 2923 E (XXVII) of 1972, 3151 G (XXVIII) of 1973, 3324 E (XXIX) of 1974 and 3411 G (XXX) of 1975.

⁵⁰¹ See resolution 2646 (XXV) of 1970, in which the recommendation also covers "other racist régimes in southern Africa".

later, in addition, requesting them to adopt such enforcement measures as blockading ports and boycotting goods. Furthermore the General Assembly recognized the legitimacy of the struggle of the people oppressed by *apartheid*,⁵⁰² and made increasingly pressing appeals to Member States for political, moral and material support and "greater assistance" to those struggling against *apartheid*. An indirect allusion to the sanction provided for in Article 6 of the Charter is also to be found in these resolutions.⁵⁰³ The Security Council, for its part, acknowledged successively that the situation in South Africa "might endanger international peace and security", "is seriously disturbing international peace and security", and "constitutes a potential threat to international peace and security". It has not had direct recourse to the measures provided for by Article 42 of the Charter, but has nevertheless invited Members to declare an "embargo" on supplies of arms, ammunition and military vehicles to South Africa.⁵⁰⁴

(29) Thus an objective examination of State practice in the United Nations enables us to conclude that the forcible maintenance of colonial domination and the application of a coercive policy of *apartheid* or absolute racial discrimination appear henceforth to be considered within the legal system of the United Nations—and probably in general international law as well—as breaches of an established international obligation to abstain from such practices or to put an end to them. It seems possible to conclude also that offences of this kind, especially if they are persisted in, are regarded as particularly serious and as liable to produce more severe legal consequences than those attaching to internationally wrongful acts of a less serious nature. Admittedly it is not yet possible to discern any real consensus of opinion as to what kind of "action" or "measures" may legitimately be taken to deal with the acts referred to, or upon other delicate points of law;⁵⁰⁵ in the Commission's view,

⁵⁰² At first, the General Assembly stated that the aim of this struggle was the safeguarding of the human rights and fundamental freedoms of the South African people as a whole, without distinction as to race, language or religion (Charter, Article 1, para. 3), and later that it was the exercise of their inalienable right to self-determination (Article 1, para. 2). From 1970 onwards, the resolutions recognized the legitimacy of the struggle of the people of South Africa using "all means at their disposal". In this connexion, see also resolutions 2646 (XXV) of 1970 and 3377 (XXX) of 1975, dealing in general with "the struggle of oppressed peoples to liberate themselves from racism, racial discrimination, *apartheid*, colonialism and alien domination". The Security Council, in more moderate terms, also recognized the legitimacy of the struggle of the South African people "in pursuance of their human and political rights" (resolutions 282 (1970) and 311 (1972)).

⁵⁰³ Resolution 2646 (XXV) declared that "any State whose official policy or practice is based on racial discrimination, such as *apartheid*, contravenes the purposes and principles of the Charter of the United Nations and should therefore have no place in the United Nations".

⁵⁰⁴ See Security Council resolutions 134 (1960), 181 (1963), 191 (1964), 282 (1970) and 311 (1972).

⁵⁰⁵ For example, the idea that the Charter legitimizes the application by third States of coercive measures involving the use of force against States practising *apartheid* or maintaining colonial domination over other countries is seriously questioned by a sizable number of States. The same is true of the idea that it legi-

however, that does not invalidate the main conclusion, namely, that the international community now appears to recognize that such acts as the forcible maintenance of colonial domination or the forcible pursuit of a policy of *apartheid* constitute internationally wrongful acts of a particularly serious character.⁵⁰⁶

(30) There is a further area in which the attitude of States shows that they and the peoples they represent have become aware and are becoming more and more aware of the serious harm which may result from certain activities, and that they realize the need for international law to set strict limits to an excessively dangerous exercise of freedom. Hence the steadily growing conviction among the members of the international community that certain prohibitions are essential, and with it the certainty that a breach of those prohibitions, particularly if it should attain massive proportions, would represent an internationally wrongful act of exceptional seriousness.

(31) We have already had occasion to note the increasing conviction that the astounding progress of modern science, although it has produced and continues to produce marvellous achievements of great benefit to mankind, nevertheless imparts a capacity to inflict kinds of damage which would be fearfully destructive not only of man's potential for economic and social development but also of his health and of the very possibility of survival for the present and future generations. At the same time, the steady increase in the world's population and the imperative

timizes the provision of armed aid by a third State to a people struggling to free itself from alien domination. Some Governments doubt whether the General Assembly—or even the Security Council—has the power to remove by recommendations alone the prohibition of the use of force established by the Charter in all cases, with the exception of self-defence and participation in action undertaken, on its own "decision", by the Security Council. Nor do the States in question subscribe to the idea of including in the legal definition of "self-defence", as the term is used in Article 51 of the Charter, armed action undertaken by a people to free itself from *apartheid* or colonial domination. Hence they cannot agree that a possible intervention in the combat, by another State, should be presented as participation in "collective self-defence", again as the term is used in Article 51. Lastly, these same States have great difficulty in agreeing—with all the attendant consequences—to regard the relations between a State and a people under its colonial domination as "international relations", in the sense in which the term is used in Article 2, paragraph 4, at least until that people has acquired the limited international legal capacity which international law attributes to insurrectional movements under certain conditions.

⁵⁰⁶ The positions adopted by States with regard to conventions concluded for the prevention and punishment of certain "international crimes", such as the Conventions dealing with genocide and *apartheid*, seem to confirm the conclusions outlined above. In drawing up the Convention on genocide (for reference, see above, foot-note 467), which was adopted unanimously, States did not really intend to place that crime on the same level, from the point of view of the consequences that would attach to it, as an aggravated act of aggression, for example. The provisions of the Convention on *apartheid* (for reference, see above, foot-note 467), on the other hand, bring to mind the very similar provisions of the Charter concerning the action to be taken under Chapter VII in the case of violations of international peace and security. However, it is precisely because of this similarity that the Convention on *apartheid* could not be adopted unanimously and has as yet been signed and ratified by only a few States.

need to expand the production of consumer goods in order to keep pace with that increase, and even more in order to satisfy the demands of great masses of humanity for a higher standard of living, have focused world attention on the problems of safeguarding, preserving and, if possible, improving the human environment.

(32) The risks to which the environment is exposed by man armed with his present resources are well known: the pollution, by one means or another, of vast areas of the atmosphere, the sea and the land; the destruction of fauna over huge areas in the oceans, and thus of essential sources of food for whole populations; the transformation of fertile regions into arid and unproductive land; the spread of poisons, bacteria and other chemical agents fatal to man or animals; modifications of weather and climate; and the degradation of groundwater supplies and of the quality of drinking water and irrigation water. These are just examples, for what can happen is beyond imagination. Frequent meetings of scientists and diplomats have been sounding the alarm on this subject for many years, and increasing efforts are being made, in particular, in the United Nations to bring about an obligation upon States to refrain from certain practices and also to see to it that their subjects observe certain prohibitions. The results of these efforts have admittedly been very limited so far. While, in the chemical and bacteriological sphere for example, there has been the adoption by all States of a collective instrument that even provides for the destruction of existing stocks of weapons of that kind,⁵⁰⁷ in contrast, in the sphere of nuclear tests, it has so far been possible to impose only a partial ban, and it is accompanied by possibilities for withdrawal from the obligations established, with the result that the ban has not gained unanimous acceptance.⁵⁰⁸ Progress is nevertheless in sight, especially as regards the prohibition of action to influence the environment and climate for military and other hostile purposes incompatible with the maintenance of international security, human well-being and health. The United Nations General Assembly has decided to include in the provisional agenda of its thirty-first session an item on the conclusion of a convention on this subject.⁵⁰⁹ Furthermore several expressions of State opinion on these various points show that unwritten rules have emerged or are emerging in international custom. Also, the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, proclaims that the protection and improvement of the human environment is a "major" issue which affects the

well-being of peoples and economic development "throughout the world" and is "the duty of all Governments". The Declaration therefore enjoins States to co-operate to develop international law further, particularly as regards protection against the dangers of pollution and other environmental damage.⁵¹⁰ In view of the foregoing, it seems undeniable that the existing rules of general international law on the subject and those which will of necessity be added to them in the future are bound to be regarded to a great extent as "peremptory" rules by the international community as a whole. It seems equally undeniable that the obligations flowing from these rules are intended to safeguard interests so vital to the international community that a serious breach of those obligations cannot fail to be seen by all members of the community as an internationally wrongful act of a particularly serious character, as an "international crime", a crime no less reprehensible than some of those which are the subject-matter of the legal instruments already mentioned.

(33) To sum up, the Commission considers that, despite the divergencies of opinion that remain on one or another aspect of the matter between different groups of States in the collective organs of the United Nations, a general trend is nevertheless clearly emerging with regard to the subject of the present discussion. It seems undeniable that today's unanimous and prompt condemnation of any direct attack on international peace and security is paralleled by almost universal disapproval on the part of States towards certain other activities. Contemporary international law has reached the point of condemning outright the practice of certain States in forcibly keeping other peoples under colonial domination or forcibly imposing internal régimes based on discrimination and the most absolute racial segregation, in imperilling human life and dignity in other ways, or in so acting as gravely to endanger the preservation and conservation of the human environment. The international community as a whole, and not merely one or other of its members, now considers that such acts violate principles formally embodied in the Charter and, even outside the scope of the Charter, principles which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law. There are enough manifestations of the views of States to warrant the conclusion that, in the general opinion, some of these acts genuinely constitute "international crimes", that is to say, international wrongs which are more serious than others and which, as such, should entail more severe legal consequences. This does not, of course, mean that all these crimes are equal—in other words, that they attain the same degree of seriousness and necessarily entail all the more severe consequences incurred, for example, by the supreme international crime, namely, a war of aggression. It may be added that the records of the discussions in

⁵⁰⁷ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, annexed to General Assembly resolution 2826 (XXVI), of 16 December 1971.

⁵⁰⁸ Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, of 5 August 1963 (United Nations, *Treaty Series*, vol. 480, p. 43).

⁵⁰⁹ The agenda item is entitled "Convention on the prohibition of military or any other hostile use of environmental modification techniques: report of the Conference of the Committee on Disarmament" (resolution 3475 (XXX), of 11 December 1975).

⁵¹⁰ See *Report of the United Nations Conference on the Human Environment* (United Nations publication, Sales No. E.73.II.A.14), pp. 3 and 5 (paragraph 2 of the preamble and principle 22 of the Declaration).

the Sixth Committee of the General Assembly during its examination of the work of the International Law Commission on the subject of responsibility⁵¹¹ authoritatively confirm the conclusions set forth above.

(34) To conclude this long investigation into the conviction shown by States regarding the main problem which the present article is called upon to solve, it seems appropriate to add that breaches of the obligations in question are not regarded by States as falling within the category of "international crimes" unless they exhibit a certain degree of seriousness. The Charter itself makes a distinction between "threats to the peace", "breaches of the peace" and "acts of aggression". Even with regard to an act of aggression, article 2 of the "Definition of Aggression" adopted by the General Assembly⁵¹² stipulates that the "gravity" of the act must be taken into account. With regard to internationally wrongful acts represented by the breach of obligations relating to the right of self-determination of peoples, the safeguarding of the human being or the preservation of the environment, the practice of States seems once again to show that such acts are recognized as genuine "international crimes" only if they are in themselves of a particularly serious nature. For evidence of this conviction on the part of Governments with regard, in particular, to the obligations relating to respect for human rights and fundamental freedoms as proclaimed in the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and other collective instruments, reference may be made to the language of resolutions adopted by the General Assembly and the Economic and Social Council, which make frequent reference to "systematic", "constant" or "persistent" practices, or to practices involving "massive", "gross" or "flagrant" violations of those rights and freedoms.⁵¹³ This, then, is the kind of offence which the General Assembly appears to distinguish from other, less serious, possible violations of obligations existing in the same sphere, and this is the kind of breach which is viewed as an "international crime".⁵¹⁴

(35) A trend similar to that noted in the attitude of

various Governments is to be observed in the *opinions of writers of learned works*. In order not to encumber this report, the Commission will not refer here to those writers who, although they clearly consider certain international obligations more important than others and any breach of them as a particularly serious internationally wrongful act, do not draw any specific inference from this as regards the régime of responsibility to be applied. On the other hand, the Commission feels that it should include in the list of writers who advocate that a distinction should be made on this basis between two categories of internationally wrongful acts, all those who in one way or another attribute different legal consequences to types of internationally wrongful act which are differentiated by reason of the subject-matter of the obligation breached; this is regardless of the fact that sometimes, by contrast with what the Commission has decided to do,⁵¹⁵ they do not include certain of these legal consequences in the global notion of international responsibility.⁵¹⁶

(36) The idea of making a distinction between different régimes of international responsibility according to the subject-matter of the obligation breached is not new in the history of legal doctrine. A century ago the Swiss jurist J. C. Bluntschli stated it in terms very similar to those used by certain contemporary writers. According to him, when a State has simply failed to fulfil its obligation towards another State, the latter can only require that the obligation be performed belatedly or that the injury suffered be redressed. By way of exception, in cases where the honour or dignity of a State has been impugned, the State may also demand adequate satisfaction. If the wrong consists in an actual encroachment on the legal domain of another State or in undue interference in that State's enjoyment of its property, the mere elimination of the wrongful situation and the restoration of the *de jure* situation, or compensation, no longer suffice. The injured State may in addition demand satisfaction, punitive damages and, depending on the circumstances, further safeguards against a repetition of the wrong. Finally, if the wrong is of an even more serious nature and leads to a breach of

⁵¹¹ See the summary records of the discussions in the Sixth Committee in 1960 and 1963 on the subject of the ground to be covered by the codification of international responsibility, and of the discussions in 1973, 1974 and 1975 during the examination of the International Law Commission's annual reports.

⁵¹² Resolution 3314 (XXIX), annex.

⁵¹³ See for example General Assembly resolutions 2144 (XXI), of 26 October 1966, 2547 B (XXIV), of 15 December 1969, 3219 (XXIX), of 6 November 1974, and 3448 (XXX), of 9 December 1975, and Economic and Social Council resolutions 1235 (XLII), of 6 June 1967, 1503 (XLVIII), of 27 May 1970 and 1919 (LVIII), of 5 May 1975.

⁵¹⁴ Special machinery has even been established under the Commission on Human Rights for the study of situations created by "a consistent pattern of gross violations" of the rights and freedoms in question, in accordance with Economic and Social Council resolution 728 F (XXVIII), of 30 July 1959. See in this connexion decisions 3 (XXX), of 6 March 1974, and 7 (XXXI), of 24 February 1975, of the Commission on Human Rights. See also resolution 1 (XXIV), of 13 August 1971, of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

⁵¹⁵ In its report on the work of its twenty-fifth session, the Commission stated that it intended the term "international responsibility" 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 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" (*Yearbook... 1973*, vol. II, p. 175, document A/9010/Rev.I, chap. II, sect. B, para. (10) of the commentary to article 1).

⁵¹⁶ Some writers restrict the notion of the international responsibility of the State to subjection to a sanction such as enforcement measures; others, who are more numerous, make this notion correspond to that of the obligation to make reparation for the damage caused. It is quite possible that a writer may recognize that reprisals or certain forms of reprisals or even other punitive sanctions may be applied to a State which has breached an international obligation, without thereby contradicting his assertion that international responsibility may be identified with the obligation to make reparation.

the peace by force, the right of the injured State may extend to the right to punish the aggressor. As to the determination of the subject or subjects of international law entitled to invoke the responsibility of the State guilty of an international wrong, Blüntschi maintains that when a wrong constitutes a danger to the community, not only the injured State but all other States which have the necessary power to safeguard international law are entitled to take action to restore and safeguard law and order. He gives a list of the wrongs in question.⁵¹⁷

(37) Blüntschi nevertheless occupies an isolated position in the doctrine of the period extending from the middle of the nineteenth century⁵¹⁸ to the outbreak of the Second World War. Although, particularly during the period between the two wars, great advances were made in studies on State responsibility, there is no work which develops *ex professo* the idea of making a distinction between two or more categories of internationally wrongful acts, on the basis of the criteria we are concerned with here.

(38) It may be asked, however, whether the idea of such a distinction does not derive rather from the manner in which the writers of that period describe the consequences of the internationally wrongful act. On this point, it must be said that the writings of the period generally make no mention of the possibility of seeking in the diversity of subject-matter of the international obligations breached, and the relative importance of this subject-matter to the international community, a criterion for differentiating between the types of reparation which, as *ex delicto* obligations, may be required of the State committing the breach. In the first place, the question does not even arise for those who maintain *a priori* that general international law does not recognize obligations of this kind, and that an "obligation" to perform specific acts, by way of reparation for the damage or otherwise, can only derive from an agreement between the State committing the breach and the injured State.⁵¹⁹ This is equally true, however, of those writers—the great majority—who maintain that general international law does attribute to a State committing any internationally wrongful act an *ex delicto* obligation to perform various acts to satisfy the injured State by way of "reparation", *lato sensu*, for the act in question; these authors do not really consider the possibility that the subject-matter of the breached obligation should be the criterion for deciding what particular acts the guilty State is required to perform in each specific case and in what circumstances other

and more exceptional forms of reparation⁵²⁰ should be required in addition to the ordinary forms. Even the possible obligation—which in the opinion of some writers should in certain cases be a supplementary one, additional to the others⁵²¹—to pay a sum of money as "exemplary", "punitive" or "penal damages" in addition to the amount paid as compensation, is attributed to specific aspects of the case concerned, and not to the fact that the State has breached obligations having one particular subject-matter rather than another.

(39) We may next consider whether the writers of this period took the subject-matter of the breached obligation as a basis for making distinctions with regard to the enforcement or other "measures" which the injured State itself or other subjects can legitimately take as sanctions against the State guilty of a wrong. Here again it is clear that those who believe

⁵²⁰ All the international lawyers of this school mention, as ordinary forms of reparation, *restitutio in pristinum*, reparation by equivalence, and material compensation. Most of them, however, also recognize the right of the injured State to demand satisfaction in certain cases. The notion of "satisfaction" is taken to include a variety of acts such as the adoption by the guilty State of measures to prevent a repetition of the breach, apologies, punishment of the guilty persons, saluting the flag, payment of a symbolic sum of money, and so forth. Some authors describe such acts as a form of redress for "moral damage", while others go so far as to see them in a penal light. But the important point lies elsewhere, namely in the fact that, in determining the cases in which these "supplementary" acts should be required of the State committing the breach, the criterion taken is not the subject-matter of the breached obligation but the specific circumstances in which the breach was committed, such as the fact that they indicate that the honour and dignity of the injured State were impugned. (See A. G. Heffter, *Le droit international public de l'Europe*, 3rd. ed., trans. by J. Bergson (Berlin, Schroeder, 1857), p. 204; L. Oppenheim, *op. cit.*, p. 205; F. von Liszt, *Le droit international*, 9th ed. (1913) trans. by G. Gidel (Paris, Pédone, 1921), pp. 202-203; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, Banks Law Publishing, 1928), pp. 413 *et seq.*; P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, Kern's), supplement 2 to vol. X (1917), pp. 21 *et seq.*, pp. 122 *et seq.*; K. Strupp, *loc. cit.*, pp. 209 *et seq.*; C. de Vischer, *loc. cit.*, pp. 118 and 119; A. Decenièvre-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), pp. 245 *et seq.*; C. Eagleton, *op. cit.*, pp. 182 *et seq.*; D. Anzilotti, *op. cit.*, pp. 421 *et seq.*; A. Roth, *Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten* (Berlin, Heymann, 1934), pp. 97 *et seq.*; S. Arató, *Die völkerrechtliche Haftung* (Pecs, Nyomatott Taizs József, 1937), pp. 51 *et seq.*; M. Whiteman, *Damages in International Law* (Washington, D.C., U.S. Government Printing Office), vols. I-II (1937), vol. III (1943); L. Reitzer, *op. cit.*; J. Personnaz, *op. cit.*

⁵²¹ On this question see D. Anzilotti, "Le questioni di diritto sollevate dagli incidenti del 'Carthage' e del 'Manouba'", *Rivista di diritto internazionale* (Spoleto) VIIIth year, 2nd series, vol. II, fasc. I (1913), pp. 512 *et seq.*; A. Decenièvre-Ferrandière, *op. cit.*, pp. 269 *et seq.*; J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford, Calif., Stanford University Press, 1926), pp. 267 *et seq.*; C. Eagleton, *op. cit.*, pp. 189 *et seq.*, and "Measure of damages in international law", *Yale Law Journal* (New Haven (Connecticut)), vol. XXXIX, No. 1 (November 1929), pp. 61 *et seq.*; A. Roth, *op. cit.*, pp. 166 *et seq.*; M. Whiteman, *op. cit.*, pp. 716 *et seq.*, 1610-1611 and 1874; H. W. Briggs, "The punitive nature of damage in international law and State responsibility for failure to apprehend, prosecute or punish", *Essays in Political Sciences in Honour of W. W. Willoughby*, ed. by J. M. Matthews and J. Hart (Oxford, Hopkins, 1937), pp. 339 *et seq.*; H. Lauterpacht, "Règles générales du droit de la paix", *Recueil des cours...*, 1937-IV (Paris, Sirey, 1938), vol. 62, pp. 354 *et seq.*

⁵¹⁷ J. C. Blüntschi, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (Nördlingen, Beck'schen, 1868), pp. 259 *et seq.*

⁵¹⁸ We have taken as the starting-point for this analysis the publication in 1844 of A. G. Heffter's manual (see below, footnote 520), in which the problem of the international responsibility of the State is systematically considered for the first time.

⁵¹⁹ See in particular H. Kelsen, "Unrecht und Unrechtsfolgen im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 545 *et seq.*

that the faculty to take enforcement measures as "sanctions" is the sole consequence attached by general international law to the internationally wrongful act of a State, must necessarily be convinced that this consequence follows from any breach of an international obligation, whatever its subject-matter.⁵²² Yet even the much greater number of writers who believe that general international law requires a State committing a wrong to make reparation, recognize the lawfulness, at least in certain cases, of recourse by the injured State to measures which would otherwise be wrongful, as sanctions applied to an internationally wrongful act of another.⁵²³ Does this mean that these authors regard the subject-matter of the breached obligation as the criterion for determining the cases in which recourse to forms of sanction would be lawful? Whatever idea they may have had of the relationship between the two forms of responsibility,⁵²⁴ the answer to this particular question must be in the negative, at least generally speaking. However, different positions gradually appear towards the end of the period we are discussing. Some writers begin to ponder the possible existence of two "forms of delict", one entailing the obligation to make restitution alone and the other entailing a possibility of pu-

⁵²² H. Kelsen, *loc. cit.*, pp. 568 *et seq.*

⁵²³ The question of repressive or, in general, enforcement measures to be applied against a State that has committed an internationally wrongful act is usually treated in a fragmentary manner, especially by the earlier writers. It is raised in discussions dealing specifically with reprisals, embargoes, peaceful blockade, intervention and war itself. See A. G. Heffter, *op. cit.*, pp. 204, 215 *et seq.*; H. W. Halleck, *International Law or Rules regulating Inter-course of States in Peace and War* (San Francisco, Bancroft, 1861), pp. 52-53, 297 *et seq.*; H. Wheaton, *Elements of International Law*, 8th ed. (Boston, Little, Brown, 1866), pp. 309 *et seq.*; C. Calvo, *Le droit international théorique et pratique*, 4th ed. (Paris, Guillaumin), vol. I (1887), pp. 266 *et seq.*, vol. III (1888), pp. 518 *et seq.*; P. Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen* (Berlin, Springer, 1896), pp. 351 *et seq.*; F. von Liszt, *op. cit.*, pp. 296 *et seq.*; W. E. Hall, *A Treatise on International Law*, 4th ed., (Oxford, Clarendon Press, 1895), pp. 57 *et seq.*; E. M. Borchard, *op. cit.*, pp. 446 *et seq.*; P. Schoen, *loc. cit.*, pp. 141 *et seq.*; K. Strupp, *loc. cit.*, pp. 179 *et seq.* and 222; C. de Visscher, *loc. cit.*, pp. 107 *et seq.*, 116 *et seq.*; C. Eagleton, *The Responsibility of States* (*op. cit.*), pp. 218 and 219; L. Reitzer, *op. cit.*, pp. 25 *et seq.* See also R. Ago, *loc. cit.*, pp. 524 *et seq.*; G. Sperduti, "Introduzione allo studio delle funzioni della necessità nel diritto internazionale", *Rivista di diritto internazionale* (Padua), XXXVth year, 4th series, vol. XXII, fasc. I-II (1943), pp. 22 *et seq.* On the question of reprisals, see P. Lafargue, *Les représailles en temps de paix* (Paris, Rousseau, 1898); the report of M. N. Politis to the Institute of International Law, "Le régime des représailles en temps de paix", *Annuaire de l'Institut de droit international*, 1934 (Brussels, Falk), pp. 1 *et seq.*, and the resolution adopted by the Institute, *ibid.*, pp. 108 *et seq.*; Y. de la Brière, "Evolution de la doctrine et de la pratique en matière de représailles", *Recueil des cours...*, 1928-II (Paris, Hachette, 1929), vol. 22, pp. 241 *et seq.*

⁵²⁴ Some of these writers consider the two forms of responsibility to be cumulative: in each specific case the State injured by an internationally wrongful act would have the right to demand reparation and at the same time the power to impose a penalty. Others consider that the injured State would be free to choose between resort to one or other of these two forms of responsibility; yet others—and they are in the majority—maintain that the injured State must first try to obtain reparation and may resort to sanctions only after its request for reparation (for an example, see article 6 of the resolution of the Institute of International Law mentioned in the preceding foot-note). These views take no account of the subject-matter of the breached obligation.

nitive action as well;⁵²⁵ others begin to regard aggression as a wrong which is different from others—an internationally wrongful act entitling the injured State to take immediate enforcement action against the State committing the act, without its being required to seek reparation first.⁵²⁶ Although no writer explicitly puts forward the idea that a distinction should be made between breaches of different international obligations, and relates the distinction to the applicability of a certain "measure" as a "sanction", a distinction between aggression and other internationally wrongful acts nevertheless becomes discernible in this connexion too. In drawing attention to the gradual affirmation of the principle of prohibition of recourse to war, various international lawyers of the period extend this prohibition to the use of force as a "sanction" against an internationally wrongful act,⁵²⁷ but they always make an exception for cases in which the wrongful act is an act of aggression.

(40) As to the other aspect of the consequences of an internationally wrongful act, namely, that of determining what subject of international law is entitled to invoke the responsibility of the State which has committed the act, there was some support during this period for the idea of making a distinction according to the subject-matter of the obligation breached, although it was still confined to a minority. It is logical that the right to demand reparation should be recognized as belonging only to the injured State, but there are some writers who recognize the right of every State to resort to reprisals, embargo and other punitive measures in certain cases.⁵²⁸ In doing so, they are obviously thinking of internationally wrongful acts of some gravity, yet it cannot be said that they establish a real connexion, in a given case, between the subject-matter of the breached obligation and the legitimacy of intervention by third States. However, certain writers cross this barrier and state more or less precisely which are the obligations the breach of which may entitle subjects of international law other than the one directly injured to resort to punitive measures.⁵²⁹ Among them are two

⁵²⁵ Ago, *loc. cit.*, pp. 530 *et seq.*

⁵²⁶ Reitzer is the writer of this period who devoted most attention to the relationship between reparation and sanction. On the basis of a meticulous analysis of international practice, he concluded that a State which is the victim of aggression is entitled, exceptionally, to take immediate steps in self-defence (*op. cit.*, pp. 91 *et seq.*). This opinion is widely shared by those who dealt with self-defence at the time. See, for instance, C. de Visscher, *loc. cit.*, pp. 107 *et seq.*; A. Verdross, "Règles générales du droit international de la paix", *Recueil des cours...*, 1929-V (Paris, Hachette, 1931), vol. 30, pp. 481 *et seq.* and 491; E. Giraud, "La théorie de la légitime défense", *Recueil des cours...*, 1934-III (Paris, Sirey, 1934), vol. 49, pp. 691 *et seq.*

⁵²⁷ See *inter alia* the report by M. N. Politis, *loc. cit.*, p. 48, and the resolution adopted by the Institute of International Law, article 4 (*Annuaire de l'Institut...* (*op. cit.*), p. 709).

⁵²⁸ For example, C. Eagleton, *op. cit.*, pp. 224 and 225.

⁵²⁹ Some writers give very vague indications about this (for instance, W. E. Hall (*op. cit.*, p. 57) refers to cases in which a State "grossly and patently violates international law in a matter of serious importance", and E. von Ullmann (*Völkerrecht* (Tübingen, Mohr, 1908), p. 463) speaks of acts of the State which imply negation of the fundamental principles of the international order and

American writers who were so struck by the outbreak of the First World War that they came out clearly in favour of differentiating between wrongful acts according to the subject-matter of the obligation breached. E. Root in 1915 and A. J. Peaslee in 1916 strongly maintained that international law must evolve in the same way as internal law, and arrive at a distinction between two kinds of wrongs: those affecting only the directly injured State and those which, on the contrary, affect the whole community of States. With regard to this latter category of internationally wrongful acts, Root considers that every State is entitled to punish them, and even bound to do so.⁵³⁰ Peaslee suggests that organs of the community, which he recommends should be established after the end of the war, should be responsible for the prevention and punishment of such acts.⁵³¹ His idea looked more to the future and was thus in line with the proposals tending in general towards the institutionalization of the international community and the development of international organizations. Root's idea, on the other hand, was in the tradition of the nineteenth-century writers and capable of realization within the framework of a non-institutionalized society.

(41) Separate mention must be made of a whole group of writers whose ideas relate more directly to penal law than to international law, and who are clearly in favour of making the distinction in question. They are the supporters of a theory which experienced a certain success in the period between the two world wars—the so-called theory of the penal responsibility of the State. More precisely, reference must be made to the school which includes V. V. Pella, Q. Saldaña, H. Donnedieu de Vabres and others, who urged the adoption of a code listing the most serious breaches of international law and specifying the penalties attaching to them. These range from punitive damages to the occupation of territory and, as a last resort, the loss of independence. All the authors in question make the implementation of their principles dependent upon the establishment of an international criminal court responsible for applying the penalties in question.⁵³²

international law). Others—and these are the earliest, as we have seen—go so far as to draw up a list of offences punishable by all States. This applies to J. C. Bluntschli, as stated above, and also to A. G. Heffter (*op. cit.*, pp. 204 and 207–208).

⁵³⁰ "The outlook for international law", *American Journal of International Law* (Washington, D.C.), vol. 10, No. 1 (January 1916), particularly pp. 2 and 8–9.

⁵³¹ "The sanction of international law", *American Journal of International Law* (Washington, D.C.), vol. 10, No. 2 (April 1916), pp. 335 *et seq.*

⁵³² See Q. Saldaña, "La justice pénale internationale", *Recueil des cours...*, 1925-V (Paris, Hachette, 1927), vol. 10, pp. 227 *et seq.*, and particularly pp. 296 *et seq.*; V. V. Pella, *La criminalité collective des Etats et le droit pénal de l'avenir*, 2nd ed. (Bucharest, Imprimerie de l'Etat, 1926); H. Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Paris, Sirey, 1928), pp. 418 *et seq.* See also the proceedings of the International Law Association concerning the establishment of an international criminal court, at the 1922, 1924 and 1926 sessions; those of the Inter-Parliamentary Union concerning wars of aggression, at the 1925 session; those of the 1926 International Congress on Penal Law concerning the establishment of an international penal court; and the

(42) To sum up, the learned works of the years 1850–1939 show that the doctrine of the time, and especially that of the years 1915–1939, was not systematically focused on solving the problem we are concerned with, but did not entirely overlook it and sometimes even made a useful contribution to the subject. A study of these works reveals above all that authors who were especially aware of the development needs of the international community understood that an answer to the question had to be found outside the traditional framework of an exclusively "civil law" view of international responsibility. Vaguely, perhaps, an idea began to take shape: the idea that there is not just one single type of internationally wrongful act and that therefore there can not be only one kind of responsibility.

(43) During the period following the Second World War, the interest which learned circles devoted to this problem grew in both intensity and scope. Immediately after the end of the hostilities, when the thought of the horrors of all kinds that mankind had just lived through was still painfully present in the minds of all, two authors stand out in adopting similar positions, at the same time but independently of each other: H. Lauterpacht in the United Kingdom and D. B. Levin in the Soviet Union. Both raised the same question: should international law make a distinction between two different categories of internationally wrongful acts of a State according to the gravity of the act in question? The coincidence is significant. Lauterpacht replies in the affirmative: "The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of international law amounting to a criminal act in the generally accepted meaning of the term".⁵³³ Levin, for his part, stresses the need to distinguish between simple breaches of international law and international "crimes", which undermine the very foundations and essential principles of

drafts prepared on those occasions (*Historical Survey of the Question of International Criminal Jurisdiction, Memorandum submitted by the Secretary-General* (United Nations publication, Sales No. 1949.V.8)).

⁵³³ L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, p. 339. The author goes on to state that the consequence of an "ordinary" internationally wrongful act consists in the obligation to make reparation for the moral and material wrong, such reparation possibly including punitive damages. Only if the State committing the wrongful act refused to make reparation could the injured State take the necessary measures to enforce the obligation to make reparation. On the other hand, Lauterpacht writes, the consequences are different in the case of breaches which, "by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilised countries" (*ibid.*, p. 355). The author gives the example of a mass massacre, on the orders of a government, of aliens residing in the territory of a State, and that of the preparation and launching of a war of aggression. In such cases, Lauterpacht concludes, State responsibility is not confined to the obligation to make reparation, but also includes the applicability of coercive measures, such as war or reprisals under traditional international law, or the sanctions provided for in Article 16 of the Covenant of the League of Nations or in Chapter VII of the Charter of the United Nations (*ibid.*, pp. 355–356).

the legal order of international society.⁵³⁴ Furthermore, at that same time, the eminent United States international jurist P. Jessup revived the question, raised by Root in 1916, of the need to treat wrongs endangering the peace and order of the international community as a breach of the law of all nations. According to Jessup, such conduct infringes a law which exists for the protection of all States; all States therefore are affected if that law is breached or weakened.⁵³⁵

(44) At the beginning of the 1950s we find a resurgence of that "penal law" school of thought, which had already gained a certain following between the two wars.⁵³⁶ But its ideas met with opposition: from the vast majority of international jurists at the theoretical level, and from States at large at the practical level, partly because the writers in question draw an excessively strict parallel between the treatment to be accorded to wrongs of the State as a subject of international law and the treatment accorded under internal penal law to offences of individuals, and partly because of their insistence that an international criminal court should be established to determine the "penal" responsibility of the State in each specific case. The propositions of this school have thus remained a dead letter, and also other writers, out of a desire to avoid becoming entangled with its ideas, have been somewhat reluctant to deal with the issue and to consider seriously the possibility of distinguishing between two different régimes of international responsibility according to the importance to the international community of the breached obligation.⁵³⁷

⁵³⁴ D. B. Levin, "Problema otvetstvennosti v nauke mezhdunarodnogo prava", *Izvestia Akademii Nauk SSSR*, No. 2, 1946, p. 105. The distinction advocated by this author is, however, more in the nature of a proposal *de jure condendo* than a description of the law in force.

⁵³⁵ Jessup's idea (*A Modern Law of Nations: An Introduction* (New York, Macmillan, 1948), pp. 11 *et seq.*) is also *de jure condendo*, since he says that if the "new" principle that the community has an interest in preventing breaches of international law were to gain acceptance, that law should evolve "in the direction of more extended governmental functions of an organized international community".

⁵³⁶ In 1950, V. V. Pella submitted to the International Law Commission his draft code of offences against the peace and security of mankind (see *Yearbook... 1950*, vol. II, pp. 315 *et seq.*, document A/CN.4/39). The author had already put forward his proposals in 1946, in his work entitled *La guerre-crime et les criminels de guerre* (Neuchâtel, Editions de la Baconnière, 1964).

⁵³⁷ A possible exception is D. H. N. Johnson, who forcefully points out that, in view of the existence of the complex machinery provided under the United Nations Charter for dealing with acts of aggression, and in view of the General Assembly's definition of aggression (in resolution 380 (V)) as the gravest of all crimes against peace and security, it is inconsistent to continue to treat an act of aggression as a mere "illegal" act involving no more than the obligation to provide compensation ("The draft code of offences against the peace and security of mankind", *International and Comparative Law Quarterly* (London), vol. 4, No. 3 (July, 1955), pp. 445 *et seq.*). See also K. Yokota, "War as an international crime", *Grundprobleme des internationalen Rechts, Festschrift für Jean Spiropoulos* (Bonn, Schimmelbusch, 1957), pp. 455 *et seq.* F. V. Garcia Amador, first Special Rapporteur on State responsibility, also makes a distinction between merely "unlawful" acts involving only the "civil" responsibility of States, and "punishable" acts involving "criminal" responsibility. The transformation of some acts of the State which were previously re-

(45) Apart from this, the legal literature of the 1950s shows a special interest in the "traditional" aspects of the theory of State responsibility. The studies which appeared in that decade make a valuable contribution to the analysis of the various aspects of the problem of the consequences of internationally wrongful acts; they are particularly concerned with analysing the relationship between reparation and penalty and with examining and differentiating between the different forms of each.⁵³⁸ On the whole, however, they do not seem to relate the possible diversity of such consequences to the breach of certain obligations rather than of others.

(46) However, although in general the writers of the 1950s do not make a theoretical distinction between two separate types of internationally wrongful act depending on the subject-matter of the obligation breached, with each type entailing the application of different régimes of responsibility, a distinction of this kind emerges none the less from their works. They treat a specific breach of the obligation not to use force as a wrongful act that is quite distinct from other such acts. Their view is that the restrictions usually placed on the right to retaliate against a State guilty of an internationally wrongful act cease to apply in cases of aggression, and that the régime of responsibility becomes much more strict. The difference in régime takes three forms: (a) a State that is the victim of aggression is considered as being empowered to take, against the aggressor State, measures which infringe the rights of that State and, exceptionally, that power is not subject to the general

garded as merely wrongful or unlawful into punishable acts is, in his view, a result of the transformation which took place after the Second World War. It would seem, however, that in his opinion the "criminal" responsibility of the State is reflected only in the obligation to punish individuals who are organs and have engaged in conduct incompatible with certain international obligations of the State. On this point Garcia Amador's opinion appears to differ from that of Johnson. See *Yearbook... 1954*, vol. II, p. 24, document A/CN.4/80, para. 13; "State responsibility in the light of the new trends of international law", *American Journal of International Law* (Washington (D.C.)), vol. 49, No. 3 (July, 1955), p. 345; "State responsibility—some new problems", *Recueil des cours... 1958-II* (Leyden, Sijthoff, 1959), vol. 94, pp. 395 *et seq.* See also his first report on State responsibility in *Yearbook... 1956*, vol. II, document A/CN.4/96, in particular pp. 182 *et seq.* and 211 *et seq.*

⁵³⁸ See in particular, among the authors who dealt with these different aspects of the subject in the 1950s and also more recently, P. A. Zannas, *La responsabilité internationale des Etats pour les actes de négligence* (Montreux, Ganguin et Laubscher, 1952); P.-A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (Annemasse, Grandchamp, 1952); B. Cheng, *op. cit.*, pp. 233 *et seq.*; P. Reuter, *loc. cit.*, pp. 189 *et seq.*; H. Accioly, *loc. cit.*, pp. 413 *et seq.*; A. Schüle, *loc. cit.*, pp. 337 *et seq.*; G. Schwarzenberger, "The problem of an international criminal law", *International Criminal Law*, ed. by G. O. W. Mueller and E. M. Wise (South Hackensack (N.J.), Rothman, 1965), pp. 13 *et seq.*; E. Jiménez de Aréchaga, *loc. cit.*; pp. 564 *et seq.*; G. Ténékides, *loc. cit.*; pp. 689 *et seq.*; B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pédone, 1973); H. J. Schlochauer, "Die Entwicklung des völkerrechtlichen Deliktsrecht", *Archiv des Völkerrechts* (Tübingen, 1975), vol. 16, No. 3, pp. 265 *et seq.* See also the textbooks by P. Guggenheim, G. Schwarzenberg, A. P. Sereni, L. Cavaré, R. Quadri, D. P. O'Connell and D. W. Greig.

obligation first to seek reparation for the injury suffered,⁵³⁹ (b) it is considered that the measures available to a State that is the victim of an act of aggression extend to the use of armed force in self-defence, although its use is not allowed in other cases of reaction to an internationally wrongful act of another party, even where due reparation has been refused;⁵⁴⁰ (c) lastly, it is acknowledged that, unlike the position in all other cases of internationally wrongful acts, a third State may assist a State that is the victim of an act of aggression, and in doing so may itself use armed force.⁵⁴¹ The literature of this period does not normally envisage any other consequences of aggression being imposable on the guilty State after the aggression has ceased. Nor does it envisage the existence of other obligations whose breach would entail the applicability of a special régime of responsibility.

(47) It was in the 1960s and 1970s that the idea took shape, and was formulated academically, in the writings of international jurists, that different kinds of internationally wrongful acts should be distinguished according to the importance of the subject-matter of the breached obligation. In this connexion, mention may first be made of the position taken by a number of Soviet authors. Tunkin, in a study published in 1962, reached the conclusion that post-war international law had distinguished between two categories of breaches of the law, each entailing distinct forms of responsibility. In the first category he included wrongs which represent a danger to peace, while his second category covered all other breaches of international obligations.⁵⁴² In 1966, in virtually

the same terms, D. B. Levin took up the distinction established by Tunkin between international crimes and simple breaches⁵⁴³ and developed it further. Outstanding among the many contributions to this subject in recent years⁵⁴⁴ is the chapter on State responsibility in *Kurs mezhdunarodnogo prava*, published in 1969. The authors of this work distinguish between two categories of breaches: those affecting the rights and interests of a particular State and the more serious ones which "violate the fundamental principles of international relations and thus injure the rights and interests of all States". The latter category comprises violations of peace between peoples and of the freedom of peoples.⁵⁴⁵ Similar viewpoints are expressed in the works of authors of the German Democratic Republic such as J. Kirsten, B. Gräfrath and P. A. Steiniger.⁵⁴⁶

State at fault and the State directly injured but also between the State at fault and all other States, and even international organizations. That effect is held to extend to the breach of other obligations as well, such as those guaranteeing the freedom of the high seas and the conservation of the living resources of the sea.

⁵⁴³ D. B. Levin, *Otvetsvennost gosudarstv...* (*op. cit.*), pp. 19 *et seq.*, 44 *et seq.*, 112 *et seq.* and 129 *et seq.* According to Levin, the category of international crimes also covers acts constituting a threat to the freedom of peoples. In this opinion, the power of imposing sanctions on States which have committed international crimes arises immediately after the perpetration of the crime, whereas, in the case of other wrongs, sanctions cannot be imposed on the wrongdoer unless he has failed to meet his obligation to make reparation. Sanctions themselves are held to be of different kinds in the two cases.

⁵⁴⁴ See, *inter alia*, L. A. Modzhoryan "Otvetsvennost v sovremennom mezhdunarodnom prave", *Soviet Yearbook of International Law, 1970* (Moscow, Nauka, 1972), pp. 143 *et seq.* and 152 *et seq.*; Y. V. Petrovsky, "O politicheskoy otvetsvennosti gosudarstv", *ibid.*, pp. 157 *et seq.*, 159 *et seq.* and 165 *et seq.*; P. M. Kuris, *op. cit.*

⁵⁴⁵ These authors maintain that the distinction between simple wrongs and "international crimes" entails consequences in respect of the subjects of the legal relations engendered by responsibility: besides the State directly injured, other States may "require compliance with the rules of international law" "in the case of an international crime". This distinction also entails consequences with regard to the forms of responsibility, since the transgressor is liable to the immediate application of sanctions, including measures of military coercion, without it being necessary to wait until he has refused to meet the obligation to make reparation (State Institute of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 420 *et seq.*, 430 *et seq.* and 434 *et seq.*)

⁵⁴⁶ J. Kirsten ("Die völkerrechtliche Verantwortlichkeit", *Völkerrecht: Lehrbuch* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1973), pp. 325 *et seq.* and 337 *et seq.*) closely follows the theories of Tunkin and Levin. Gräfrath and Steiniger, on the other hand, propose a division of internationally wrongful acts into three groups according to the subject-matter of the breached obligation. The first comprises the most serious wrongs, namely, breaches of the peace, in which the authors include armed aggression and the forcible maintenance of a racist régime or colonial domination. The second category, according to them, consists of "violations of State sovereignty". This category comprises breaches of all the fundamental principles of international law, from non-intervention to freedom of navigation on the high seas. The third category covers all other breaches. See Gräfrath and Steiniger, *loc. cit.*, pp. 225 *et seq.* (with a draft convention on the subject); B. Gräfrath, "Rechtsfolgen der völkerrechtlichen Verantwortlichkeit als Kodifikationskriterium", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Gesellschafts und Sprachwissenschaftliche Reihe* (Berlin), vol. XXII, No. 6, 1973, pp. 451 *et seq.*; P. A. Steiniger, "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *ibid.*, pp. 441 *et seq.*

⁵³⁹ See for example D. W. Bowett, *Self-Defence in International Law* (Manchester, University Press, 1958).

⁵⁴⁰ As regards the United Nations system—and, in the opinion of many writers, customary international law also—the prevailing view is that the injured State should not be allowed to resort to the use of force even in response to an internationally wrongful act, except in the case of armed aggression. See, for example, H. Wehberg, "L'interdiction du recours à la force — Le principe et les problèmes qui se posent", *Recueil des Cours...*, 1951-I (Leyden, Sijthoff, 1952), vol. 78, p. 72; and with some reservations, D. W. Bowett, *op. cit.*, pp. 12 *et seq.* For a minority opposing view, see E. Colbert Speyer, *Retaliation in International Law* (New York, King's Crown Press, 1948), p. 203; J. Stone, *Aggression and World Order, A Critique of United Nations Theories of Aggression* (London, Stevens, 1958), pp. 94 *et seq.*

⁵⁴¹ See, with specific reference to the United Nations system, J. L. Kunz, "Individual and collective self-defense in Article 51 of the Charter of the United Nations", *American Journal of International Law* (Washington (D.C.)), vol. 41, No. 4 (October, 1947), pp. 872 *et seq.*; H. Kelsen, "Collective security and collective self-defense under the Charter of the United Nations", *American Journal of International Law* (Washington (D.C.)), vol. 42, No. 4, (October, 1948), pp. 783 *et seq.*; D. W. Bowett, "Collective self-defence under the Charter of the United Nations", *The British Year Book of International Law, 1955-56* (London), vol. 32, 1957, pp. 130 *et seq.*

⁵⁴² The study is in the work by G. I. Tunkin referred to in footnote 409. The régime of responsibility applicable to the breach of obligations essential for safeguarding peace is considered to comprise all forms of responsibility, from the obligation to make reparation to the application of the most severe sanctions permissible under international law. The responsibility attendant upon the breach of other international obligations, however, is held to be more limited. Moreover, according to Tunkin, wrongs of the former kind give rise to a legal relationship not only between the

(48) In other countries, the legal literature of this period has developed the ideas put forward in previous years. For instance, it has confirmed in particular the principle that a breach of the prohibition of the use of force is an internationally wrongful act, which because of its exceptional seriousness, must entail the application of a régime of responsibility which is much more severe than the régime attendant upon a breach of other international obligations. It has also confirmed that this difference of régime has the threefold aspect outlined above.^{547, 548} Some authors, however, stand apart in openly advocating the systematic adoption of the distinction between an international "delict" and an international "crime". In the opinion of Verzijl, for example, an international crime should be distinguished from a delict in that it not only creates an obligation on the part of the guilty State to restore the *status quo ante* or to indemnify the victim of the wrong but also entails the application of sanctions by the international community. He states that the term "international crime", first used to describe a war of aggression, was subsequently extended to cover grave breaches of the laws of war, crimes against humanity and similar misdemeanours.⁵⁴⁹ Various authors extend the category of international crimes to other cases, but they do so only in order to recognize that the faculty of punishing them is possessed by States other than the State directly injured. D. Schindler, in an interim report to the Institute of International Law on the principle of non-intervention in civil wars, proposed that the perpetuation of a colonial régime or a régime of racial discrimination should be regarded as an internationally wrongful act *erga omnes* and, as such, justifying non-military intervention by third States. In his final report he refers in particular to genocide as an international crime.⁵⁵⁰ Brownlie holds that the category of international crimes includes the breach of any obligation flowing from a rule of *jus cogens*. Among the "most probable" rules in that category, he mentions those which prohibit wars of aggression, the slave trade, piracy and other crimes against humanity, and

⁵⁴⁷ See above, para. (46).

⁵⁴⁸ See, for example, I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), pp. 251 *et seq.* and 329 *et seq.*; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford, Oxford University Press, 1963), pp. 202, 205 and 217 *et seq.*; M. Akehurst, "Reprisals by third States", *The British Year Book of International Law*, 1970 (London), vol. 44, 1971, pp. 15 *et seq.*; J. Delivanis, *La légitime défense en droit international public: Le droit international face à ses limites* (Paris, Librairie générale de droit et de jurisprudence, 1971), pp. 30 *et seq.*, 66 *et seq.* and 148 *et seq.*; P. Lamberti Zanardi, *La Legittima difesa nel diritto internazionale* (Milan, Giuffrè, 1972), pp. 135, 179 *et seq.* and 276 *et seq.*; D. W. Bowett, "Reprisals involving recourse to armed force", *American Journal of International Law* (Washington (D.C.)), vol. 66, No. 1 (January, 1972), pp. 1 *et seq.* (with reservations); M. L. Forlati Picchio, *La sanzione nel diritto internazionale* (Padua, CEDAM, 1974), pp. 64, 178 *et seq.*, 266 *et seq.* and 417 *et seq.*

⁵⁴⁹ J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), vol. VI, pp. 741 *et seq.*

⁵⁵⁰ "Le principe de non-intervention dans les guerres civiles", *Yearbook of the Institute of International Law*, 1973 (Basle), vol. 55 (1973), pp. 483, 508, 561 and 562.

the rules which sanction the self-determination of peoples.⁵⁵¹ Thinking along the same lines, some authors have put the question whether, in the event of the breach of particularly important obligations, it might not be necessary to envisage the possibility of an *actio popularis*.⁵⁵²

(49) In conclusion, on the basis of the analysis which has been made of the subject, the Commission feels justified in saying that ideas have moved substantially ahead in the international legal literature of different countries and different legal systems. The opinions which in the older doctrine represented the isolated voices of certain unusually forward-looking thinkers have become increasingly widespread and forceful, to the point where in modern works they represent a solidly established viewpoint. Many men of learning have been impelled in their writings to follow a trend similar to that concurrently discernible in the attitudes of various Governments and their representatives, and they have even helped to influence and consolidate the latter's views.

(50) Because of the relatively new aspects of the question which is the subject of the present article, an examination of the various *codification drafts* has not provided the Commission with many useful suggestions for resolving it. Most of these drafts were prepared before the Second World War and are generally confined to the specific topic of responsibility for damage caused to foreigners. They therefore concentrate on defining the obligation to make reparation for such damage. The only draft which is both recent and general in scope is the one prepared in 1973 by B. Gräfrath and P. A. Steiniger. The draft provides (in article 6) that "the form and content of international responsibility are governed by the character of the breach". It then makes provision for special régimes of responsibility applicable to various cases of internationally wrongful acts, classified according to the three groups recommended by the authors of the draft.⁵⁵³

(51) Having thus, as the foregoing pages indicate, analysed in turn the evolution of international jurisprudence, of State practice and of legal opinion with regard to the subject dealt with in the present article, the members of the Commission arrived unanimously at two conclusions. First, they found that the subject-matter of the international obligation breached has no bearing on the characterization as internationally wrongful of an act of a State which commits such a breach: regardless of the subject-matter and

⁵⁵¹ *Principles of Public International Law* (*op. cit.*), pp. 415 *et seq.* Brownlie speaks of *delicta juris gentium* as opposed to "torts as reparation obligations between tortfeasor and claimant".

⁵⁵² As early as 1966, Brownlie noted a trend in international law towards recognizing that States other than the State directly injured have a legal interest in the observance of certain obligations (*ibid.*, pp. 389-390). Following the judgment of the International Court of Justice in the *Barcelona Traction* case, such authors as B. Bollecker-Stern (*op. cit.*, pp. 83 *et seq.*) expressed support for the admissibility of an *actio popularis* in the cases of breach *erga omnes* mentioned by the Court.

⁵⁵³ See Gräfrath and Steiniger, *loc. cit.*, pp. 227 *et seq.*

specific content of the obligation, an act of a State which is not in conformity with what is required of it by that obligation is always and indisputably an internationally wrongful act. Secondly, the Commission recognized that the subject-matter of the international obligation breached has, on the other hand, an undeniable bearing on the definition of the régime of responsibility attaching to the internationally wrongful act constituted by the breach in question. The forms of responsibility applicable to the breach of certain obligations of essential importance for the safeguarding of fundamental interests of the international community naturally differ from those which apply to the breach of obligations of which the subject-matter is different; and the respective subjects of international law permitted to implement (*mettre en œuvre*) those various forms of responsibility may also be different. The Commission concluded from this that it was necessary to distinguish between two different categories of internationally wrongful act according to the subject-matter of the international obligation breached, and that those categories were bound to differ in their characterization.

(52) Although the Commission thus recognized conclusively that some wrongs are to be regarded as more serious than others, and hence deserve to be characterized accordingly, it did not feel that the task of specifying the respective régimes of international responsibility applicable to the two kinds of internationally wrongful acts thus distinguished came within the scope of the present article, or indeed of the present chapter. This is a question which the Commission will have to settle when it takes up the problem of the content and the different forms of responsibility. The Commission is of course well aware that, having differentiated between internationally wrongful acts on the basis of the degree of importance of the subject-matter of the breached obligation, it will inevitably be compelled to go on and differentiate between the régimes of responsibility applicable. It has already been shown that the distinction in question is necessarily a normative one; it has been pointed out that the only justification for making it in the present draft is to enable the consequences attendant on certain more serious wrongs to be differentiated from those attendant on other breaches of international obligations. However, from the point of view of the general structure of the draft, the two tasks must obviously be accomplished in succession.

(53) For all these reasons the Commission felt that it should resist the temptation to give any indication at the present time, even in the commentary to this article, as to what it thinks should be the régime of responsibility applicable to the most serious internationally wrongful acts, namely, those it has decided to call "international crimes". The temptation is easy to understand, for the Commission's detailed consideration of State practice and learned works has necessarily acquainted it with numerous opinions on this subject, some of them debatable, which have produced different reactions among its members and caused them legitimate concern. However, since the

Commission will be obliged, at a later stage in its work on the codification of State responsibility, to indicate its position as to the determination of the different forms of international responsibility which are possible, and the different subjects of international law which are permitted to implement (*mettre en œuvre*) those forms of responsibility in the various cases postulated, it must be very careful not to take a stand too hastily on such delicate and complex issues. The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members. Having said that, it must quickly be added that this by no means implies—indeed it is very unlikely—that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (*mettre en œuvre*) the various forms concerned, it will conclude that there is one uniform régime of responsibility for the more serious internationally wrongful acts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other. In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions. Moreover, we have seen the extent to which State practice and the authors of legal writings bring out the differences in gravity that exist even among the various internationally wrongful acts which are lumped together under the common label of international crimes. The same must undoubtedly be true of other internationally wrongful acts; the idea that they always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out.

(54) The Commission also recognized that it would be wrong to believe that there is a single basic régime of international responsibility which is applicable to all internationally wrongful acts without distinction, and that all that is required is to add extra consequences to it for wrongful acts constituting international crimes. That may be true for some particular crimes, but there is no gainsaying the possible existence of others with respect to which the applicability of certain specific forms of responsibility would exclude the applicability of the consequences prescribed for other wrongs. The idea that there is some kind of least common denominator in the régime of international responsibility must be discarded. It is therefore inconceivable that the Commission, even if it so wished, could limit its task to establishing in the draft articles a supposedly general régime of responsibility valid for all internationally wrongful acts, leaving it to international custom or particular con-

ventional instruments to lay down the régime, or rather régimes, of responsibility applicable to international "crimes". It would be unfortunate if the Commission falsely gave the impression that it considers the régime of responsibility prescribed by general international law to be the same for all internationally wrongful acts. General international law now differentiates between various types of internationally wrongful acts and, consequently, between various régimes of international responsibility; accordingly, the codification of general international law entails the definition of those different kinds of wrong and the determination of the corresponding régimes of responsibility. Moreover, it should be remembered that the General Assembly has asked the Commission to codify the whole body of general rules governing international responsibility, regardless of the subject-matter of the obligation breached by the State and of the seriousness of the breach for the international community; and one point which the General Assembly stressed particularly was that priority should be given to the question of responsibility for the breach of the most essential international obligations. The Commission would therefore be disappointing the hopes placed in its work if it prepared a draft convention which made no reference to the régime of responsibility applicable to breaches of obligations of that kind.

(55) The Commission is also convinced that, in codifying the general rules which recognize the existence of different types of internationally wrongful act and which, in pursuance of this recognition, provide for different régimes of international responsibility, it is in no danger of encroaching on the Charter of the United Nations or on the special régime of measures which the Charter provides in regard to certain acts which it particularly sets out to prevent and punish. The Commission is in no way called upon to interpret or to supplement the Charter by the rules which it formulates, and still less to derogate from the Charter. Its task is to codify general international law. In so far as certain provisions of the Charter are now an integral part of general international law on the subject with which the Commission is concerned, they will be logically and faithfully reflected in its work. Otherwise, precisely because of their "special" nature and also because of the provisions of Article 103, the provisions of the Charter would always prevail over those of a general codification convention. Any concern which may be felt about this question is therefore groundless.

(56) In conclusion, the Commission, recalling the programme of work on the codification of State responsibility which it adopted at its fifteenth session in 1963—in which it affirmed the need to consider whether it was advisable to distinguish between different categories of internationally wrongful acts from the standpoint of the régimes of responsibility applicable to them⁵⁵⁴—and taking as a basis the results of

the study thus far, decided, in the present article, which it adopted unanimously on first reading, to establish a distinction between international crimes and international delicts and to state the basic criteria for this distinction. In due course it will proceed to determine the régimes of international responsibility applicable to these different types of internationally wrongful act.

(57) Having given these explanations, the Commission considers it advisable to add the following comments on the various paragraphs of article 19.

(58) *Paragraph 1* merely states the principle that the subject-matter of the international obligation breached has no bearing on the characterization as internationally wrongful of an act committed by a State in breach of that obligation. The main purpose of the explicit formulation of this principle, which is the corollary to the principle stated in sub-paragraph (b) of article 3, is to bring out, as a premise and, in a way, as a warning regarding the subsequent provisions of the article, that any act of the State which is not in conformity with what is required of it by any international obligation whatsoever is an internationally wrongful act and engages the responsibility of the State. The fact of distinguishing, among the mass of international obligations of States, those which are considered to be most essential and to safeguard the fundamental interests of the international community, and the fact that breaches of such obligations are treated as specially serious acts and as "international crimes", should not give the false impression that, in the end only these breaches are significant. The others also have their importance, have a disrupting effect on international life and necessarily have consequences in regard to international responsibility. From this point of view paragraph 1 covers both paragraph 2, on the most serious, and paragraph 4, on the less serious breaches; it brings them together by emphasizing the equally wrongful nature of acts which, under different designations, come within the scope of one or the other of these two paragraphs.

(59) *Paragraph 2* deals with the most serious breaches and introduces, with respect to them, the idea of "international crime". After mature consideration, the Commission chose this designation because it has come into common use in the practice of States and in contemporary learned works and because it is frequently employed in resolutions adopted by organs, first, of the League of Nations and, later, of the United Nations, as well as in important international instruments, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the "Definition of Aggression" adopted by the General Assembly (resolutions 2625 (XXV) and 3314 (XXIX) respectively), and the conventions on genocide, *apartheid*,⁵⁵⁵ etc. Of

⁵⁵⁴ See second point, para. (1), of the programme of work on state responsibility adopted in 1963 by the Sub-Committee on

State Responsibility at the Commission's fifteenth session (*Yearbook... 1963*, vol. II, p. 228, document A/5509, annex I, para. 6.

⁵⁵⁵ For reference, see above, foot-note 467.

course, in adopting the designation "international crime", the Commission intends only to refer to "crimes" of the State, to acts attributable to the State as such. Once again it wishes to sound a warning against any confusion between the expression "international crime" as used in this article and similar expressions, such as "crime under international law", "war crime", "crime against peace", "crime against humanity", etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes, for which those instruments require States to punish the guilty persons adequately, in accordance with the rules of their internal law. Once again, the Commission takes this opportunity of stressing that the attribution to the State of an internationally wrongful act characterized as an "international crime" is quite different from the incrimination of certain individuals-organs for actions connected with the commission of an "international crime" of the State, and that the obligation to punish such individual actions does not constitute the form of international responsibility specially applicable to a State committing an "international crime" or, in any case, the sole form of this responsibility.

(60) The Commission had, in theory, a choice between several approaches for designating the international obligations whose content is such that an act committed by a State in breach of one of them is regarded as an "international crime". It considered, however, that it should reject the idea of drawing up a list of these obligations, for that would have had a number of major disadvantages. First, the establishment of such a list—which ought to be complete, and even exhaustive—would be virtually impossible, and the Commission would have been entirely diverted from its present tasks if it had had to undertake work of that kind. Secondly, carrying out that work would have very considerably increased the risk, which the Commission has always tried to avoid, of allowing itself to become involved, under cover of the codification of international responsibility, in defining the content of the obligations whose breach entails international responsibility. As the Commission has emphasized on a number of occasions, in its codifying of international responsibility it should simply take note of the fact that States have certain international obligations, take them for granted and accept them as they have been defined, either by international custom or by written instruments. For the Commission itself to attempt to define these various obligations would mean transforming the codification of State responsibility into codification of the whole of international law. Thirdly and lastly, the preparation of a list of the obligations whose breach—in certain circumstances, at least—would constitute an international crime, would necessarily lead to a "rigid" result reflecting the situation of today and not permitting the rule it is intended to establish to be progressively adapted to the future evolution of international law. Although the breach of some particular obligation is not now considered to be an international crime, a change may take place in

the legal conscience of States, and it would be unsatisfactory if the convention adopted today had to be constantly amended to bring it into line with the developments of tomorrow.

(61) The Commission therefore decided to follow the system adopted in the first instance by itself, and subsequently by the United Nations Conference on the Law of Treaties, for determining the "peremptory" norms of international law. This system consists in giving only a basic criterion for determining the obligations in question—a criterion clear enough to permit international practice and jurisprudence to crystallize around it, and at the same time flexible enough not to be an obstacle to development of the legal conscience of States. The criterion formulated in paragraph 2 of article 19 has two aspects. One is the requirement that the obligation breached shall, by virtue of its content, be essential for the protection of fundamental interests of the international community; the other, which complements the first and provides a guarantee that is essential in such a delicate matter, makes the international community as a whole responsible for judging whether the obligation is essential and, accordingly, whether its breach is of a "criminal" nature. At first sight, the text of paragraph 2 may give an impression of tautology. In reality, what it says is no more tautological than the analogous text of article 53 of the Vienna Convention. What the latter article provides is that in order to be "objectively" considered as "peremptory", i.e. as not permitting of any derogation, a norm of international law must be "subjectively" accepted and recognized as such by the international community as a whole. Similarly, paragraph 2 of the article under consideration provides that in order to be "objectively" considered as an "international crime", and as such liable to more severe legal consequences as a result of responsibility, an internationally wrongful act must be "subjectively" recognized as a "crime" by the international community as a whole. Moreover, it is clear what is meant by this reference to the international community as a whole. It certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an "international crime", not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community.

(62) This being so, the Commission considers it important not to be misled by the parallel drawn above between the basic criterion stated in the present article for determining internationally wrongful acts falling within the category of international crimes, and the criterion set out in article 53 of the Vienna Convention for determining the norms of international law which are to be included in the category of peremptory norms. Care must be taken not to carry this parallel further than it really goes. It would be wrong simply to conclude that any breach of an obligation deriving from a peremptory norm of interna-

tional law is an international crime and that only the breach of an obligation having this origin can constitute such a crime. It can be accepted that obligations whose breach is a crime will "normally" be those deriving from rules of *jus cogens*, though this conclusion cannot be absolute. But above all, although it may be true that failure to fulfil an obligation established by a rule of *jus cogens* will often constitute an international crime, it cannot be denied that the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime. Too close an assimilation of the two notions may be an attractive simplification, but it does not appear to be conceptually acceptable.

(63) After stating, in paragraph 2 of the article, the basic general criterion to be applied in the specific determination of internationally wrongful acts falling within the category of international crimes, the Commission was faced with an alternative: either to confine the article to the general criterion, or to include additional particulars, in order to facilitate the understanding and application of the criterion. It noted that the authors of the Vienna Convention chose the first solution, and at a certain stage some members of the Commission suggested following that example. On reflection, however, it seemed to the Commission that the problem of differentiating international crimes from other internationally wrongful acts was far more complicated than that of distinguishing between peremptory norms of international law and norms from which derogation is permitted. Consequently, the Commission was finally unanimous in recognizing the advisability of adopting the second solution. It therefore decided to give, through a number of examples, some more concrete indications of how the basic principle would be adapted and applied in practice. This it did in *paragraph 3* of the article.

(64) In order to adhere to its intention, the Commission refrained from any attempt itself to define any particular breach of an international obligation as an international crime. It considered that it was not its task to identify certain actions as international crimes or to outline an international criminal code. Wishing to give its own indications an objective basis, it therefore took pains to refer to international law now in force, and more specifically to certain conventional instruments—including, in particular, the United Nations Charter and some other multilateral treaties—which show that breaches of certain international obligations are recognized as international crimes, and to international custom in so far as it shows a similar recognition. It is from these established sources that the examples in paragraph 3 are drawn. The Commission has nevertheless taken the precaution of stating expressly that the content of this paragraph must be read in the light, and having regard to the application, of the basic principle stated in paragraph 2. This means that in order to establish in a concrete case whether the breach of one of the international obligations cited as examples is indeed an international crime and must suffer the conse-

quences thereof, confirmation must always be sought in the basic criterion, and it must be established that the obligation actually breached is really an obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as an international crime by that community as a whole. Lastly, it should be noted that the examples given are in no way intended to be exhaustive: that is to say, it must not be concluded that international law now in force does not recognize others. This is what is meant by the words "an international crime may result, *inter alia*, from". Then, it need hardly be said that the reference to international law in force makes it clear that the situation may change in the future. Internationally wrongful acts which are not regarded as crimes by international law today, could obviously be so regarded by the international law of tomorrow.

(65) The technique adopted in drafting the examples in paragraph 3 is as follows: first, a specific field is mentioned in which contemporary international law imposes on States obligations of such a kind that their breach is considered an international crime; then there follow one or more specific examples of obligations existing in this field, which prohibit actions now considered by the international community as a whole to be typical international crimes. By using the words "such as that" the Commission intended to emphasize once again that any obligation referred to is mentioned only as one example among others.

(66) As the examples in paragraph 3 are formulated, the conclusion that an international crime crime has been committed depends in every case on two requirements being met: (a) the obligation in one or other of the spheres mentioned must be "of essential importance" for the pursuit of the fundamental aim characterizing the sphere in question; and (b) the breach of that obligation must be a "serious" breach. It is not difficult to see the reason for this dual requirement. In each of the spheres mentioned there are obligations which are of primary importance in the pursuit of the fundamental aim in question, and others which are of only secondary importance. A breach of one of the latter can obviously not be taken as the basis for accusing a State of an international crime. Moreover, even the breach of an obligation of essential importance may not assume proportions sufficient to warrant it being characterized as a crime. This can be done only if the seriousness of the breach is established. Thus it cannot be concluded that an international crime exists unless these two conditions are met.

(67) The four spheres mentioned respectively in sub-paragraphs (a), (b), (c) and (d) of paragraph 3 are those corresponding to the pursuit of the four fundamental aims of the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, the safeguarding of the human being, and the safeguarding and preservation of the human environment. The Commission made its choice in the light of the results of its analysis of

international jurisprudence, State practice and the most authoritative doctrine—an analysis which has been relied on throughout this commentary. The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community are to a large extent those which give rise to the obligations comprised within the four main categories mentioned. It is mainly among them that are to be found the rules which the contemporary international legal order has elevated to the rank of *jus cogens*. And it is mainly among the obligations they impose on States that are to be found those obligations whose breach is no longer accepted as an internationally wrongful act like any other. There is no need to emphasize the decisive influence which the Charter of the United Nations has had on this development of international law, especially those provisions of the Charter which set out the purposes and principles of the United Nations.

(68) The maintenance of international peace and security has been the main preoccupation of the international community and its most vital concern for a very long time. It is not surprising that the Commission should have headed its list of examples with the international obligations relating to this fundamental aim. In the legal thinking of States, breaches of these obligations represent the most serious international crimes. As a specific example of an international crime in this sphere, the Commission has chosen the breach of the obligation prohibiting aggression—the most indisputable example, the supreme international crime. The Commission decided unanimously not to attach any adjective to the term “aggression”. With regard to the notion of aggression itself, most of the members of the Commission referred to the definition of aggression adopted by consensus in General Assembly resolution 3314 (XXIX). Some members of the Commission, however, thought that the notion of “aggression” could have a broader meaning than that given it by the said definition and could, for example, include “economic” aggression as well as aggression involving the use of armed force.⁵⁵⁶ The Commission was nevertheless unanimous in recognizing that it was not its task to define the precise notion of aggression, since that was the responsibility of other bodies. Moreover, it stressed that, as mentioned above, the actions it mentioned were only examples.

(69) Having regard to the second of the purposes of the United Nations as set out in the Charter, the

⁵⁵⁶ These members referred in particular to their statements in the Commission at its eighteenth session (see *Yearbook... 1966*, vol. II, p. 246, document A/6309/Rev.1, part II, chap. II, “Draft articles on the law of treaties”, para. (3) of the commentary to article 49, recommending the inclusion of economic pressure within the concept of coercion, and also to the contents of the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, adopted on 23 May 1969 at the United Nations Conference on the Law of Treaties (*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.

Commission gave second place to the sphere of obligations essential for safeguarding the right of self-determination of peoples. In that context, it was unanimous in selecting, as what today is an indisputable example of an international crime, the breach of the obligation prohibiting the establishment or maintenance by force of colonial domination. The expression “by force” should be understood as meaning against the will of the subject population, even if that will is not manifested, or has not yet been manifested, by armed opposition. Some members of the Commission spoke of the possibility of deleting this expression, but did not press the suggestion when it was objected that it might have the effect of unduly extending the scope of the international “crime” referred to.

(70) In the general context of the pursuit of the third of the purposes of the United Nations, namely “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” the Commission thought that, for the purposes of the subject-matter of the present article, it should concentrate its attention on the sphere of obligations for safeguarding the human being. In addition, in order to avoid extending the category of international crimes beyond what is reasonable and to remain in conformity with the provisions of international law now in force, it added the qualification that, for the breach to be characterized as an international crime, it must be “on a widespread scale”, that is to say, it must take the form of a large-scale or systematic practice adopted in contempt of the rights and dignity of the human being. As specific examples, it expressly mentioned slavery, genocide and *apartheid*, but did not fail to note that other manifest breaches might be considered as international crimes in this sphere.

(71) Lastly, within the equally wide framework of concern for the preservation of certain assets which are essential for the progress and survival of humanity, the Commission paid particular attention to recent developments in international law on the subject of the safeguarding and preservation of the human environment. In this sphere, it took as its example a breach of the obligations prohibiting massive pollution of the atmosphere or the seas. Some members expressed reservations regarding the choice of pollution as an example, because they thought that the notion of pollution was not defined as precisely as the other examples mentioned in paragraph 3. Nevertheless, they expressed full agreement with the general provision in sub-paragraph (d).

(72) Paragraph 4 of article 19 seeks to define comprehensively all the internationally wrongful acts which do not come within the special category of “international crimes”. Such a definition, which some members of the Commission do not consider absolutely essential, seems particularly necessary and useful to others, especially in view of the use to be made of it later in the draft, in particular for determining the régimes of responsibility applicable to the

different types of internationally wrongful acts. For purposes of this definition, the Commission provisionally adopted the term "international delicts". This designation was commonly used as a synonym for internationally wrongful acts in works on international law written in French, Italian, Spanish and German before the introduction of the category of "international crimes" was contemplated, and it has the added advantage of being habitually employed in several systems of internal law to denote unlawful acts of lesser gravity than those called "crimes". However, the literal equivalent in English, "international delict", is obsolete, and it is difficult to find terminology in the common law systems which corresponds to what is current in the systems of Ro-

man origin. The Commission will therefore revert to this point later.

(73) In conclusion, the Commission wishes to emphasize that it is aware of the exceptional importance of the subject dealt with in this article. In the codification of the law of international responsibility, the adoption of a formulation which expressly recognizes the distinction between international crimes and international delicts is a step comparable to that achieved by the explicit recognition of the category of rules of *jus cogens* in the codification of the law of treaties. The Commission is therefore convinced that the representatives of Governments will devote very special attention to this article when discussing its report.

Chapter IV

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

79. The International Law Commission, at its nineteenth session, in 1967, made new arrangements for dealing with the topic "Succession of States and Governments"⁵⁵⁷ which was among the topics it had selected for codification in 1949.⁵⁵⁸ It decided to divide the topic among several special rapporteurs, 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.⁵⁵⁹ 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.

80. In 1967, the Commission also appointed Sir Humphrey Waldock as Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui as 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.⁵⁶⁰

81. Between 1968 and 1972, Sir Humphrey Waldock submitted to the Commission five reports on succession of States in respect of treaties.⁵⁶¹ 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,⁵⁶² which were transmitted the same year to Governments of Member States for their observations, in accordance with articles 16 and 21 of the Commission's Statute.⁵⁶³ In 1974, in the light of the observations received in the meantime from Governments of Member States, the Commission adopted a final set of 39 draft articles on succession of States in respect of treaties.⁵⁶⁴ The General Assembly, in paragraph 3 of its resolution 3496 (XXX) of 15 December 1975, decided to convene a conference of plenipotentiaries in 1977 to consider those draft articles and "to embody the results of its work in an international convention and such other instruments as it may deem appropriate".

82. Following his appointment as Special Rapporteur, Mr. Bedjaoui submitted to the Commission, at its twentieth session in 1968, a first report on succession of States in respect of rights and duties resulting from sources other than treaties.⁵⁶⁵ 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 the various aspects into which it could be divided. Following the discussion of that report the Commission, in the same year, took several decisions, one of which con-

⁵⁵⁷ For a detailed account of the historical background of the topic 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.

⁵⁵⁸ See *Yearbook... 1949*, p. 281, document A/925, para. 16.

⁵⁵⁹ *Yearbook... 1963*, vol. II, p. 260, document A/5509, annex II.

⁵⁶⁰ *Yearbook... 1967*, vol. II, p. 368, document A/6709/Rev.1, paras. 38-41.

⁵⁶¹ See *Yearbook... 1972*, vol. II, p. 224, document A/8710/Rev.1, paras. 17-21.

⁵⁶² *Ibid.*, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, section C.

⁵⁶³ *Ibid.*, p. 225, document A/8710/Rev.1, para. 23.

⁵⁶⁴ See *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

⁵⁶⁵ *Yearbook... 1968*, vol. II, p. 94, document A/CN.4/204.

cerned the scope and title of the topic and another the priority to be given to one particular aspect of succession of States.

83. Endorsing the recommendations contained in the first report by the Special Rapporteur, 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 its delimitation. 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".⁵⁶⁶

84. This decision was confirmed by the General Assembly in paragraph 4(b) of its resolution 2634 (XXV) of 12 November 1970, 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". The absence of any reference to "succession of Governments" in that recommendation by the General Assembly reflects the decision taken by the Commission, also 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".⁵⁶⁷

85. As mentioned above,⁵⁶⁸ the first report by the Special Rapporteur 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; legal régime of the predecessor State; territorial problems; 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.⁵⁶⁹

The report also notes that the predominant view of members of the Commission was that the economic

⁵⁶⁶ *Yearbook... 1968*, vol. II, p. 216, document A/7209/Rev.1, para. 46.

⁵⁶⁷ *Yearbook... 1963*, vol. II, p. 224, document A/5509, para. 57.

⁵⁶⁸ Para. 82.

⁵⁶⁹ *Yearbook... 1968*, vol. II, pp. 220 and 221, document A/7209/Rev.1, paras. 73 and 78.

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.⁵⁷⁰

86. The second report by the Special Rapporteur,⁵⁷¹ submitted at the twenty-first session of the Commission in 1969, was entitled "Economic and financial acquired rights and 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".⁵⁷² 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".⁵⁷³

87. Between 1970 and 1972, at the Commission's twenty-second to twenty-fourth sessions, the Special Rapporteur submitted three reports to the Commission—his third report⁵⁷⁴ in 1970, the fourth⁵⁷⁵ in 1971 and the fifth⁵⁷⁶ 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 session⁵⁷⁷ and an outline of the fifth report in its report on the work of its twenty-fourth session.⁵⁷⁸

⁵⁷⁰ *Ibid.*, p. 221, para. 79.

⁵⁷¹ *Yearbook... 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

⁵⁷² *Ibid.*, p. 228, document A/7610/Rev.1, para. 61.

⁵⁷³ *Ibid.*, pp. 228–229, para. 62.

⁵⁷⁴ *Yearbook 1970*, vol. II, p. 131, document A/CN.4/226.

⁵⁷⁵ *Yearbook... 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

⁵⁷⁶ *Yearbook... 1972*, vol. II, p. 61, document A/CN.4/259.

⁵⁷⁷ See *Yearbook... 1971*, vol. II (Part One), pp. 341 *et seq.*, document A/8410/Rev.1, paras. 77–98.

⁵⁷⁸ *Yearbook... 1972*, vol. II, p. 323, document A/8710/Rev.1, para. 71.

88. At the twenty-fifth (1970), twenty-sixth (1971) and twenty-seventh (1972) sessions of the General Assembly, during the Sixth Committee's consideration of the report of the International Law Commission, several representatives expressed the wish that progress should be made in the study on succession of States in respect of matters other than treaties.⁵⁷⁹ 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) of 20 November 1962 and 1902 (XVIII) of 18 November 1963, with a view to ... making progress in 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".

89. In 1973, at the twenty-fifth session of the Commission, the Special Rapporteur submitted a sixth report⁵⁸⁰ dealing, like his three previous reports, with succession of States to public property. The sixth report revised and supplemented 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 1972.⁵⁸¹ It contained a series of draft articles relating to public property in general. These articles divided public property 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.

90. The Special Rapporteur's sixth report was considered by the Commission at its twenty-fifth session in 1973. In view of the complexity of the subject, the Commission decided, after full discussion and on the proposal of the Special Rapporteur, to limit its study for the time being to just one of the three categories of public property dealt with by the Special Rapporteur,

namely, property of the State.⁵⁸² In the same year, it adopted on first reading eight draft articles, the text of which is reproduced below.⁵⁸³ Articles 1 to 3 constitute the Introduction to the draft, relating to the question as a whole of succession of States in respect of matters other than treaties. Articles 4 to 8 belong to part I of the draft, entitled "Succession to State property". They form the initial provisions of section 1 of that part, entitled "General provisions".

91. In 1974, at the twenty-sixth session of the Commission, the Special Rapporteur submitted a seventh report, dealing exclusively with succession to State property.⁵⁸⁴ The report contained 22 draft articles together with commentaries, forming a sequel to the eight draft articles adopted in 1973. The Commission was unable to consider this report at its twenty-sixth session since, pursuant to paragraph 3(a) and (b) of General Assembly resolution 3071 (XXVIII), it had to devote most of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.⁵⁸⁵ In the same year, in resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should "proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties" (sect. I, para. 4(b)).

92. At its twenty-seventh session, in 1975, the Commission considered draft articles 9 to 15 and X, Y and Z, contained in the Special Rapporteur's seventh report, and referred them to the Drafting Committee, with the exception of article 10, relating to rights in respect of the authority to grant concessions,⁵⁸⁶ on which it reserved its position. Having examined the provisions referred to it (with the exception, for lack of time, of articles 12 to 15), the Committee submitted texts to the Commission for articles

⁵⁸² See *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 87.

⁵⁸³ For the text of articles 1 to 8 and the commentaries thereto adopted by the Commission at its twenty-fifth session, see *Yearbook... 1973*, vol. II, pp. 202 *et seq.*, document A/9010/Rev.1, chap. III, sect. B. For the text of all the articles adopted so far by the Commission, see below, sect. B.1.

⁵⁸⁴ *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

⁵⁸⁵ *Ibid.*, p. 304, document A/9610/Rev.1, para. 160.

⁵⁸⁶ Draft article 10 reads as follows:

"Article 10. Rights in respect of the authority to grant concessions
"1. For the purposes of the present article, the term 'concession' means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

"2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

"3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory."

⁵⁷⁹ See *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.

⁵⁸⁰ *Yearbook... 1973*, vol. II, pp. 3 *et seq.*, document A/CN.4/267.

⁵⁸¹ *Yearbook... 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, section C.

9 and 11 and, on the basis of articles X, Y and Z, texts for article X and for sub-paragraph (e) of article 3. The Commission adopted in first reading all the texts submitted by the Committee, subject to a few amendments. These texts are reproduced below in the form agreed by the Commission.⁵⁸⁷ One of them, sub-paragraph (e) of article 3, forms part of the Introduction to the draft. The others, namely, articles 9, 11 and X, complete section 1 (General provisions) of part I (Succession to State property).

93. The General Assembly, in paragraph 4(c) of resolution 3495 (XXX) of 15 December 1975, repeated its recommendation that the International Law Commission should "proceed with the preparation on a priority basis of draft articles on succession of States in respect of matters other than treaties".

94. At the present session, the Special Rapporteur submitted an eighth report (A./CN.4/292)⁵⁸⁸ concerning succession of States in respect of State property and containing six additional draft articles (articles 12 to 17), with commentaries. The Commission considered this report at its 1389th to 1400th meetings and referred draft articles 12 to 17 to the Drafting Committee. At its 1405th meeting the Commission considered the report of the Drafting Committee, and adopted on first reading the texts submitted by it, namely, sub-paragraph (f) of article 3 and articles 12 to 16. Sub-paragraph (f) of article 3 (Use of terms) forms part of the Introduction to the draft, and articles 12 to 16 form section 2 (Provisions relating to each type of succession of States) of part I (Succession to State property).

95. The text of all the draft articles on succession of States in respect of matters other than treaties adopted so far by the Commission, and also the text of articles 12 to 16 and of sub-paragraph (f) of article 3 and the commentaries thereto as adopted at the present session, are reproduced below for the information of the General Assembly.⁵⁸⁹

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

(a) *Form of the draft*

96. As in the case of the codification of other topics 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 the study of the subject has been completed. The Com-

mission, 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) *Scope of the draft*

97. As noted above,⁵⁹⁰ 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. In 1968, in a report submitted at the twentieth session of the Commission, Mr. Bedjaoui, 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.⁵⁹¹

98. 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".⁵⁹² 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

⁵⁸⁷ For the texts of sub-paragraph (e) of article 3 and articles 9, 11 and X and the commentaries thereto adopted by the Commission at its twenty-seventh session, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.2. For the text of all the articles adopted so far by the Commission, see below, sect. B.1.

⁵⁸⁸ Reproduced in *Yearbook... 1976*, vol. II (Part One).

⁵⁸⁹ See below sect. B.

⁵⁹⁰ See above, para. 79.

⁵⁹¹ *Yearbook... 1968*, vol. II, pp. 96-97, document A/CN.4/204, paras. 18-21.

⁵⁹² For an explanation of the General Assembly's insertion of the words "of States" after the word "Succession" in the title of the topic, see para. 84 above.

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.⁵⁹³

99. At its twentieth session, in 1968, the Commission considered that, in view of the magnitude and complexity of the topic, it would do 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".⁵⁹⁴ Accordingly, at its twenty-fifth session, in 1973, the Commission expressed the intention, subject to any later decision, to include in the draft articles as many "matters other than treaties" as possible.⁵⁹⁵

100. 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) *Structure of the draft*

101. At the present stage of its work, the Commission has divided the draft into an introduction and a number of parts. The introduction will contain those provisions which apply to the draft as a whole, while each part will contain those which apply exclusively to one category of specific matters. The Commission moreover decided, in the circumstances outlined above,⁵⁹⁶ to devote part I of the draft to succession to State property.

102. As can be seen from paragraphs 90, 92 and 94 above, the Commission has so far in the course of three sessions adopted 16 draft articles, three of which belong to the Introduction and 13 to part I of the draft articles. Of these thirteen eight articles form section 1, "General provisions", and apply to all types of succession to State property. The remaining five articles fall within section 2, "Provisions relating to each type of succession of States".

103. With the adoption of articles 12 to 16 and subject to the eventual adoption, at a future session, of provisions concerning specifically archives, as is explained below,⁵⁹⁷ the Commission has at the present session, completed its study of succession to State property which forms the subject of part I of the draft. In the normal course of events, after complet-

⁵⁹³ *Yearbook... 1968*, vol. II, pp. 216-217, document A/7209/Rev.1, para. 46.

⁵⁹⁴ See para. 85 above.

⁵⁹⁵ *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 85.

⁵⁹⁶ Paras. 89-90.

⁵⁹⁷ See below, sect. B.2, introductory commentary to section 2 of part I of the draft, para. (7).

ing that study, the Commission would have considered the succession of States to the other categories of public property.⁵⁹⁸ However, in view of the instructions laid down by the General Assembly in resolution 3315 (XXIX),⁵⁹⁹ the Special Rapporteur intends to proceed directly, in a ninth report he is to submit to the Commission at its next session, to the study of succession to public debts, in all probability confining this to succession to State debts. The Special Rapporteur may also, simultaneously, submit a report containing a special study on archives, in order that the Commission may complete its work on the succession of States in the matter of State property. The Commission will decide later in what order it should consider the other questions concerning public property and the other matters included in the topic, in particular the question of the procedure to be followed for the peaceful settlement of disputes which may arise out of the application or interpretation of the draft articles.

(d) *Provisional character of the provisions adopted at the twenty-fifth, twenty-seventh and twenty-eighth sessions*

104. In its report on the work of its twenty-fifth session, the Commission stated that it deemed 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" and "State property". It observed that the final content of provisions of that nature would depend to a considerable extent on the results reached by the Commission in its further work. It therefore decided that during the first reading of the draft it would reconsider the text of the articles adopted at the twenty-fifth session with a view to making any amendments which might be found necessary.⁶⁰⁰ At its twenty-seventh session, and again at the present session, the Commission extended that decision to the articles adopted during those two sessions.

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

105. The text of articles 1 to 9, 11, X, and 12 to 16 adopted by the Commission at its twenty-fifth, twenty-seventh and twenty-eighth sessions, together with the introductory commentary to section 2 of Part I of the draft and the text of articles 12 to 16 and of article 3, sub-paragraph (f), as well as the commentaries thereto adopted by the Commission at the present session, are reproduced below for the information of the General Assembly.

⁵⁹⁸ See paras. 89-90 above.

⁵⁹⁹ See para. 91 above.

⁶⁰⁰ *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 91.

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED
SO FAR BY THE COMMISSION

INTRODUCTION

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.

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.

Article 3. — Use of terms

From 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;

(e) "third State" means any State other than the predecessor State or successor State;

(f) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

PART I

SUCCESSION TO 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.

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.

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.

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.

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.

Article 9. — General principle of the passing of State property

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

[*Article 11. — Passing of debts owed to the State*

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates, shall pass to the successor State.]

Article X. — Absence of effect of a succession of States on third State property*

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, at that date, are owned by a third State according to the internal law of the predecessor State [or the successor State as the case may be].

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Article 12. — Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Article 13. — Newly independent States

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became dependent, became State property of the administering State

* Provisional designation.

during the period of dependence, it shall pass to the newly independent State.

2. Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

3. (a) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(b) Movable State property of the predecessor State other than the property mentioned in sub-paragraph (a), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

5. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the foregoing paragraphs shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Article 14. — Uniting of States

1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.]

Article 15. — Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State, other than that mentioned in sub-paragraph (b), shall pass to the successor State in an equitable proportion.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

3. Paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 16. — Dissolution of a State

1. When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in sub-paragraph (c) shall pass to the successor States in an equitable proportion.

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

2. INTRODUCTORY COMMENTARY TO SECTION 2 OF PART I OF THE DRAFT AND TEXT OF ARTICLES 12 TO 16 AND OF ARTICLE 3, SUB-PARAGRAPH (F), WITH COMMENTARIES THERETO. ADOPTED BY THE COMMISSION AT ITS TWENTY-EIGHTH SESSION

PART I

SUCCESSION TO STATE PROPERTY

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Commentary

(1) Article 9 of the draft, as provisionally adopted by the International Law Commission at its twenty-seventh session (1975), states the general principle of the passing of State property,⁶⁰¹ and is one of the general provisions included in section 1 of part I of the draft. Articles 12 to 16, provisionally adopted at the present session, comprise section 2, and deal with the question of the passing of State property from the predecessor State to the successor State separately for each type of succession. This method was deemed to be the most appropriate for section 2 of part I of the draft, in view of the obvious differences existing between various types of succession owing, first, to the political environment in each of the cases where there is a change of sovereignty over or a change in the responsibility for the international relations of the territory to which the succession of States relates, and, secondly, to the various constraints which the movable nature of certain kinds of property places on the quest for solutions.

⁶⁰¹ For the text of the article, see subsection 1 above.

Choice of types of succession

(2) For the topic of succession of States in respect of treaties, the Commission, in its 1972 provisional draft,⁶⁰² adopted four separate types of succession of States: (a) transfer of part of a territory; (b) newly independent States; (c) uniting of States and dissolution of unions; and (d) secession or separation of one or more parts of one or more States. Nevertheless, at its twenty-sixth session, in 1974, the Commission, in the course of its second reading of the draft articles on succession of States in respect of treaties, made certain changes which had the effect of redefining the first type of succession more fully and clearly and combining the last two types into one. First of all, "transfer of part of a territory" was referred to as "succession in respect of part of territory". The Commission incorporated into this type of succession the case in which "any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State".⁶⁰³ The Commission meant by this formula to cover the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State. Any such case is assimilated, for the purposes of succession of States in respect of treaties, to the first type of succession, namely, "succession in respect of part of territory". In addition, the Commission combined the last two types of succession of States under one heading, "uniting and separation of States".

(3) For the purposes of the draft on succession of States in respect of treaties, the International Law Commission summarized its choice of types of succession as follows:

The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the treaties of the predecessor State of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of one or more new States as a result of the separation of parts of the territory of a State; formation of a union of States; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States.⁶⁰⁴

(4) In its work of codification and progressive development of the law relating to succession of States in

respect of treaties and to succession of States in respect of matters other than treaties, the Commission has constantly borne in mind the desirability of maintaining some degree of parallelism between the two sets of draft articles and in particular, as far as possible, the use of common definitions and common basic principles, without thereby ignoring or dismissing the characteristic features that distinguish the two topics from one another. The Commission has considered that, so far as is possible without distorting or unnecessarily hindering its work, the parallelism between the two sets of draft articles should be regarded as a desirable objective. Nevertheless, as regards the present draft, the required flexibility should be allowed in order to adopt such texts as best suit the purposes of the codification, in an autonomous draft, of the rules of international law governing specifically succession of States in respect of matters other than treaties and, more particularly, succession to State property.

(5) In the light of the foregoing, the Commission, while reaffirming its position that for the purpose of codifying the modern law of succession of States in respect of treaties it was sufficient, as it did in the 1974 draft, to arrange the cases of succession of States under the three broad categories referred to above,⁶⁰⁵ nevertheless found that, in view of the characteristics and requirements peculiar to the subject of succession of States in respect of matters other than treaties, particularly as regards succession to State property, some further precision in the choice of types of succession was necessary for the purpose of the draft now being prepared. Consequently, as regards *succession in respect of part of territory*, the Commission decided that it was appropriate to distinguish and deal separately in the present draft with three cases: (1) the case where part of the territory of a State is transferred by that State to another State, which is the subject of article 12; (2) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State, which forms the subject of paragraph 5 of article 13 (Newly independent States); (3) the case where a part of the territory of a State separates from that State and unites with another State, which is the subject of paragraph 2 of article 15 (Separation of part or parts of the territory of a State). Also, as regards the *uniting and separation of States*, the Commission, while following the pattern of dealing in separate articles with those two types of succession, nevertheless found it appropriate to distinguish between the "separation of part or parts of the territory of a State", which is the subject of article 15, and the "dissolution of a State", which forms the subject of article 16.

⁶⁰² *Yearbook... 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, sect. C.

⁶⁰³ *Yearbook... 1974*, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D, article 14.

⁶⁰⁴ *Ibid.*, p. 172, document A/9610/Rev.1, para. 71.

⁶⁰⁵ See above, para. (3).

Choice between general rules and rules relating to property regarded "in concreto"

(6) The Commission, on the basis of the reports submitted by the Special Rapporteur, considered which of three possible methods might be followed for determining the kind of rules that should be formulated for each type of succession. A first method consisted in adopting, for each type of succession, special provisions for each of those kinds of State property affected by a succession of States which are most essential and most widespread, so much so that they can be said to derive from the very existence of the State and represent the common denominators, so to speak, of all States, such as currency, Treasury, State funds, archives and libraries. The second method involved drafting, for each type of succession, more general provisions, not relating *in concreto* to each of these kinds of State property. A third possible method consisted in combining the first two and formulating, for each type of succession, one or two articles of a general character, adding perhaps one or two articles, where appropriate, relating to specific kinds of State property.

(7) The Commission decided to adopt the method to which the Special Rapporteur had reverted in his eighth report (A/CN.4/292)⁶⁰⁶ namely, that of formulating for each type of succession general provisions, applicable to all kinds of State property. The Commission decided not to follow the first method, which was at the basis of the Special Rapporteur's seventh report and which it had discussed at the twenty-seventh session (1975), not so much because a choice based on property regarded *in concreto* might be considered as being artificial, arbitrary or inappropriate, but rather because of the extremely technical character of the provisions it would have been obliged to draft for such complex matters as currency, Treasury and State funds, etc. Nevertheless, the Commission took the position that the question of archives might, in view of its exceptional importance and its own peculiarities, appropriately be dealt with in a separate section of the draft devoted specifically to that matter. It requested the Special Rapporteur to submit a special report on the matter at its next session so that it would be in a position to complete its study in good time.

Distinction between immovable and movable property

(8) In formulating, for each type of succession, general provisions applicable to all kinds of State property, the Commission found it necessary to introduce a distinction between immovable and movable State property, since these two categories of property cannot be given identical treatment and, in the event of succession to State property, must be considered separately, irrespective of the legal systems of the predecessor State and the successor State. The distinction, known to the main legal systems of the

world, corresponds primarily to a physical criterion for differentiation, arising out of the very nature of things. Some property is physically linked to territory so that it cannot be moved; this is immovable property. Then there are other kinds of property which are capable of being moved, so that they can be taken out of the territory; these constitute movable property. However, it seems desirable to make it clear that in adopting this terminology, the Commission is not leaning towards the universal application of the laws of a particular system, especially those that derive purely from Roman law, because, as is the case with the distinction between public domain and private domain, a notion of internal law should not be referred to when it does not exist in all the main legal systems. The distinction made thus differs from the rigid legal categories found, for example, in French law. It is simply that the terms "movable" and "immovable" seem most appropriate for designating, for the purposes of succession to State property, property which can be moved or which is immobilized.

(9) Referring both categories of State property to "territory" is simply a reflection of the historical fact that State sovereignty developed over land. Whoever possessed land possessed economic and political power and this is bound to have a far-reaching effect on present-day law. Modern State sovereignty is based primarily on a tangible element: territory. It can, therefore, be concluded that everything linked to territory, in any way, is a base without which a State cannot exist, whatever its political or legal system.

Criteria of linkage of the property to the territory

(10) Succession to State property is governed, irrespective of the type of succession, by one key criterion applied throughout section 2 of part I of the draft: the principle of the linkage of such property to the territory. Although the existence of the general principle that State property passes from the predecessor State to the successor State is not to be denied, the need for certain nuances quite quickly becomes apparent. The essential principle that State property passes from the predecessor State to the successor State is simply a reflection of the principle of the linkage of such property to the territory. It is through the application of a material criterion, namely, the relation which exists between the territory and the property by reason of the nature of the property or where it is situated, that the existence of the principle of succession to State property can be deduced. Moreover, behind this principle lies the further principle of the actual viability of the territory to which the succession of States relates.

(11) As regards immovable State property, the principle of the linkage of such property to the territory finds concrete application by reference to the geographical situation of the State property concerned, in conformity with the general principle of the passing of State property stated in article 9:

⁶⁰⁶ Reproduced in *Yearbook... 1976*, vol. II (Part One).

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

Consequently, for the types of succession dealt with in section 2 of part I of the draft, as appropriate, the rule regarding the passing of immovable State property from the predecessor to the successor State is couched in the following terms, used in paragraphs 2(a) of article 12 and 2 of article 13:

immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State,

or in the somewhat different form used in paragraph 1(a) of articles 15 and 16:

immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated.

It should be evident that, as adopted by the Commission, the rule relating to the passing of immovable State property does not apply to such property when it is situated outside the territory to which the succession of States relates, except, of course, in the case of the dissolution of a State, as is explained in the commentary to article 16.

Special aspects due to the mobility of the property

(12) As regards movable State property, the specific aspects which are due to the movable nature or mobility of State property add a special difficulty to the problem of the succession of States in this sphere. Above all, the fact that the property is movable, and can therefore be moved at any time, makes it easy to change the control over the property. In the Commission's view, the mere fact that movable State property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automatically entitle the predecessor State to retain it. In order for the predecessor State to retain or the successor State to receive such property, other conditions must be fulfilled. Those conditions are not unrelated to the general conditions concerning viability both of the territory to which the succession of States relates and of the predecessor State. They are closely linked to the general principle of equity, which should never be lost from view and which, in such cases, enjoins apportionment of the property between the successor State or States and the predecessor State, or among the successor States if there is more than one and the predecessor State ceases to exist. A territory stripped, for example, of those of its archives which are most essential to its everyday administration will be able to survive only with great difficulty. The predecessor State must not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the

territory to which the succession of States relates and of jeopardizing the viability of the successor State. Attention should therefore be drawn to the limits imposed by good faith beyond which the predecessor State cannot go without failing in an essential international duty.

(13) Any movable State property of the predecessor State which is in the territory to which the succession of States relates quite by chance at the time when the succession of States occurs should not *ipso facto*, or purely automatically, pass to the successor State. If only the place where the property is situated were taken into account, that would in some cases constitute a breach of equity. Moreover, the fact that State property may be where it is purely by chance is not the only reason for caution in formulating the rule. There may even be cases where the predecessor State situates movable property, not by chance, but deliberately, in the territory to which a succession of States will relate, without that property having any link with the territory, or at least without its having such a link to that territory *alone*. In such a case, it would again be inequitable to leave the property to the successor State *alone*. For example, it might be that the country's gold reserves or the metallic cover for the currency in circulation throughout the territory of the predecessor State had been left in the territory to which the succession of States relates. It would be unthinkable, merely because the entire gold reserves of the predecessor State were in that territory, to allow the successor State to claim them if the predecessor State was unable to evacuate them in time.

(14) On the other hand, while the presence of movable State property in the part of the territory which remains under the sovereignty of the predecessor State after the succession of States normally justifies the presumption that it should remain the property of the predecessor State, such a presumption, however natural it may be, is not necessarily irrefutable. The mere fact that property is situated outside the territory to which the succession of States relates cannot in itself constitute an absolute ground for retention of such property by the predecessor State. If the property is linked solely, or even concurrently, to the territory to which the succession of States relates, equity and the viability of the territory require that the successor State should be granted a right on that property.

(15) In the light of the foregoing considerations, the Commission came to the conclusion that as far as movable State property is concerned, the principle of the linkage of such property to the territory should not find concrete application by reference to the geographical situation of the State property in question. Having in mind that, as is explained above,⁶⁰⁷ the legal rule applicable to the passing of movable State property should be based on the principle of viability of the territory and take into account the principle of equity, the Commission considered the

⁶⁰⁷ Para. (12).

question of how to give expression to the criterion of linkage between the territory and the movable State property concerned. Having concluded that the requirement suggested by the Special Rapporteur in his eighth report of a "direct and necessary link" between the property and the territory was not without ambiguity, it discarded, for similar reasons, expressions used by the Special Rapporteur in some of his previous reports such as "property appertaining to sovereignty over the territory" or "property necessary for the exercise of sovereignty over the territory". In order to give an indication of the nature of the problem and of its possible solution, the Commission provisionally agreed to use the expression "property ... connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". Consequently, for the types of succession dealt with in section 2 of part I of the draft, as appropriate, the rule regarding the passing of movable State property from the predecessor to the successor State is couched in the following terms, which are used in articles 12 (para. 2(b)), 13 (para. 3(a)), 15 (para. 1(b)) and 16 (para. 1(c)):

Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

However, in adopting this formula, the Commission does not wish to imply that there is no need to continue searching for a better form of wording, which could be adopted at a later stage in the work on the topic, in order to express the idea more precisely and clearly.

The principle of equity

(16) As indicated above⁶⁰⁸ the principle of equity is one of the underlying principles in the rule regarding the passing of movable State property from the predecessor State to the successor State when that property is connected with the activity of the former in respect of the territory to which the succession of States relates. In that context the principle of equity, although important, does not occupy the pre-eminent position since the whole rule would then be reduced to a rule of equity. At the limit that rule would make any attempt at codification unnecessary, and all that would be required would be one article stating that the rule of equitable apportionment of property must be applied in all cases of succession to movable State property. Equity cannot be assigned the main role, because there is also a material criterion concerning the connexion of the property with the activity of the predecessor State in the territory. In fact, the principle of equity is more a balancing element, a corrective factor designed to preserve the "reasonableness" of the linkage between the movable State property and the territory. Equity makes it possible to inter-

pret the concept of "property ... connected with the activity of the predecessor State in respect of the territory ..." in the most judicious fashion and to give it an acceptable meaning.

(17) The principle of equity, however, is called to play a greater role in connexion with the rules established for certain specific types of succession concerning the passing from the predecessor State to the successor State or States of movable State property other than that connected with the activity of the former in respect of the territory to which the succession of States relates. When, in the case of newly independent States, the dependent territory has contributed to the creation of such property, it shall pass to the successor State in proportion to the contribution of the dependent territory (article 13, para. 3(b)). In the case of separation of part or parts of the territory of a State or dissolution of a State, such property shall pass to the successor State or States in an equitable proportion (article 15, para. 1(c) and article 16, para. 1(d)).

(18) In the case of dissolution of a State, the principle of equity is at the basis of the rule regarding the passing of immovable State property of the predecessor State situated outside its territory to one of the successor States, since it requires that the other successor States be equitably compensated.

(19) Finally, as regards the cases of separation of part or parts of the territory of a State and dissolution of a State, the rules regarding the passing both of immovable and movable State property are without prejudice to any question of equitable compensation that may arise as a result of a succession of States (article 15 para. 3 and article 16, para. 2).

(20) What is meant by the principle of equity, according to Charles de Visscher, is "an independent and autonomous source of law".⁶⁰⁹ According to a resolution of the Institute of International Law:

1. ... Equity is normally inherent in a sound application of the law ...;

2. The international judge ... can base his decision on equity, without being bound by the applicable law, only if all the parties clearly and expressly authorize him to do so.⁶¹⁰

Under Article 38, paragraph 2, of its Statute, the International Court of Justice may in fact decide a case *ex aequo et bono* only if the parties agree thereto.

(21) The Court has, of course, had occasion to deal with this problem. In the *North Sea Continental Shelf* cases, it sought to establish a distinction between *equity* and *equitable principles*. The Federal Republic of Germany had submitted to the Court, in connexion with the delimitation of the continental shelf, that the "equidistance method" should be rejected, since it "would not lead to an equitable apportionment".

⁶⁰⁹ *Annuaire de l'Institut de droit international*, 1934 (Brussels), vol. 38, p. 239.

⁶¹⁰ *Annuaire de l'Institut de droit international*, 1937 (Brussels), vol. 40, p. 271.

⁶⁰⁸ Paras. (12) and (15).

The Federal Republic asked the Court to refer to the notion of equity by accepting the "principle that each coastal State is entitled to a just and equitable share*".⁶¹¹ Of course, the Federal Republic made a distinction between deciding a case *ex aequo et bono*, which could be done only with the express agreement of the parties, and invoking *equity* as a general principle of law. In its judgment, the Court decided that in the cases before it, international law referred back to equitable principles, which the parties should apply in their subsequent negotiations.

(22) The Court stated:

... it is not a question of applying *equity** simply as a matter of abstract justice, but of applying a *rule of law** which itself requires the application of *equitable principles**, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field.⁶¹²

In the view of the Court, "equitable principles" are "actual rules of law" founded on "very general precepts of justice and good faith".⁶¹³ These "equitable principles" are distinct from "equity" viewed "as a matter of abstract justice". The decisions of a court of justice

must by definition be *just**, and *therefore** in that sense *equitable**. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying *not outside but within the rules**, and in this field it is precisely a *rule of law** that calls for the application of equitable principles*.⁶¹⁴

(23) Paragraphs 92 and 93 of the judgment of the Court give a fairly good indication of the direction in which to look when applying the principle of equity:

It is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable ... it would ... be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case ...

In fact, there is no legal limit to the consideration which States may take account of for the purpose of making sure that they apply equitable procedures, and *more often than not it is the balancing-up of all such considerations that will produce this result** rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations *naturally varies with the circumstances of the case**.⁶¹⁵

(24) Having in mind the Court's elaboration of the concept of equity, as described in the preceding paragraphs, the Commission wishes to emphasize that equity, in addition to being a supplementary element throughout the draft, is also used in the present section as part of the material content of specific

provisions and not as the equivalent of the notion of equity as used in an *ex aequo et bono* proceeding, to which a tribunal can have recourse only upon express agreement between the parties concerned.

Article 12. — Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Commentary

(1) As was indicated above,⁶¹⁶ the International Law Commission, when establishing its 1974 final draft on succession of States in respect of treaties, concluded that for the purpose of the codification of the modern law relating to that topic it was sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; and (c) uniting and separation of States. In the 1974 draft, succession in respect of part of territory was dealt with in article 14, the introductory sentence of which reads as follows:

When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State;

As was also indicated above,⁶¹⁷ in adopting the foregoing text for the type of succession characterized as "succession in respect of part of territory", the Commission added the case of a non-self-governing territory that achieves its decolonization by integration with a State other than the colonial State to the case of part of the territory of a pre-existing State which becomes part of the territory of another State. The Commission considered that, for the purposes of succession in respect of treaties, the two cases could be dealt with together in the same provision since one single principle, that of "moving treaty-frontiers" was applicable to both of them.

⁶¹¹ North Sea continental shelf, judgment, *J.C.J. Reports* 1969, p. 9, p. 9.

⁶¹² *Ibid.*, p. 47.

⁶¹³ *Ibid.*, p. 46.

⁶¹⁴ *Ibid.*, p. 48.

⁶¹⁵ *Ibid.*, p. 50.

⁶¹⁶ Introductory commentary to section 2, paras. (2) and (3).

⁶¹⁷ *Ibid.*, para. (2).

(2) The quite unique nature of "succession in respect of part of territory" as compared with other types of succession gives rise to difficulties in the context of the topic of succession of States in respect of matters other than treaties. A frontier adjustment, which as such raises a problem of "succession in respect of part of territory", may in some cases affect only a few unpopulated or scarcely populated acres of a territory that can, as in the case of some States, cover millions of square miles and be populated by millions of inhabitants. It is very unlikely that frontier adjustments affecting only a few unpopulated acres of land, such as that which enabled Switzerland to extend the Geneva-Cointrin airport into what was formerly French territory, will give rise to problems of State property such as currency, Treasury and State funds or archives. It should also be borne in mind that minor frontier adjustments are the subject of agreements between the States concerned whereby they settle all the questions arising as a result between the predecessor State transferring territory and the successor State to which it is transferred, without the need to consult a population that may or may not exist. But while it is true that "succession in respect of part of territory" covers the case of a minor frontier adjustment which, moreover, is effected through an agreement providing a general settlement of all the problems involved, without the need to consult the population, it is nevertheless a fact that this type of succession also includes cases affecting territories and tracts of land that may be highly populated. In those cases problems concerning the passing of State property such as currency, Treasury and State funds and archives certainly do arise, and in fact they are particularly acute.

(3) It is this situation—namely, the fact that the area affected by the territorial change may be either very densely populated or very sparsely populated—that accounts for the ambiguities, the uniqueness and hence the difficulty of the specific case of "succession in respect of part of territory" in the context of succession of States in respect of matters other than treaties. In short, the magnitude of the problems of passing of State property varies not just because of the size of the territory transferred but mainly as a result of the need to consult or not to consult the population of the territory concerned. These problems arise in each and every case, but more perceptibly and more conspicuously when the area of the transferred territory is large and densely populated. This incontrovertible reality is simply a reflection of the phenomenon of substitution of sovereignty over the territory in question, which inevitably manifests itself through an extension to the territory of the successor State's own legal order and hence through a change, for example, in the monetary tokens in circulation or in the ownership of the territory's archives. Currency, in particular, is a very important item of State property, being the expression of a regalian right of the State and the manifestation of its sovereignty.

(4) It should be added that cases of "succession in

respect of part of territory" do not always involve agreements the existence of which would explain giving a residual character to the rules to be formulated for governing succession to State property. Moreover, it is in those cases where a very populated part of the territory of a State passes to another State—in other words, precisely the cases in which the problems of State property such as currency, Treasury and State funds and archives arise on a larger scale—that agreements for the settlement of such problems may be lacking. This is not a theoretical hypothesis. Apart from war or the annexation of territory by force, both of which are prohibited by contemporary international law, the case can be envisaged of detachment of part of a State's territory and its attachment to another State following a referendum on self-determination, or the case of secession by part of a State's population and attachment of the territory in which it lives to another State. In such situations, it is not always possible to count on the existence of an agreement between the predecessor State and the successor State, especially in view of the politically charged circumstances which may surround such territorial changes.

(5) It is in the light of the foregoing considerations that the Commission, as is explained above,⁶¹⁸ decided that for the purposes of codifying the rules of international law relating to succession of States in respect of matters other than treaties, and in particular, to succession to State property, it was appropriate to distinguish and deal separately in the present draft with three cases covered by one single provision in article 14 of the 1974 draft on succession in respect of treaties: (1) the case where part of the territory of a State is transferred by that State to another State, which is the subject of the present article; (2) the case where a part of the territory separates from that State and unites with another State, which is the subject of paragraph 2 of article 15 (Separation of part or parts of the territory of a State); and (3) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, which forms the subject of paragraph 5 of article 13 (Newly independent States).

(6) Article 12 is therefore limited to the cases of transfer of part of the territory of a State to another State. The word "transfer" in the title of the article and the words "is transferred" in *paragraph 1* are intended to emphasize the precise scope of the provisions of article 12. The cases of transfer of territory envisaged are those where the fact of the replacement of the predecessor State by the successor State in the matter of responsibility for the international relations of the part of the territory concerned does not presuppose the consultation of the population of that part of territory in view of the minor political, economic, strategic, etc., importance of that part of territory or the fact that it is scarcely inhabited, if at

⁶¹⁸ *Ibid.*, para. (5).

all. Furthermore, the cases envisaged are always those which, according to article 2 of the draft, occur in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. In most of those cases, problems concerning the passing of such State property as currency, Treasury and State funds, archives, etc., do not actually arise or have no great relevance and it is by the agreement of the predecessor and the successor States that the passing of State property, whether immovable or movable, from one State to the other, is normally settled. This primacy of the agreement in the situation covered by article 12 is reflected in paragraph 1 of the article, according to which "when a part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor to the successor State is to be settled by agreement between the predecessor and successor States". It should be understood that, according to paragraph 1, such passing of State property should be settled in principle by agreement and that the agreement should govern the disposition of property, no duty to negotiate or agree being thereby implied.

(7) In the absence of an agreement between the predecessor and the successor States, the provisions of *paragraph 2* of article 12 apply. Sub-paragraph (a) of paragraph 2 concerns the passing of immovable State property, whereas sub-paragraph (b) of the same paragraph deals with the passing of movable State property. As is explained above⁶¹⁹ *sub-paragraph (a) of paragraph 2* states the rule regarding the passing of immovable State property from the predecessor State to the successor State by reference to the geographical situation of the State property concerned, in conformity with the general principle of the passing of State property embodied in article 9 of the draft. It provides, therefore, that "immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State". It may be convenient to repeat here that this rule does not extend to immovable State property situated outside the territory to which the succession of States relates, a property which is and remains that of the predecessor State.

(8) *Sub-paragraph (b) of paragraph 2* of article 12 states the rule regarding the passing of movable State property from the predecessor State to the successor State by reference to the material criterion provisionally adopted of the connexion existing between the property concerned and the activity of the predecessor State in respect of the territory to which the succession of States relates, as is explained above.⁶²⁰ Under that criterion, there is no distinction to be made as to the actual location of the movable State property in question and consequently, there is no need to refer expressly to the passing of property "on the date of the succession of States", the time element

being, moreover, already implied in the definition of State property contained in article 5 of the draft. Sub-paragraph (b) of paragraph 2, therefore, provides that "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State".

(9) The situation covered by the provisions of article 12 is to be distinguished from that of a part of the territory of a State which separates from that State and unites with another State, contemplated in *paragraph 2 of article 15*, as is indicated above.⁶²¹ In the case of such separation, as opposed to the case of transfer of a part of territory, the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned presupposes the expression of a conforming will on the part of the population of the separating part of territory in consequence of the extension and large number of inhabitants of that part of territory or of its importance from a political, economic, strategic, etc., point of view. It is in these cases of separation of part of the territory of a State that problems concerning the passing of such State property as currency, Treasury and State funds, archives etc., arise or have a greater significance and where the resolution of those problems is not always achieved by agreement between the predecessor and the successor States, such agreement being unlikely when the territorial change in question is surrounded by politically charged circumstances, as is often the case. An agreement between the predecessor and the successor States is certainly to be envisaged but not with the primacy that is accorded it in article 12, since what is paramount in the case to which paragraph 2 of article 15 relates is the will of the population expressed in exercise of the right to self-determination. Consequently the formulation of paragraph 1 of article 15, which applies to the case of separation of part of the territory of a State when that part unites with another State, departs from that of paragraph 1 of article 12 and contains the following clause: "and unless the predecessor State and the successor State otherwise agree:".

(10) A further distinction between the rules applicable in the cases covered by article 12, on the one hand, and by paragraph 2 of article 15, on the other, resulting likewise from the factual differences between them as described in the preceding paragraph, is reflected in the provision whereby in the absence of the agreement envisaged in both articles, it is only in the latter case that a third category of State property passes to the successor State. Thus, according to article 15, when a part of the territory of a State separates from that State and unites with another State (para. 2) and unless the predecessor State and the successor State otherwise agree (para. 1), movable State property of the predecessor State other than that connected with the activity of the predecessor

⁶¹⁹ *Ibid.*, para. (11).

⁶²⁰ *Ibid.*, in particular para. (15).

⁶²¹ See above, para. (5).

State in respect of the territory to which the succession of States relates, shall pass to the successor State in an equitable proportion (para. 1 (c) in conjunction with para. 1 (b)). No such provision is required in the cases covered by article 12.

(11) The rules relating to the passing of State property in cases where a part of the territory of a State is transferred to another State (article 12) and where a part of the territory of a State separates from that State and unites with another State (article 15, para. 2) are founded in State practice, judicial decisions and legal theory, which admit generally the devolution of the State property of the predecessor State. Some examples may illustrate the point, even if they may seem broader in scope than the rules adopted.

(12) The devolution of such State property is clearly established practice. There are, moreover, many international instruments which simply record the express relinquishment by the predecessor State, without any *quid pro quo*, of all State property without distinction situated in the territory to which the succession of States relates. It may be concluded that relinquishment of the more limited category of immovable State property situated in that territory should *a fortiori* be accepted. The immovable State property which thus passes to the successor State is property which the predecessor State formerly used, as appropriate in the portion of territory concerned, for the manifestation and exercise of its sovereignty or for the performance of the general duties implicit in the exercise of that sovereignty, such as the defence of that portion of territory, security, promotion of public health and education, national development, and so on. Such property can easily be listed: it includes, for example, barracks, airports, prisons, fixed military installations, State hospitals, State universities, local government office buildings, premises occupied by the main central government services, buildings of the State financial, economic or social institutions, and postal and telecommunications facilities where the predecessor State was itself responsible for the functions which they normally serve.

(13) Two types of cases will be omitted from the examples to follow as being not sufficiently illustrative because the fact that they reflect the application of a general principle of devolution of State property is due to other causes of a peculiar and specific kind. The first type comprises all cessions of territories against payment. The purchase of provinces, territories and the like was an accepted practice in centuries past but has been tending towards complete extinction since the First World War, and particularly since the increasingly firm recognition of the right of peoples to self-determination. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly, these old cases of transfer are no longer demonstrative. On purchasing a territory, a State purchased everything in it, or everything it wanted, or everything the other party wanted to sell there, and the transfer of State property does not constitute proof of

the existence of the rule, which in this case resulted simply from capacity to pay.⁶²²

(14) The second type consists of forced cessions of territories, which are prohibited by international law, so that succession to property in such cases cannot be regulated by international law.⁶²³ In this connex-

⁶²² See, for example, the Convention of Gastein of 14 August 1865 whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (English text in *British and Foreign State Papers, 1865-1886* (London, William Ridgeway, 1870), vol. 56, p. 1026; French text in *Archives diplomatiques, 1865*, (Paris, Aymot, édit., 1865) t. IV, p. 6); the Treaty of Washington of 30 March 1867 whereby Russia sold its North American possessions to the United States of America for \$1.2 million (English text in W. M. Malloy, comp., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, D.C., Government Printing Office, 1910), vol. II, p. 1521; the Convention whereby France ceded Louisiana to the United States of America for \$15 million (English and French texts in G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Librairie Dieterich, 1831), t. VII, p. 106).

⁶²³ In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XLI of the Treaty of the Pyrenees, which gained France the places of Arras, Béthune, Lens, Bapaume, and so forth, specified that the places in question:

"... shall remain ... unto the said Lord the most Christian King, and to his Successors and Assigns ... with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardian-ship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priors, Dignities, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countries ... formerly belonging to the said Lord the Catholic King ... And for that effect, the said Lord the Catholick King ... doth renounce [these rights] ... together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests ... the said Lord the Catholick King ... doth consent to be ... united and incorporated to the Crown of France; all Laws, Customs, Statutes and Constitutions made to the Contrary ... notwithstanding."

(English text in 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. 69-70; French text in J. Du Mont, *Corps universel diplomatique du droit des gens, contenant un recueil des traités d'alliance, de paix, de trêve ...*, (Amsterdam, P. Brunel et al., eds., 1728) t. VI, part II, p. 269.)

There was a very special conception of patrimony and domain in many European countries at that time. Cession effected transfer of the sovereign power in its entirety, involving not only property but also rights over property and over persons. Treaties of the sixteenth and seventeenth centuries contained clauses whereby the dispossessed sovereign absolved the inhabitants of the ceded territory from their oath of fidelity and the successor received their "faith, homage, service and oath of fidelity". See also, for example, article 47 of the 1667 Treaty of Capitulation of Lille, Douai and Orchies:

"And shall retain the said towns and the commoners aforesaid without distinction of station, and likewise the churches, chapels, public loan-offices, and all foundations, cloisters, hospitals, communities, poor-houses whether general or special, lazarets, confraternities, convents, including such as are foreign, all their movable and immovable property, rights, titles, privileges, plate, or coin, bells, pewter, lead, all other metals whether worked or unworked, rings, jewels, ornaments, sacred vessels, relics, libraries and in general all their property, offices and benefices of any kind or condition whatsoever, without any obligation of payment, and shall also recover property that has been confiscated or carried away, if such there be or it is situated in the kingdom, whether in conquered territory or elsewhere."

ion, reference is made to the provisions of article 2 of the draft.

(15) A third set of cases which are, perhaps, only too demonstrative consists of those involving "voluntary cessions without payment". In these very special and marginal cases, the passing of immovable State property is neither controversial nor ambiguous because it takes place not so much under the general principle of succession of States as by an expressly stated wish.⁶²⁴

(16) Territorial changes such as those covered by article 12 and article 15, paragraph 2, have occurred relatively often following a war. In such cases, peace treaties contain provisions relating to territories ceded by the defeated Power. For that reason, the provisions of peace treaties and other like instruments governing the problems raised by transfers of territory must be treated with a great deal of caution, if not with express reservations. Subject to that proviso, it may be noted that the major peace treaties which ended the First World War opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.⁶²⁵

(17) As to the Second World War, a Treaty of 29 June 1945 between Czechoslovakia and the USSR stipulated the cession to the Union of Soviet Socialist Republics of the Sub-Carpathian Ukraine within the boundaries specified in the Treaty of Saint-Germain-en-Laye. An annexed protocol provided for "transfer without payment of the right of ownership over State property in the Sub-Carpathian Ukraine". The Treaty of Peace concluded on 12 March 1940 between Finland and the USSR⁶²⁶ provided for reciprocal territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufacturing enterprises, telegraphic installations and electric stations. The Treaty

of Peace of 10 February 1947 between the Allied and Associated Powers and Italy also contained provisions applying the principle of the passing of property, including immovable property, from the predecessor State to the successor State. In particular, paragraph 1 of annex XIV to the Treaty (Economic and Financial Provisions Relating to Ceded Territories) provided that "the successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it...".⁶²⁷

(18) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property and therefore of immovable property. This is true, in the first place, of national courts. According to Rousseau, "the general principle of the passing of public property to the new or annexing State is now accepted without question by national courts."⁶²⁸

(19) Decisions of international jurisdictions confirm this rule. In the Peter Pázmány University case, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "principle of the generally accepted law of State succession".⁶²⁹ The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 confirmed the principle of the devolution to the successor State, in full ownership, of immovable State property. This can be readily deduced from one of its decisions. The Commission found that "The main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including *biens communaux* within the territories ceded".⁶³⁰

⁶²⁴ Cf., for example, the cession by Great Britain to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; the decision in July 1821 by an assembly of representatives of the Uruguayan people held at Montevideo concerning the incorporation of the Cisplatina Province; the voluntary incorporation in France of the free town of Mulhouse in 1798; the voluntary incorporation of the Duchy of Courland in Russia in 1795; the Treaty of Rio of 30 October 1909 between Brazil and Uruguay for the cession without compensation of various lagoons, islands and islets; the voluntary cession of Lombardy by France to Piedmont, without payment, under the Treaty of Zurich of 10 November 1859; etc.

⁶²⁵ Articles 256 of the Treaty of Versailles (E. Parkes, J. E. Field and R. C. Thomson, eds., *British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, p. 125, 208 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 412-414), 191 of the Treaty of Trianon (*ibid.*, (1923), vol. 113, pp. 564-565), and 142 of the Treaty of Neuilly-sur-Seine (*ibid.* (1922), vol. 112, pp. 821-822).

⁶²⁶ English text in *Supplement to the American Journal of International Law*, 1940 (Concord (N.H.), American Society of International Law, Rumford Press, 1940), vol. 34, pp. 127-131.

⁶²⁷ United Nations, *Treaty Series*, vol. 49, p. 225.

⁶²⁸ Charles Rousseau, *Cours de droit international public—Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les Cours de droit, 1964-1965), p. 139. Reference is generally made to the judgement of the Berlin Court of Appeal (*Kammergericht*) of 16 May 1940 (case of the succession of States to Memel—return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939 (H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases, 1919-1942, Supplementary Volume* (London), case No. 44, pp. 74-76)), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 (case of Amine Namika Sultan v. Attorney-General (H. Lauterpacht, ed., *Annual Digest . . . , 1947*, case No. 14, pp. 36-40)), which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of article 60 of the Treaty of Lausanne of 1923.

⁶²⁹ Judgment of 15 December 1933, Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University v. the State of Czechoslovakia), *P.C.I.J.*, Series A/B, No. 61, p. 237.

⁶³⁰ Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, Re-

(20) As for as movable State property is concerned, the Commission has already explained⁶³¹ the reasons why the principle of the linkage of such property to the territory should not find concrete application by reference to the geographical situation of the property in question, in view of the special aspects due to the mobility of that property. The Commission provisionally decided to give expression to the criterion of linkage between the territory and the movable property concerned by means of the formula: "property ... connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". That concept may be regarded as closely related to that sanctioned by international judicial decision, which concerns the transfer of property belonging to local authorities necessary for the viability of the local territorial authority concerned. For example, in the dispute concerning the apportionment of the property of local authorities whose territory had been divided by a new delimitation of the frontier between France and Italy, the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947, noted that:

... the Treaty of Peace did not reflect any *distinctions ... between the public domain and the private domain** that might exist in the legislation of Italy or the State to which the territory is ceded. However, the nature of the property and the economic use to which it is put have a certain effect on the apportionment.*

The apportionment must first of all be just and equitable. However, the Treaty of Peace does not confine itself to this reference to justice and equity, but provides a more specific criterion for a whole category of municipal property* and for what is generally the most important category.

The question may be left open whether the ... [Treaty] provides for two types of agreement ..., one kind apportioning the property of the public authorities concerned, the other ensuring "the maintenance of the municipal services essential to the inhabitants* ..." But, even if that were so, the criterion of the maintenance of the municipal services necessary to the inhabitants should a fortiori play a decisive role* when these services—as will usually be the case—are provided by property belonging to the municipality which must be apportioned. The apportionment should be carried out according to a principle of utility,* since in this case that principle must have seemed to the drafters of the Treaty the most compatible with justice and equity.⁶³²

(21) As regards, more specifically, movable State property, the cases of currency, gold and foreign exchange reserves and State funds will be discussed in turn below, by way of example. These cases being sufficiently illustrative for the present purpose, no specific reference will be made in the context of article 12 to the case of archives, on which there exists

considerable State practice, and in view of the Commission's decision referred to above.⁶³³

Currency

(22) A definition of currency for the purposes of international law should take account of the following three fundamental elements: (a) currency is an attribute of sovereignty, (b) it circulates in a given territory and (c) it represents purchasing power. It has been observed that this legal definition

necessarily relies on the concept of statehood or, more generally, that of *de jure* or *de facto* sovereign authority. It follows from this proposition that media of exchange in circulation are, legally speaking, not currency unless their issue has been established or authorized by the State and, *a contrario*, that currency cannot lose its status otherwise than through formal demonetization.⁶³⁴

For the purposes of the present topic this means that the predecessor State loses and the successor State exercises its own monetary authority in the territory to which the succession of States relates. That should mean that at the same time the State patrimony associated with the expression of monetary sovereignty or activity in that territory (gold and foreign exchange reserves, and real property and assets of the institution of issue situated in that territory) must pass from the predecessor State to the successor State.

(23) The normal relationship between currency and territory is expressed in the idea that currency can circulate only in the territory of the issuing authority. The concept of the State's "territoriality of currency" or "monetary space" implies, first, the complete surrender by the predecessor State of monetary powers in the territory considered and, secondly, its replacement by the successor State in the same prerogatives in that territory. But both the surrender and the assumption of powers must be organized on the basis of a factual situation, namely, the impossibility of leaving a territory without any currency in circulation on the date on which the State succession occurs. The currency inevitably left in circulation in the territory by the predecessor State and retained temporarily by the successor State justifies the latter in claiming the gold and foreign exchange which constitute the security or backing for that currency. Similarly, the real property and assets of any branches of the central institution of issue in the territory to which the State succession relates pass to the successor State under this principle of the State's "currency territoriality" or "monetary space". It is because the circulation of currency implies security or backing—the public debt, in the last analysis—that currency in circulation cannot be dissociated from its base or normal support, which is formed by all the gold or foreign exchange reserves and all assets of

ports of *International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 514 [translation from French].

Annex XIV, para. I, provided that "The successor State shall receive, without payment, *Italian State and para-statal property** within territory ceded to it ..." (United Nations, *Treaty Series*, vol. 49, p. 225).

⁶³¹ See above, introductory commentary to sect. 2, paras. (12)–(15).

⁶³² United Nations, *Reports of International Arbitral Awards*, vol. XIII (*op. cit.*), p. 519 [translation from French].

⁶³³ See above, para. (7) of the introductory commentary to sect. 2.

⁶³⁴ D. Carreau, *Souveraineté et coopération monétaire internationale* (Paris, Cujas, 1970), p. 27 [translation from French].

the institution of issue. This absolute inseparability, after all, merely describes the global and "mechanistic" fashion in which the monetary phenomenon itself operates.

(24) In the world monetary system as it exists today, currency has value only through the existence of its gold backing, and it would be futile to try, in the succession of States, to dissociate a currency from its backing. For that reason it is essential that the successor State, exercising its jurisdiction in a territory in which there is inevitably paper money in circulation, should receive in gold and foreign exchange the equivalent of the backing for such issue. This, however, does not always happen in practice. The principle of allocation or assignment of monetary tokens to the territory to which the succession of States relates is essential here. If currency, gold and foreign exchange reserves, and monetary tokens of all kinds belonging to the predecessor State are temporarily or fortuitously present in the territory to which the succession of States relates without the predecessor State's having intended to allocate them to that territory, obviously they have no link or relationship with the territory and cannot pass to the successor State. The gold owned by the Banque de France which was held in Strasbourg during the Franco-German War of 1870 could not pass to Germany after Alsace-Lorraine was annexed to that country unless it were established that that gold had been "allocated" to the transferred territory.

(25) When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board, estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.⁶³⁵

(26) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.⁶³⁶ Under the peace treaties concluded, the new Soviet régime became fully responsible for the debt represented by the paper money issued by the Russian State Bank in these four countries.⁶³⁷ The provisions of some of these instruments indicated that Russia released the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those coun-

tries during the war.⁶³⁸ At the same time and in these same treaties, part of the bullion reserves of the Russian State Bank was transferred to each of these States. The ground given in the case of Poland is of some interest: the 30 million gold roubles paid by Russia under this head corresponded to the "active participation" of the Polish territory in the economic life of the former Russian Empire.

State funds

(27) State public funds in the territory to which the succession of States relates should be understood to mean cash, stocks and shares which, although they form part of the over-all assets of the State, have a link with that territory by virtue of the State's sovereignty over or activity in that region. If they are connected with the activity of the predecessor State in respect of the territory to which the succession of States relates, State funds, whether liquid or invested, pass to the successor State. The principle of connexion with the activity is decisive in this case, since it is obvious that funds of the predecessor State which are in transit through the territory in question or are temporarily or fortuitously present in that territory do not pass to the successor State.

(28) State public funds may be liquid or invested; they include stocks and shares of all kinds. Thus, the acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also, according to the Supreme Court of Poland, the transfer to the successor of a share in the capital of an association.⁶³⁹

(29) As part of the "transfer without payment of the right of ownership over State property", the USSR received public funds situated in the Sub-Carpathian Ukraine, which, within the boundaries specified in the Treaty of Saint-Germain-en-Laye of 10 September 1919, was ceded by Czechoslovakia in accordance with the Treaty of 29 June 1945.

Article 13. — Newly independent States

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became dependent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

⁶³⁵ See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, *Treaty Series*, vol. 117, p. 19).

⁶³⁶ No reference is made here to the cases of Finland, which already enjoyed monetary autonomy under the former Russian régime, or Turkey.

⁶³⁷ See the following treaties: with Estonia of 2 February 1920, article 12; with Latvia of 11 August 1920, article 16; with Lithuania of 12 July 1920, article 12; and with Poland of 18 March 1921, article 19 (League of Nations, *Treaty Series*, vol. XI, p. 51; vol. II, p. 212; vol. III, p. 122; and vol. VI, p. 123).

⁶³⁸ See B. Nolde, "La monnaie en droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, 1929-II (Paris, Hachette, 1930), vol. 27, p. 295.

⁶³⁹ Digest by the United Nations Secretariat of the decision of the Supreme Court of Poland in the case, Polish State Treasury v. Deutsche Mittelstandskasse (1929) (*Yearbook... 1963*, vol. II, p. 133, document A/CN.4/157, para. 337).

2. Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

3. (a) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(b) Movable State property of the predecessor State other than the property mentioned in sub-paragraph (a), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

5. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the foregoing paragraphs shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Article 3. — Use of terms

For the purposes of the present articles:

...

(f) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

Commentary

(1) Article 13 concerns succession to State property by a newly independent State. The International Law Commission, at its present session, considered it advisable, in connexion with the adoption of article 13 in first reading, to include a definition of the term "newly independent State" in article 3 of the draft (Use of terms). The text adopted, which constitutes sub-paragraph (f) of article 3, reproduces the definition which the Commission adopted in article 2, paragraph 1 (f), of the 1974 draft articles on succession of States in respect of treaties. The part of the commentary to that article relating to the definition is equally applicable in the present case. As the Commission stated:

... the definition given in paragraph 1 (f) includes any case of emergence to independence of any former dependent territories, whatever its particular type may be [(colonies, trusteeships, mandates, protectorates, etc.)]. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case ... of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of a uniting of two or more existing States. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent State" has been chosen instead of the shorter expression "new State".⁶⁴⁰

(2) In contrast to other types of State succession where, until the occurrence of the succession, the predecessor State possesses the territory to which the succession of States relates and exercises its full sovereignty there, the type covered by this article involves a dependent or non-self-governing territory whose territory has a special juridical status under the Charter of the United Nations. As the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁶⁴¹ states, such territory has

a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Moreover, in accordance with General Assembly resolution 1514 (XV), every people, even if it is not politically independent at a certain state of its history, possesses the attributes of national sovereignty inherent in its existence as a people. There is also no doubt, as is explained below,⁶⁴² that such people enjoys the right of permanent sovereignty over its wealth and natural resources.

(3) Although the question might be raised as to the usefulness of the Commission's making special provisions relating to newly independent States, in view of the fact that the process of decolonization is practically finished, the Commission is convinced of the need to include such provisions in the present draft. A draft of articles on a topic which, like succession of States in matters other than treaties, necessarily presupposes the exercise of a right which is at the forefront of United Nations doctrine and partakes of the character of *jus cogens*, namely, the right of self-determination of peoples, cannot ignore the most important and widespread form of the realization of that right in the recent history of international relations, namely, the process of decolonization which has taken place since the Second World War. In fact, the Commission cannot but be fully conscious of the pre-

⁶⁴⁰ Yearbook... 1974, vol. II (Part One), p. 176, document A/9610/Rev.1, chap. II, sect. D, para. (8) of the commentary to article 2.

⁶⁴¹ General Assembly resolution 2625 (XXV), annex.

⁶⁴² Paras. (27)-(33).

cise mandate it has received from the General Assembly, with reference to its work of codification and progressive development of the rules of international law relating to succession of States, to examine the problems of succession of States with appropriate reference to the views of States which have achieved independence since the Second World War.⁶⁴³ Although the process of decolonization has already been largely effected, it has not yet been completed, as is confirmed in the 1975 report of the Committee of Twenty-four⁶⁴⁴ which points out that many dependent or Non-Self-Governing Territories still remain to be decolonized. Moreover, the usefulness of the present draft articles is not limited to dependent or Non-Self-Governing Territories yet to be decolonized. In many instances, the effects of decolonization, including, in particular, problems of succession to State property, remain for years after political independence is achieved. The necessity of including provisions on newly independent States was fully recognized by the Commission in the course of its work on succession of States in respect of treaties and found reflection in the final draft on that topic submitted in 1974 for consideration by the General Assembly. In the present case, there is no reason for departing from the typology established in the draft articles on succession of States in respect of treaties: on the contrary, the reasons for maintaining the type of succession concerning "newly independent States" are equally if not more compelling in the case of succession of States in respect of matters other than treaties. Besides, in view of the close link and the parallelism between the two sets of draft articles, there would be an inexplicable gap in the present draft if no provision were made for newly independent States.

(4) *Article 13* covers the various situations that may result from the process of decolonization: the commonest case, where a newly independent State emerges from a dependent territory; the case where such a State is formed from two or more dependent territories (*paragraph 4*); and the case where a dependent territory becomes part of the territory of an existing State other than the State which was administering it (*paragraph 5*). In all these cases the rules relating to the passing of State property should be the same since the basis for the succession in each case is the same: decolonization. It is for this reason that, as has been indicated,⁶⁴⁵ the Commission considered it appropriate to deal with the last case under the present article whereas, in the 1974 draft on succession of States in respect of treaties, that case had been covered by the provisions of article 14 (Succession in respect of part of territory), since it is a ques-

tion of the applicability of the same principle, that of the "moving treaty-frontiers" rule, to all the situations covered.

(5) The rules relating to the passing of State property in the case of newly independent States vary somewhat from those relating to other types of succession in order to take full account of the special circumstances surrounding the emergence of such States. The principle of the viability of the territory becomes imperative in the case of States achieving independence from situations of colonial domination, and the principle of equity requires that preferential treatment be given to such States in the legal regulation of succession to State property. Two main differences are, therefore, to be indicated. First, immovable property situated in the dependent territory concerned, and movable property connected with the activity of the predecessor State in respect of the dependent territory concerned, should, as a general rule, pass to the successor State upon the birth of a newly independent State, whether it is formed from one or two or several dependent territories, or upon the dependent territory's decolonization through integration or association with another existing State, reference to an agreement being unnecessary, by contrast with the case of the articles relating to other types of succession. The reason why article 13 does not, with reference to newly independent States, use the expressions "in the absence of an agreement" or "unless the predecessor State and the successor State otherwise agree", which are employed in other articles of section 2, is not so much because a dependent territory which is not yet a State could not, strictly speaking, be considered as possessing the capacity to conclude international agreements, but, principally in recognition of the very special circumstances which accompany the birth of newly independent States as a consequence of decolonization and which lead, when negotiations are undertaken for the purpose of achieving independence, to results that are, in many instances distinctly unfavourable to the party acceding to independence because of its unequal and unbalanced legal, political and economic relationship with the former metropolitan territory.

(6) The second difference resides in the introduction of the concept of the contribution of the dependent territory to the creation of certain movable property of the predecessor State which is not connected with the activity of that State in respect of the dependent territory in question, so that such property should pass to the successor State in proportion to the contribution made by the dependent territory. This provision represents a concrete application of the concept of equity forming part of the material content of a rule of positive international law which is designed to preserve, *inter alia*, the patrimony and the historical and cultural heritage of the people inhabiting the dependent territory concerned. In the cases of newly independent States, entire nations are affected by the succession of States which have contributed to the creation of the predecessor State's property. It is only equitable that such property should pass to the suc-

⁶⁴³ General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963.

⁶⁴⁴ Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Official Records of the General Assembly, Thirtieth Session, Supplement No. 23 (A/10023/Rev.1)*.

⁶⁴⁵ See above, para. (5) of the introductory commentary to sect. 2.

cessor State in proportion to the contribution of the dependent territory to its creation. In this connexion, reference can be made to resolution 3391 (XXX) in which the General Assembly calls for the "restitution of works of art to countries victims of expropriation", affirms that "the prompt restitution to a country of its *objets d'art*, monuments, museum pieces and manuscripts by another country, without charge, is calculated to strengthen international co-operation", and invites States Members of the United Nations to ratify the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the General Conference of UNESCO in 1970.⁶⁴⁶

(7) *Paragraph 1* of article 13 deals with a problem unique to newly independent States. It concerns the case of a successor State which, before it became a dependent territory, was an independent State and thus owned State property. During the period of its dependence some or all of such State property may well have passed to the State administering the territory. This might be movable property of cultural or historical significance such as works of art or museum pieces, or such immovable property as embassies and administrative buildings. The paragraph sets forth a rule of restitution of such property to the former owner, stating that all such property shall pass to the newly independent State. The situation covered by paragraph 1 needs to be provided for expressly even though it might be considered to be a particular aspect of the larger question relating to the "*biens propres*" of the dependent territory. The provisions of article 13 are not intended to apply to property belonging to the non-self-governing territory, as that property is not affected by the succession of States. Generally speaking, colonies enjoyed a special regime under what was termed a legislative and conventional speciality. They possessed a certain international personality so that they could own property inside and outside their territory. Consequently, there is no reason why succession should cause colonies to lose their own property. Only the metropolitan patrimony situated in, or connected with the activity of the predecessor State in relation to the territory, forms part of the succession. However, in the absence of express regulations for the situation covered by paragraph 1, questions might be raised whether in the case of a State which had become a dependent territory the property that, having belonged to that State, passed to the administering power was still to be regarded as property of the dependent territory or not.

(8) *Paragraph 2* regulates the problem of immovable property of the predecessor State situated in the territory which has become independent. In accordance with the general principle of the passing of State property stated in article 9, this paragraph provides, as in the articles concerning other types of succes-

sion, that immovable property so situated shall pass to the newly independent State. This solution is generally accepted in legal literature and in State practice, although in neither case is express reference always made to "immovable" property of the predecessor State "situated in the territory"; rather, the reference is frequently to property in general, irrespective of its nature or its geographical situation. Thus, if general transfer is the rule, the passing to the successor State of the more limited category of property provided for in this paragraph must *a fortiori* be permitted.

(9) Reference may be made in this connexion to article 19, first paragraph, of the Declaration of principles concerning economic and financial co-operation of 19 March 1962 (Evian agreement between France and Algeria) which provided that "Public real estate [of the French State] in Algeria will be transferred to the Algerian State ...".⁶⁴⁷ In fact, all French military real estate and much of the civil real estate (excluding certain property retained by agreement and other property which is still in dispute) has over the years gradually passed to the Algerian State.

(10) A great many bilateral instruments or unilateral enactments of the administering or constituent Power simply record the express relinquishment by the predecessor State without any *quid pro quo*, of all State property or, even more broadly, all public property without distinction situated in the territory to which the succession of States relates. For example, the Constitution of the Federation of Malaya (1957) provided that all property and assets in the Federation or one of the colonies which were vested in Her Britannic Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or specifications, authorizes the transfer of all the property, of whatever kind, of the predecessor State.⁶⁴⁸ Reference may also be made to the Final Declaration of the International Conference in Tangier signed at Tangier on 29 October 1956, although it is not strictly applicable since the International Administration of Tangier cannot be regarded as a State. Article 2 of the Protocol annexed to the Declaration stated that the Moroccan State, "which recovers possession of the public and private domain entrusted to the International Administration ... receives the latter's property ...".⁶⁴⁹ Among other examples that may be given is the "Draft agreement on Transitional Measures" of 2 November 1949 between Indonesia and the Netherlands, adopted at the end of the Hague Round-Table Conference (August-November 1949),⁶⁵⁰ which provided for the devolution of all

⁶⁴⁷ United Nations, *Treaty Series*, vol. 507, p. 65.

⁶⁴⁸ *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 85-86. See also the Constitution of the Independent State of Western Samoa (1962) which declared: "All property which immediately before Independence Day is vested in Her Majesty ... or in the Crown ... shall, on Independence Day, vest in Western Samoa" (*ibid.*, p. 117).

⁶⁴⁹ United Nations, *Treaty Series*, vol. 263, p. 171.

⁶⁵⁰ *Ibid.*, vol. 69, p. 266.

⁶⁴⁶ UNESCO, *Records of the General Conference, Sixteenth Session*, vol. I, *Resolutions* (Paris, 1970), p. 135.

property, and not only immovable property, in the Netherlands public and private domain in Indonesia. A subsequent military agreement transferred to Indonesia, in addition to some warships and military maintenance equipment of the Netherlands fleet in Indonesia, which constituted movable property, all fixed installations and equipment used by the colonial troops.⁶⁵¹ Similarly, when the Colony of Cyprus attained independence, all property of the Government of the island (including immovable property) became the property of the Republic of Cyprus.⁶⁵² Libya received "the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration".⁶⁵³ In particular, the following property was transferred immediately: "the public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya", as well as the public archives and "the property in Libya of the Fascist Party and its organizations".⁶⁵⁴ Likewise, Burma was to succeed to all property in the public and private domain of the colonial Government,⁶⁵⁵ including fixed military assets of the United Kingdom in Burma.⁶⁵⁶

(11) The Commission is not unaware of agreements concluded between the predecessor State and the newly independent successor State under which the successor State has relinquished in favour of the former its right of ownership to the part of the State property which had passed to it on the occurrence of the succession of States.⁶⁵⁷ The independence agreements were followed by various protocols concerning property, under which the independent State did not succeed to the whole of the property belonging to the predecessor State. This was usually done in order to provide for common needs in an atmosphere of close co-operation between the former metropolitan State and the newly independent State. The forms those agreements took were, however, varied. In some cases, the pre-independence *status quo* was provision-

ally maintained.⁶⁵⁸ In others, devolution of the (public and private) domain of the former metropolitan State was affirmed as a principle but was actually implemented only in the case of property which would not be needed for the operation of its various military or civilian services.⁶⁵⁹ Sometimes the agreement with the territory that had become independent clearly transferred all the public and private domain to the successor, which incorporated them in its patrimony but, under the same agreement, expressly retroceded parts of them either in ownership or in usufruct.⁶⁶⁰ In some cases the newly independent State agreed to a division of property between itself and the former metropolitan State, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and of the presence of the former metropolitan State.⁶⁶¹ Lastly, there have been cases where a treaty discarded the distinctions between public and private domains, of the territory or of the metropolitan State, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements:

⁶⁵⁸ "Agreement between the Government of the French Republic and the Government of the Republic of Chad concerning the transitional arrangements to be applied until the entry into force of the agreements of co-operation between the French Republic and the Republic of Chad", signed in Paris on 12 July 1960 (*Materials on Succession of States (op. cit.)*, pp. 153-154) article 4. A protocol to a property agreement was signed later, on 25 October 1961. It met the concern of the two States to provide for "common needs" and enabled the successor State to waive the devolution of certain property (see Decree No. 63-271 of 15 March 1963 publishing the Protocol to the property agreement between France and the Republic of Chad of 25 October 1961 (with the text of the Protocol annexed), in France, *Journal officiel de la République française, Lois et décrets* (Paris, 95th year), 21 March 1963, pp. 2721-2722).

⁶⁵⁹ See Decree No. 63-270 of 15 March 1963 publishing the Convention concerning the property settlement between France and Senegal, signed on 18 September 1962 (with the text of the Convention annexed), in *ibid.*, p. 2720. Article 1 establishes the principle of the transfer of "ownership of State appurtenances registered ... in the name of the French Republic" to Senegal. However, article 2 specifies: "Nevertheless, State appurtenances shall remain under the ownership of the French Republic and be registered in its name if they are certified to be needed for the operation of its services ... and are included in the list" given in an annex. This provision concerns, not the *use* of State property for the needs of the French services, but the *ownership* of such property.

⁶⁶⁰ A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26 October 1963), in France, *Journal officiel de la République française, Lois et décrets* (Paris, 31 October 1963), 95th year, No. 256, pp. 9707-9708. Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French Services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

⁶⁶¹ Cf. Decree No. 63-268 of 15 March 1963 publishing the Protocol to the property agreement between France and the Gabonese Republic, of 6 June 1961, in France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2718-2719.

⁶⁵¹ *Ibid.*, p. 288.

⁶⁵² Treaties concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. United Nations, *Treaty Series*, vol. 382, annex E, pp. 130-138, article 1 and *passim*.

⁶⁵³ United Nations General Assembly resolution 388 (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", article 1.

⁶⁵⁴ *Ibid.* The inalienable property of the State is defined in articles 822-828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks (i.e. immovable property), arms, munitions, etc. (i.e. movable property).

⁶⁵⁵ Government of Burma Act, 1935.

⁶⁵⁶ See United Kingdom, *Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the recognition of Burmese independence and related matters*, Annex: Defence Agreement signed on the 29th August 1947 in Rangoon, Cmd 7360 (London, H. M. Stationery Office, 1948).

⁶⁵⁷ See G. Fouilloux: "La succession aux biens publics français dans les Etats nouveaux d'Afrique", in *Annuaire français de droit international*, XI, 1965 (Paris, C.N.R.S.), pp. 885-915. Cf. also G. Fouilloux, "La succession des Etats de L'Afrique du Nord aux biens publics français", in *Annuaire de L'Afrique du Nord*, 1966, pp. 51-79.

The Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by a global settlement based on equity and satisfying their respective needs.⁶⁶²

(12) However, it should be pointed out that these instruments have usually been of a temporary character. The more balanced development of the political relations between the predecessor State and the newly independent successor State has in many cases enabled the successor State sooner or later to regain the immovable State property situated in its territory which had been the subject of agreements with the former metropolitan State.

(13) *Paragraph 3* of article 13, dealing with movable State property, makes a distinction between two types of such property: that "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates," and that not connected with such activity but to the creation of which the dependent territory has contributed.

(14) *Sub-paragraph (a)* of *paragraph 3* concerns the first of the two types, and states the common rule adopted with respect to the transfer of part of the territory of a State, the separation of part or parts of the territory of a State, and the dissolution of a State. Reference may be made in this connexion to paragraphs (12) to (15) of the introductory commentary to section 2, which are relevant to this sub-paragraph. It should be noted that the movable State property which may be located in the dependent territory only temporarily or fortuitously, like the gold of the Banque de France which was evacuated to West Africa during the Second World War, is to be excluded from the application of the rule since it is not actually connected with the activity of the State "in respect of the territory to which the succession of States relates".

(15) State practice relating to the rule enunciated in sub-paragraph (a) of paragraph 3 can be discussed with reference to the first three main categories of movable State property, namely, currency, Treasury and State funds, and archives. Since in the present context the question of archives is illustrative, a brief reference will be made to it, bearing in mind the Commission's decision referred to above.⁶⁶³

⁶⁶² Article 31 of the Franco-Malagasy agreement of 27 June 1960 concerning economic and financial co-operation, approved by a Malagasy Act of 5 July 1960 and by a French Act of 18 July 1960 (France, *Journal officiel de la République française, Lois et décrets* (Paris, 20 July 1960), 92nd year, No. 167, p. 6615). A Franco-Malagasy Protocol on property was signed later, on 18 October 1961 (Decree No. 63-269 of 15 March 1963 publishing this Protocol, in France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2719-2720). This confirms the situation created by another economic co-operation agreement of 27 June 1960 and acknowledges—but in this context—Madagascar's ownership of the remaining State appurtenances, although France retains the ownership of military premises and constructions.

⁶⁶³ See para. (7) of the introductory commentary to sect. 2.

Currency

(16) The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State since it is a regalian right and an attribute of public authority. In this sense, as far as the privilege of issue is concerned, there is no question of succession of States involved; the predecessor State loses its privilege of issue in the dependent territory and the newly independent State exercises its own privilege, which it derives from its own sovereignty, upon achieving independence. Nor does the question of monetary tokens issued in the dependent territory by its own institution of issue relate directly to succession of States.

(17) Among the examples that may be given, there is that of the various Latin American colonies which became independent at the beginning of the nineteenth century, and where the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscriptions of the new State for the image and name of His Most Catholic Majesty on the coins in circulation, or to giving some other name to the Spanish peso without changing its value or the structure of the currency.

(18) In the case of India, that country succeeded to the sterling assets of the Reserve Bank of India, estimated at £1,160 million.⁶⁶⁴ However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder—i.e., the greater part of the assets—was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.⁶⁶⁵

(19) The French Government withdrew its monetary tokens from the French Establishments in India but agreed to pay compensation. Article XXIII of the Franco-Indian Agreement of 21 October 1954⁶⁶⁶ stated:

The Government of France shall reimburse to the Government of India within a period of one year from the date of the *de facto* transfer the equivalent value at par in £ sterling or in Indian rupees of the currency withdrawn from circulation from the Establishments after the *de facto* transfer.

⁶⁶⁴ United Kingdom, *Financial Agreement between the Government of the United Kingdom and the Government of India*, Cmd. 7195 (London, H. M. Stationery Office, 14 August 1947).

⁶⁶⁵ For details, see I, Paenson, *Les conséquences financières de la succession des Etats (1932-1953)* (Paris, Domat-Monchrestien, 1954), *passim* and in particular pp. 65-66 and 80.

⁶⁶⁶ English text in India, *Foreign Policy of India: Texts of Documents, 1947-64* (New Delhi, Lok Sabha (secretariat), 1966), p. 212. French text in France, Ministry of Foreign Affairs, *Recueil des traités et accords de la France, année 1962* (Paris, 1962), p. 535.

(20) State practice not being uniform, it is not possible to establish a rule applicable to all situations regarding the succession to currency. It is necessary to examine the concrete situation which is found on the date of the succession. If the currency is issued by an institution of issue belonging to the territory itself, independence will not change the situation. However, if the currency issued for the territory by and under the responsibility of a "metropolitan" institution of issue is to be kept in circulation, it must be backed by gold and reserves for reasons already explained in the commentary to article 12.

State funds

(21) With regard to State funds, some examples may be given, as follows. On termination of the French Mandate, Syria and Lebanon succeeded jointly to the "common interests" assets, including "common interests" Treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of the Banque de Syrie et du Liban, although most of these assets were blocked and were released only progressively over a period extending to 1958.⁶⁶⁷ In the case of the advances which the United Kingdom had made in the past towards Burma's budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of 20 years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the costs it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.⁶⁶⁸

Archives

(22) State practice relating to the attribution of archives was in no way uniform until the Second World War. One solution was that the archives remained in the territory and shared its destiny, as was the case of the archives of the Spanish possessions in America. Another solution was for the metropolitan Power to repatriate the archives either by force or by agreement. Thus in 1864 Great Britain authorized the Ionian Islands to unite with Greece, and transferred all the archives to London. France at an early stage practised a special form of repatriation of archives: a royal edict of 1776 set up the *Dépôt des papiers publics des colonies*, which was to receive every year, at Versailles, copies of papers of court record-offices, notaries' records, registers of births, marriages and deaths, and so forth.

⁶⁶⁷ For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (France, *Journal officiel de la République française, Lois et décrets*, Paris, 10 March 1950, 82nd year, No. 60, pp. 2697-2700); for Lebanon, see the Franco-Lebanese monetary and financial agreement of 24 January 1948 (*ibid.*, 14 and 15 March 1949, 81st year, No. 64, pp. 2651-2654; also in United Nations, *Treaty Series*, vol. 173, p. 99).

⁶⁶⁸ The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign, and for certain costs relating to demobilization.

(23) Efforts have been made since the Second World War, as a result of the process of decolonization, to find a uniform solution with regard to the devolution of archives. No satisfactory solution, however, has yet been reached owing, perhaps, in part, to the variety of situations involved: diversity of local conditions, of the preceding status and of the degree of administrative organization left in the territory by the colonial Power. It may be noted in this connexion that a publication of the Direction des archives de France states the following:

It appears undeniable that the metropolitan country should hand over to States that achieve independence in the first place *the archives which antedate the colonial régime*,* which are without question the property of the territory. It also has the duty to hand over *all documents which make it possible to ensure the continuity of administrative activity and to preserve the interests of the local population**... As a result, the titles to property of the State and of semi-public institutions, documents concerning public buildings, railways, public highways, cadastral documents, census results, local registers of births, marriages and deaths, etc., should normally be handed over with the territory itself. This implies the regular handing over of local administrative archives to the new authorities. It is sometimes regrettable that the conditions in which the passing of power from one authority to another has occurred has not always made it possible to ensure the regularity of this handing over of archives, which may be considered indispensable.⁶⁶⁹

(24) *Sub-paragraph (b) of paragraph 3* of the present article relates to the apportionment between the predecessor State and the successor State of movable State property not connected with the activity of the predecessor State in respect of the dependent territory to the creation of which the dependent territory contributed. Like *sub-paragraph (a)*, the *sub-paragraph* deals with such property, regardless whether it is situated in the territory of the predecessor State, of the successor State or of a third State. The question may be asked, for example, if successor States can claim any part of the subscriptions made by the administering States to the shares of the capital stock of international or regional financial institutions such as the World Bank. Although there seems to be no precedent regarding the apportionment of such assets between the predecessor State and the successor State, the question may well arise in view of the fact that participation in various intergovernmental bodies of a technical nature is open to dependent territories as such. Such property may well be considered property which belonged as of right to the dependent territory in the proportion determined by the territory's contribution. The Commission believes that the rule set forth in *sub-paragraph (b)*, to the effect that the property of the predecessor State other than the property mentioned in *sub-paragraph (a)*, to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of that territory, will make it possi-

⁶⁶⁹ France, Direction des archives de France, *Actes de la Sixième Conférence internationale de la Table ronde des archives, Les archives dans la vie internationale* (Paris, Imprimerie nationale, 1963), pp. 43-44.

ble to solve more easily and equitably many of the problems arising in this connexion.

(25) *Paragraph 4* concerns the cases of newly independent States formed from two or more dependent territories. It states that the general rules set out in paragraphs 1 to 3 of article 13 apply to such cases. As examples of such newly independent States mention may be made of Nigeria, which was created out of four former territories, namely, the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons; Ghana, which was formed from the former colony of the Gold Coast, Ashanti, the Northern Territories Protectorate and the Trust Territory of Togoland; and the Federation of Malaya which emerged in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. The Commission finds no reason to depart from the formula contained in article 29, paragraph 1, of the 1974 draft articles on succession of States in respect of treaties, which deals with the case of newly independent States formed from two or more territories in the same manner as the case of newly independent States which emerge from one dependent territory, for the purpose of applying the general rules concerning succession with respect to treaties.

(26) *Paragraph 5* involves a dependent territory which becomes part of the territory of an existing State other than the administering State of the dependent territory. As explained above,⁶⁷⁰ the Commission considered it more appropriate to deal with this case together with that of newly independent States, unlike the 1974 draft articles, which included this case under "succession in respect of part of territory" together with the case of simple transfer of part of a territory. Association or integration with an independent State is a mode of implementing the right of self-determination of peoples, exactly like the establishment of a sovereign and independent State, as is clearly stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It is therefore more logical to include this paragraph in an article dealing with newly independent States. In view of the basic similarity of the questions involved in succession to State property when the successor State is a newly independent State and when it is a State with which a dependent territory has been integrated or associated, the present paragraph calls for the application to both cases of the same general rules provided for in paragraphs 1 to 3 of the article.

(27) *Paragraph 6* is a provision which confirms that the principle of the permanent sovereignty of every people over its wealth and natural resources takes precedence over agreements which may be concluded between the predecessor and the newly independent State to determine succession of State property otherwise than by the application of the principles con-

tained in the present article. The principle of the permanent sovereignty of every people over its wealth and natural resources has been forcefully affirmed in a number of General Assembly resolutions and in other United Nations instruments.⁶⁷¹

(28) The formulation of the Charter of Economic Rights and Duties of States under the auspices of the United Nations Conference on Trade and Development looms large among recent developments within the United Nations system in the field of permanent sovereignty over natural resources. This Charter, which was adopted by the General Assembly in its resolution 3281 (XXIX), of 12 December 1974, should, according to the resolution, "constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries". The 15 fundamental principles which, according to this Charter (chapter I), should govern economic as well as political relations among States, include the "remedying of injustices which have been brought about by force and which *deprive a nation of the natural means necessary for its normal development*"^{*} State property is certainly one of those "necessary natural means". Article 2 of this Charter (para. 1) states that "every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities". Expanding the passage from the resolution quoted above, article 16 states in its paragraph 1 that:

It is the right and duty of all States, individually and collectively, to eliminate colonialism ... neo-colonialism ... and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the *restitution*^{*} and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

(29) The General Assembly, meeting in a special session for the first time in the history of the United Nations to discuss economic problems following the "energy crisis", gave due prominence to the "full permanent sovereignty of every State over its natural resources and all economic activities" in its Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI), of 1 May 1974). In section VIII of its Programme of Action on the establishment of that new international economic order (resolution 3202 (S-VI), of 1 May 1974) the Assembly states that all efforts should be made "to defeat attempts to prevent the free and effective exer-

⁶⁷⁰ See above, para. (5) of the introductory commentary to sect. 2.

⁶⁷¹ See, for example, General Assembly resolutions 626 (VII), of 21 December 1952; 1803 (XVII), of 14 December 1962; 2158 (XXI), of 25 November 1966; 2386 (XXIII), of 19 November 1968 and 2692 (XXV) of 11 December 1970. See also Economic and Social Council resolutions 1737 (LIV), of 4 May 1973, and 1956 (LIX), of 25 July 1975. See, further, article 1, para. 2, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), of 16 December 1966, annex).

cise of the rights of every State to full and permanent sovereignty over its natural resources”.

(30) Just as individuals are equal before the law in a national society, so all States are said to be equal in the international sphere. But in spite of this theoretical equality, flagrant inequalities remain between States so long as sovereignty—a system of reference—is not accompanied by economic independence. When the elementary bases of national economic independence do not exist, it is idle to speak of the principle of sovereign equality of States. If it is really desired to free the principle of the sovereign equality of States from its large element of illusion, the formulation of the principle should be adapted to modern conditions in such a way as to restore to the State the elementary bases of its national economic independence. To this end, the principle of economic independence, invested with a new and vital legal function, and elevated accordingly to the status of a principle of contemporary international law, must be reflected in particular in the right of peoples to dispose of their natural resources, and in the prohibition of all forms of unwarranted intervention in the economic affairs of States, together with the outlawing of the use of force and of any form of coercion in economic and commercial relations. General Assembly resolution 1514 (XV), of 14 December 1960, which did not neglect the right of peoples to dispose of their natural resources, and, more particularly resolution 1803 (XVII) and other subsequent resolutions which affirmed the principle of the permanent sovereignty of States over their natural resources,⁶⁷² demonstrate the efforts of the General Assembly to make a legal reality of the fundamental matter of the principle of economic independence, and to remedy the disturbing fact that the gap between developed and developing States is constantly widening.

(31) It is by reference to these principles that an appraisal should be made of the validity of the so-called “co-operation” or “devolution” agreements and of all bilateral instruments which, under the pretext of establishing “special” or “preferential” ties between the new States and the former colonial Powers, impose on the former excessive conditions which are ruinous to their economies. The validity of treaty relations of this kind should be measured by the degree to which they respect the principles of political self-determination and economic independence. Some members of the Commission expressed the view that any agreements which violate these principles should be void *ab initio*, without even any need to wait until the new State is in a position formally to denounce their unfair character. Their invalidity should derive intrinsically from contemporary international law and not simply from their subsequent denunciation.

(32) Devolution agreements must therefore be judged according to their content. Such agreements do not, or only rarely, observe the rules of the succession of States. In fact, they impose new conditions

for the independence of States. For example, the newly independent State can remain independent only if it agrees not to claim certain property, or to assume certain debts, extend certain laws or respect certain treaties of the administering Power. Therein lies the basic difference from the other types of succession, where the independence of the will of the contracting parties must be recognized. In the case of devolution agreements, freedom to conclude an agreement results in conditions being imposed on the very independence of the State itself. Through their restrictive content such agreements institute a “probation” system, the conditional independence of the newly independent States. It is for this reason that the question of their validity must be raised with respect to their content.

(33) In the light of the foregoing considerations the Commission, while being aware that the principle of permanent sovereignty over wealth and natural resources applies in the case of every people and not only of peoples of newly independent States, nevertheless thought it particularly relevant and necessary to stress that principle within the context of succession of States relating to newly independent States.

Article 14. — Uniting of States

1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.]

Commentary

(1) In the present draft, the Commission uses the term “uniting of States” in the same sense as it did in the 1974 draft articles on the succession of States in respect of treaties, namely, the “uniting in one State of two or more States, which had separate international personalities at the date of the succession”.⁶⁷³ Article 14 covers the case where one State merges with another State even if the international personality of the latter continues after they have united. It should thus be distinguished from the case of the emergence of a newly independent State out of two or more dependent territories, or from the case of a dependent territory which becomes integrated or associated with a pre-existing State, which have been dealt with in article 13.

⁶⁷³ *Yearbook... 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, chap. II, sect. D, articles 30 and 31, para. (1) of the commentary.

⁶⁷² See above, foot-note 671.

(2) As the Commission wrote in 1974, the succession of States envisaged in the present article does not take account of the particular form of the internal constitutional organization adopted by the successor State:

The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions ...

Being concerned only with the uniting of two or more States in one State, associations of States having the character of intergovernmental organizations such as, for example, the United Nations, the specialized agencies, OAS, the Council of Europe, CMEA, etc., fall completely outside the scope ...; as do some hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new State and do not therefore constitute a succession of States.⁶⁷⁴

(3) The formulation in article 14 of the *international* legal rule governing succession to State property in cases of the uniting of States, is limited to setting forth a general rule for the passing of State property from the predecessor States to the successor State, while making a provision of *renvoi* to the internal law of the successor State as far as the internal allocation of the property which passes is concerned. Thus, *paragraph 1* states that when two or more States unite and form a successor State, the State property of the predecessor States shall pass to the successor State. However, this rule is made subject to *paragraph 2*, which contains a rule of *renvoi* to the internal law of the successor State concerned for the allocation of the property so passed as belonging to the successor State itself or, as the case may be, to its component parts. "Internal law" as referred to in *paragraph 2* includes in particular the constitution of the State and any other kind of internal legal rules, written or unwritten, including those which effect the incorporation into internal law of international agreements.

(4) In the practice of States, constitutions and other basic legal instruments determine the allocation of State property. Although not directly relevant to the provisions of the present article, examples of such internal laws may be of interest. The United States Constitution states in article IV, section 3:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.⁶⁷⁵

(5) In the case of the Swiss Confederation, the 1848 Constitution includes an article 33, dealing with postal services, which provides as follows:

(d) The Confederation shall have the right and the obligation to acquire, in return for fair compensation, material belonging to the

postal administration, provided that it is suited to the use for which it is intended and is needed by the administration.

(e) The federal administration shall have the right to utilize buildings at present used for postal purposes, in return for compensation, by purchase or by lease.⁶⁷⁶

The 1874 Swiss Constitution contains an article 22, reading as follows:

In return for fair compensation, the Confederation shall have the right to use or to acquire the ownership of existing parade-grounds and buildings used for military purposes in the cantons, and property accessory thereto. The terms of compensation shall be regulated by federal law.⁶⁷⁷

(6) The Malaysia Act, 1963, which is the Constitution of Malaysia, contains a specific passage entitled "Succession to property". Its principal provisions are as follows:

75. (1) Subject to sections 78 and 79, any land which on Malaysia Day is vested in any of the Borneo States or in the State of Singapore, and was on the preceding day occupied or used by the government of the United Kingdom or of the State, or by any public authority other than the government of the State, for purposes which on Malaysia Day become federal purposes, shall on and after that day be occupied, used, controlled and managed by the Federal Government or, as the case may be, the said public authority, so long as it is required for federal purposes; and that land—

(a) shall not be disposed of or used for any purposes other than federal purposes without the consent of the Federal Government; and

(b) shall not by virtue of this sub-section be used for federal purposes different from the purposes for which it was used immediately before Malaysia Day without the consent of the government of the State and, where it ceases to be used for those purposes and that consent is not given, shall be offered to the State accordingly.

(2) For the purposes of sub-section (1) "federal-purposes" includes the provision of government quarters for the holders of federal office or employment; but that sub-section shall not apply to any land by reason of its having been used by any government for providing government quarters other than those regarded by that government as institutional quarters.

(3) Property and assets other than land which immediately before Malaysia Day were used by the government of a Borneo State or of Singapore in maintaining government services shall be apportioned between the Federation and the State with regard to the needs of the Federal and State governments respectively to have the use of the property and assets for Federal or State services, and subject to any agreement to the contrary between the governments concerned a corresponding apportionment as at that date shall be made of other assets of the State (but not including land) and of the burden, as between the Federation and the State, of any financial liabilities of the State (including future debt charges in respect of those liabilities); and there shall be made all such transfers and payments as may be necessary to give effect to any apportionment under this sub-section.⁶⁷⁸

(7) It may also be of interest, in the context of the present article, to give some examples of the alloca-

⁶⁷⁶ C. Hilty, *Les Constitutions fédérales de la Suisse* (Neuchâtel, Attinger, 1891), p. 451 [translation from French].

⁶⁷⁷ *Ibid.*, p. 443.

⁶⁷⁸ United Nations, *Materials on Succession of States (op. cit)*, pp. 92-93.

⁶⁷⁴ *Ibid.*, paras. (2) and (3) of the commentary.

⁶⁷⁵ Constitution of the United States of America, 17 September 1787.

tion of State property as effected through international agreements. Thus the Republic of Central America, formed by the union of several Central American States in 1897, gave the constituting States substantial autonomy, as is apparent from article III of the Treaty of Union of 15 June 1897, which provided that they retain their "autonomic system in regard to their administration; their union having for its one object the maintenance in its international relations of a single entity in order to guarantee their common independence, rights and due respect".⁶⁷⁹ However, the same Treaty, in article XIII, conferred on the President the power "to fix, when necessary, the mode and the resources with which each of the States should contribute to the defence of the territory..." and "to fix the amount and the manner in which the States shall share in the common expenses."⁶⁸⁰

(8) The Treaty of Union of the Federation of Central America of 19 January 1921 made reference to a succession of States in respect of property. Thus, article 5, paragraph (a), provides that

...The Assembly shall designate and delimit the territory of which [the Federal District] shall consist and shall designate within it the town or place which will be the political capital of the Federation. The State, or States, from whom territory is taken in order to constitute the Federal District, shall cede it forthwith to the Federation without payment.⁶⁸¹

Article 5, paragraph (j), makes provision for succession to movable property:

The [Executive] Council shall have the free disposal of such armaments and military stores as at present exist in the States, after having provided them with the quantity required for the police forces.⁶⁸²

(9) During the Commission's consideration of the text of the present article, prior to its adoption in first reading, some members expressed doubts as to the appropriateness of including a rule of *renvoi* to internal law as is done in paragraph 2 of the article, and as to the exact import of the words "subject to paragraph 2" used in paragraph 1. Different views were expressed on the question whether, upon the occurrence of a succession of States through the unifying of two or more States, all State property of the predecessor State actually passes to the successor State, or whether parts of the State property of the predecessor State remain the property of the constituent unit or units which had owned them before the occurrence of the succession of States. Further, opinions differed as to which of the two paragraphs of article 14 expressed the rule of international law on the matter.

(10) In view of these reservations regarding the text

⁶⁷⁹ G. F. de Martens, ed., *Nouveau recueil général de traités* (Leipzig, Dieterich, 1905), second series, vol. XXXII, p. 279.

⁶⁸⁰ *Ibid.*, p. 280.

⁶⁸¹ M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment for international Peace, 1931) vol. I (1919-1921), p. 602.

⁶⁸² *Ibid.*, p. 606.

of the article, and in order to draw attention to the questions raised, the Commission decided to place article 14 between square brackets. It intends to revert to the article at a later stage in its work on this subject.

Article 15. — Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) Immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) Movable State property of the predecessor State, other than that mentioned in sub-paragraph (b), shall pass to the successor State in an equitable proportion.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

3. Paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 16. — Dissolution of a State

1. When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) Immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) Immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) Movable State property of the predecessor State other than that mentioned in sub-paragraph (c) shall pass to the successor States in an equitable proportion.

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Commentary

(1) *Articles 15 and 16* both deal with cases where a part or parts of the territory of a State separate from that State and form one or more individual States. However, article 15 concerns the case of secession of States where the predecessor State continues its existence, while article 16 relates to the case of dissolution of States where the predecessor ceases to exist after the separation of parts of its territory.

(2) It may be recalled that, in its 1972 provisional draft articles on succession of States in respect of treaties,⁶⁸³ the Commission made a clear distinction between the separation of part of a State, or secession, and the dissolution of a State. However, that approach having been disputed by a number of States in their comments on the draft⁶⁸⁴ and also by certain representatives in the Sixth Committee at the twenty-eighth session of the General Assembly, the Commission subsequently, in its 1974 draft articles, somewhat modified the treatment of these two cases. While maintaining the theoretical distinction between the dissolution of a State and the separation of parts of a State, it dealt with both cases together in one article from the standpoint of the successor States (article 33), and at the same time made provision for the case of separation of parts of a State from the standpoint of the predecessor State which continues to exist (article 34).⁶⁸⁵

(3) With regard to the question of succession to State property, the Commission believes that the distinction between secession and dissolution should be maintained in view of the special characteristics of succession in that sphere. It considers that if the distinction was deemed to be valid for succession in respect of treaties, it is the more so for the purposes of succession to State property. If the predecessor State survives, it cannot be deprived of all its State property; and if it disappears, its State property cannot be left uninherited.

(4) *Paragraph 1 (a) of articles 15 and 16* lays down a common rule relating to the passing of immovable State property, according to which unless it is otherwise agreed by the predecessor State and the successor State or, when the predecessor State ceases to exist, by the successor States concerned, immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated. As has been explained, this basic rule, with slight variations, has been given for all the types of succession of States provided for in section 2 of part I of the draft.⁶⁸⁶

(5) Some examples of relevant State practice can be cited in the present context. With regard to the sep-

aration of a part or parts of a State under *article 15*, it should first be noted that before the establishment of the United Nations, most examples of secession were to be found among cases of the "secession of colonies" because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State since, according to contemporary international law what we are concerned with is nearly independent States resulting from decolonization under the Charter of the United Nations. Since the establishment of the United Nations, there have been only three cases of secession which were not cases of decolonization: the separation of Pakistan from India, the withdrawal of Singapore from Malaysia, and the secession of Bangladesh. In the case of Pakistan, according to one author, an Expert Committee was appointed on 18 June 1947 to consider the problem of apportionment of the property of British India and the presumption guiding its deliberations was that "India would remain a constant international person, and Pakistan would constitute a successor State".⁶⁸⁷ Thus, Pakistan was regarded as a successor State by a pure fiction. On 1 December 1947, an agreement was concluded between India and Pakistan under which each of the Dominions would become the owner of the immovable property situated in its territory.⁶⁸⁸

(6) As for the cases of dissolution of States under *article 16*, an old example is to be found in the Treaty of 19 April 1839 dividing the Netherlands into two separate kingdoms, Belgium and Holland, article XV of which provided as follows: "Public or private utilities, such as canals, roads or others of a similar nature, constructed, in whole or in part, at the expense of the Kingdom of the Netherlands, shall belong, with the benefits and charges attaching thereto, to the country in which they are situated".⁶⁸⁹ The same rule was applied upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, after which "freehold property of the Federation situate in a Territory would vest in the Crown in right of the Territory".⁶⁹⁰

(7) As far as doctrine is concerned, this aspect of State succession, namely, succession through secession or dissolution, has not been given much attention in legal literature. The writings of A. S. de Bustamante may, however, be cited. On the question of secession, he stated that "in the sphere of principles, there is no difficulty about the general principle of the passing of public property, except where the devolution of a particular item is agreed on for special

⁶⁸³ *Yearbook... 1972*, vol. II, pp. 292 and 295, document A/8710/Rev.1, chap. II, sect. C, articles 27 and 28.

⁶⁸⁴ *Yearbook... 1974*, vol. II (Part One), pp. 68-69, documents A/CN.4/278 and Add.1-6, paras. 390 and 391.

⁶⁸⁵ *Ibid.*, pp. 260-266, document A/9610/Rev.1, chap. II, sect. D, articles 33 and 34.

⁶⁸⁶ See above, introductory commentary to sect. 2, para. (11).

⁶⁸⁷ D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I, *International Relations*, p. 220.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ See *British and Foreign State Papers, 1838-1839*, vol. XXVII (London, Harrison, 1856), pp. 997-998.

⁶⁹⁰ D. P. O'Connell, *op. cit.*, p. 230.

reasons".⁶⁹¹ He also refers to the draft code of international law by E. Pessoa, article 10 of which provided that "if a State is formed through the emancipation of a province or region, property in the public and private domain situated in the detached territory passes to it".⁶⁹² The same author writes on the cases of dissolution of States as follows:

In cases where a State is divided into two or more States and none of the new States retains or perpetuates the personality of the State which has ceased to exist, the doctrines with which we are already familiar [the principle that property passes to the successor State] must be applied to public and private property which is within the boundaries of each of the new States.⁶⁹³

(8) As for immovable State property of the predecessor State situated outside its territory, no specific provision is made in *article 15*, in conformity with the general principle of the passing of State property applied throughout the articles of section 2 of Part I of the draft, which requires the geographical location of that State property in the territory to which the succession of States relates. The common rule stated in paragraph 1 (a) is, however, tempered in the case of both articles by the provisions of paragraphs 3 of article 15 and 2 of article 16 which reserve any question of equitable compensation that may arise as a result of a succession of States. However, in the case of dissolution of the predecessor State, immovable State property should naturally pass to the successor States. Since immovable property is indivisible, *article 16, paragraph 1* (b) states that such property shall pass to one of the successor States, with the condition that the other successor State or States should be equitably compensated.

(9) The foregoing rule conforms to the opinions of publicists, who generally take the view that the predecessor State, having completely ceased to exist, no longer has the legal capacity to own property and that its immovable property abroad should therefore pass to the successor State or States. It is the successor State which has the better title to such property, having, after all, formed part of the State that has ceased to exist. There can be no question that on the extinction of the predecessor State the successor receives the State property of the predecessor because the property would otherwise become abandoned and ownerless. Abandonment of the property, if that is the case, is not the cause for the occurrence of a right of succession; at the most, it is the occasion for it. In any event, in practice, such property is normally apportioned under special agreements between the successor States. Thus, in the Agreement of 23 March 1960 concerning the settlement of economic questions arising in connexion with the dissolution of the union between Sweden and Norway, the following provisions are found in article 7:

⁶⁹¹ A. S. de Bustamante y Sirven, *Droit international public*, French translation by Paul Goulé, 1934-1939 (Paris, Sirey, vol. III, 1936), p. 310.

⁶⁹² *Ibid.*, pp. 281-282.

⁶⁹³ *Ibid.*, p. 335.

The right of occupation of the consular premises in London, which was acquired on behalf of the "Joint Fund for Consulates" in 1877 to have effect until 1945, and which is at present enjoyed by the Swedish Consul-General in London, shall be sold by the Swedish Consulate-General. The sale shall become final only after approval by the Swedish and Norwegian Ministries of Foreign Affairs. The proceeds of the sale shall be apportioned equally between Sweden and Norway.⁶⁹⁴

(10) In connexion with a more recent case, it has been reported that, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, agreements were concluded for the devolution of property situated outside the territory of the union, under which Southern Rhodesia was given Rhodesia House in London and Zambia the Rhodesian High Commissioner's house.⁶⁹⁵

(11) *Article 15, paragraph 1* (b) and *article 16, paragraph 1* (c) set forth the basic rule relating to movable State property, which is applied consistently throughout Section 2 of Part I of the draft. It stipulates that movable State property of the predecessor State connected with the activity of that State in respect of the territory(ies) to which the succession relates shall pass to the successor State.⁶⁹⁶

(12) When Pakistan was separated from India under an agreement signed on 1 December 1947, a great deal of equipment, especially arms, was attributed to India, which undertook to pay Pakistan a certain sum to contribute towards the construction of munitions factories.⁶⁹⁷ Upon the dissolution of the Federation of Rhodesia and Nyasaland, the assets of the joint institution of issue, and gold and foreign exchange reserves, were apportioned in proportion to the volume of currency circulating or held in each territory of the predecessor State which became a successor State.⁶⁹⁸

(13) With regard to archives, the Declaration of 27 April 1906 by Sweden and Norway concerning the distribution of the archives of the legations and consulates which had formerly been jointly owned provided that:

(1) ... documents relating exclusively to Norwegian affairs, and compilations of Norwegian laws and other Norwegian publications, shall be handed over to the Norwegian diplomatic agent accredited to the country concerned...⁶⁹⁹

This is followed by a list of the consulates whose archives were to revert to Norway and Sweden respectively.

Article 1 of the Treaty concluded between Czechoslovakia, Italy, Poland, Romania and the Serb-Croat-Slovene State on 10 August 1920 at Sèvres provides as follows:

⁶⁹⁴ Descamps, *Recueil international des traités du XX^e siècle, 1906* (Paris, Rousseau), pp. 861-862.

⁶⁹⁵ D. P. O'Connell, *op. cit.*, p. 231.

⁶⁹⁶ See above, introductory commentary to section 2, para. (15).

⁶⁹⁷ D. P. O'Connell, *op. cit.*, pp. 220-221.

⁶⁹⁸ *Ibid.*, p. 196.

⁶⁹⁹ Descamps, *op. cit.*, p. 1050.

Allied States to which territory of the former Austro-Hungarian monarchy has been or will be transferred, or which were established as a result of the dismemberment of that monarchy, undertake to restore to each other any of the following objects which may be in their respective territories:

1. Archives, registers, plans, title-deeds and documents of every kind of the civil, military, financial, judicial or other administrations of the transferred territories...⁷⁰⁰

(14) *Article 15, paragraph 1 (c) and article 15, paragraph 1 (d)* enunciate a common rule according to which movable State property of the predecessor State, other than that connected with the activity of that State in respect of the territory(ies) to which the succession of States relates, shall pass to the successor State or States in an equitable proportion. The reference to equity, a key element in the material content of the provisions regarding the distribution of property and which thus has the character of a rule of positive international law, has already been explained.⁷⁰¹

(15) The Agreement concerning the settlement of economic questions arising in connexion with the dissolution of the union between Sweden and Norway contains the following provisions:

Article 6. (a) Sweden shall repurchase from Norway its ... half-share in movable property at legations abroad which was purchased on joint account.* An expert appraisal of such property shall be made and submitted for approval to the Swedish and Norwegian Ministries of Foreign Affairs.

(b) Movable property at consulates which was purchased on joint account shall be apportioned between Sweden and Norway, without prior appraisal, as follows:

There shall be attributed to Sweden the movable property of the consulates-general in ...

There shall be attributed to Norway the movable property of the consulates-general in ...⁷⁰²

(16) The diplomatic practice followed by Poland when it was reconstituted as a State upon recovering territories from Austria-Hungary, Germany and Russia was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories it regained or to the acquisition of which those territories had contributed. Poland claimed its share of such property in proportion to the contribution of the territories which it recovered. However, this rule apparently has not always been followed in diplomatic practice. Upon the fall of the Hapsburg dynasty, Czechoslovakia sought the restitution of a number of vessels and tugs for navigation on the Danube. An arbitral award was made.⁷⁰³ In the course of the proceedings, Czecho-

slovakia had submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subsidy from them, on the ground that these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, were to the same proportionate extent the owners of the property.⁷⁰⁴ The position of Austria and Hungary was that, in the first place, the property was not *public* property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "the Treaties themselves do not give Czecho-Slovakia the right to State property except to such property situated in Czecho-Slovakia".⁷⁰⁵ The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of succession to public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

(17) *Article 15, paragraph 2* states that the rules enunciated in paragraph 1 of the same article apply when a part of the territory of a State separates from that State and unites with another State. Reference to this provision has already been made in the commentary to article 12,⁷⁰⁶ above, where the case concerned is distinguished from that covered by the provisions of article 12, namely, the transfer of part of the territory of a State. In the 1974 draft on succession in respect of treaties, the situations covered by paragraph 2 of article 15 and by article 12 were dealt with in a single provision, since the question there was the applicability to both cases of the same principle of treaty law, that of moving treaty-frontiers. In the context of succession of States in respect of matters other than treaties, however, there are differences between the two situations, which call for regulation by means of separate legal provisions. These differences are connected principally with whether or not it is necessary to consult the population of the territory to which the succession of States relates, depending on the size of the territory and of its population and in consequence, its political, economic and strategic importance, and also with the fact of the usually politically charged circumstances that surround the succession of States in the case to which paragraph 2 of

⁷⁰⁰ *British and Foreign State Papers*, vol. CXIII (London, H. M. Stationery Office, 1923), p. 960.

⁷⁰¹ See above, introductory commentary to sect. 2, paras. (17) *et seq.*

⁷⁰² Descamps, *op. cit.*, pp. 860-861.

⁷⁰³ Case of the cession of vessels and tugs for navigation on the Danube, Allied Powers (Greece, Romania, Serb-Croat-Slovene Kingdom, Czechoslovakia) v. Germany, Austria, Hungary and Bulgaria (Decision: Paris: 2 August 1921, Arbitrator: Walker D.

Hines (U.S.A.)). See United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), pp. 97-212.

⁷⁰⁴ *Ibid.*, p. 120.

⁷⁰⁵ *Ibid.*, pp. 120-121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers*, 1919, vol. 112 (*op. cit.*), pp. 412-414), and article 191 of the Treaty of Trianon (*ibid.*, 1922, vol. 113 (*op. cit.*), pp. 564-565).

⁷⁰⁶ See above, paras. (5), (9) and (10) of the commentary to article 12.

article 15 relates. As was explained above,⁷⁰⁷ the differences which ensue in the legal sphere are of two kinds: first, in the case covered by article 15, paragraph 2, where part of the territory of a State separates from that State and unites with another State, the agreement between the predecessor State and the successor State is not given the pre-eminent role it has under article 12, which is concerned with the transfer of part of the territory of a State to another State. Secondly, by contrast with article 12, article 15 provides for the passing to the successor State, of a third category of movable State property, namely, movable State property of the predecessor State other than that connected with the activity of that State in respect of the territory to which the succession of States relates.

(18) Lastly, *article 15, paragraph 3*, and *article 16, paragraph 2*, lay down the common rule that the general rules contained in these articles are without prejudice to any question of equitable compensation that may arise as a result of a succession of States. This is a further example, in section 2, of a rule of pos-

⁷⁰⁷ *Ibid.*, paras. (9) and (10).

itive international law incorporating the concept of equity, to which reference has already been made.⁷⁰⁸ It is intended to ensure a fair compensation for any successor State as well as any predecessor State which would be deprived of its legitimate share as a result of the exclusive attribution of certain property either, on the one hand, to the predecessor State or, on the other, to the successor State or States. For example, there may be cases where all or nearly all the immovable property belonging to the predecessor State is situated in that part of its territory which later separates to form a new State, although such property was acquired by the predecessor State with common funds. If, under paragraph 1(a) of articles 15 and 16, such property were to pass to the successor State in the territory of which it is situated, the predecessor might be left with little or no resources permitting it to survive as a viable entity. In such a case, the rule contained in the present paragraphs should be applied in order to avoid this inequitable result.

⁷⁰⁸ See above, introductory commentary to sect. 2, paras. (17) *et seq.*

Chapter V

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

106. Paragraph 1 of General Assembly resolution 2669 (XXV) of 8 December 1970 recommended that the International Law Commission should 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.

107. At its twenty-third session, in 1971, the Commission included the subject "Non-navigational uses of international watercourses" in its general programme of work.⁷⁰⁹ The Commission also agreed that for undertaking the substantive study of the rules of international law relating to the non-navigational uses of international watercourses with a view to its progressive development and codification on a worldwide 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"⁷¹⁰ prepared pursuant to General Assembly resolution 1401 (XIV) of 21 No-

vember 1959, as well as in the United Nations Legislative Series.⁷¹¹ In paragraph 2 of resolution 2669 (XXV), the General Assembly 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".

108. 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".

109. At its twenty-fourth session, held in 1972, the Commission indicated its intention to take up the foregoing 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

⁷⁰⁹ See *Yearbook... 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

⁷¹⁰ *Yearbook... 1974*, vol. II (Part Two), p. 33, document A/5409.

⁷¹¹ 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.).

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.⁷¹²

110. 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. By the same resolution (paragraph 6, 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.

111. Pursuant to the foregoing decision of the General Assembly, the Secretary-General submitted to the Commission at its twenty-fifth session an advance report⁷¹³ on the progress of work in the preparation of the supplementary report requested by the Assembly.

112. At its twenty-fifth session, the Commission gave special attention to the question of the priority to be given to the topic. Taking into account the fact that the supplementary report on international watercourses⁷¹⁴ would be submitted to members by the Secretariat in the near future, the Commission 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.⁷¹⁵

113. By paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973 the General Assembly recommended that the Commission should at its twenty-sixth session commence its work on the law of the non-navigational uses of international watercourses by, *inter alia*, adopting preliminary measures provided for under article 16 of its statute. Also, by paragraph 6 of the same resolution, the General Assembly requested the Secretary-General to complete the supplementary report requested in resolution 2669 (XXV), in time to submit it to the Commission before the beginning of its twenty-sixth session.

114. At its twenty-sixth session the Commission had before it the supplementary report on the legal problems relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV).⁷¹⁶

⁷¹² *Yearbook... 1972*, vol. II, p. 324, document A/8710/Rev.1, para. 77.

⁷¹³ *Yearbook... 1973*, vol. II, p. 95, document A/CN.4/270.

⁷¹⁴ See above, para. 107.

⁷¹⁵ *Yearbook... 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 175.

⁷¹⁶ *Yearbook... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

115. Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) the Commission, at its twenty-sixth session, set up the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, composed of Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi, which was requested to consider the question and to report to the Commission. The Sub-Committee adopted and submitted a report.⁷¹⁷ The Commission considered the report of the Sub-Committee at its 1297th meeting held on 22 July 1974 and adopted it without change. The Commission also appointed Mr. Richard D. Kearney as Special Rapporteur for the question of the law of the non-navigational uses of international watercourses.⁷¹⁸

116. The report of the Sub-Committee dealt first with the nature of international watercourses and pointed out that a preliminary question that arises in a study of the legal aspects of non-navigational uses of international watercourses is consideration of the scope that should be given to the term "international watercourses". It was noted that some of the more recent multilateral treaties relating to international uses of water have used "river basin" as the measure of scope of application.⁷¹⁹ Other recent agreements had used the drainage basin concept.⁷²⁰ In

⁷¹⁷ *Ibid.*, vol. II (Part One), p. 301, document A/9610/Rev.1, chapter V, annex.

⁷¹⁸ *Ibid.*, document A/9610/Rev.1., chap. V, para. 159.

⁷¹⁹ The Convention relating to the general development of the Senegal River basin (see *Yearbook... 1974*, vol. II (Part Two), p. 289, document A/CN.4/274, paras. 36-39), signed at Bamako on 26 July 1963 by Guinea, Mali, Mauritania and Senegal, provides in article 13 (*ibid.*, para. 38) that the Senegal River, including its tributaries, is "an international river". The Convention relating to the status of the Senegal River (*ibid.*, paras. 45-50), concluded between the same States on 17 February 1964 at Dakar, provides, in article 11 (*ibid.*, para. 48), that the Inter-State Committee established by the 1963 Convention shall be responsible, *inter alia*, for assembling basic data relating to the River basin as a whole and informing the riparian States of all projects or problems concerning the development of the River basin. The Act regarding navigation and economic co-operation between the States of the Niger basin (*ibid.*, paras. 40-44) concluded at Niamey on 26 October 1963 between Cameroon, Chad, Dahomey, Guinea, the Ivory Coast, Mali, Niger, Nigeria, and Upper Volta provides in article 2 (*ibid.*, para. 41), that the utilization of the River Niger, its tributaries and subtributaries, is open to each riparian State in respect of the portion of the Niger River basin lying in its territory and without prejudice to its sovereign rights in accordance with the principles defined in the Act and in the manner that may be set forth in subsequent special agreements.

⁷²⁰ The Great Lakes Water Quality Agreement (see *Yearbook... 1974*, vol. II (Part Two), p. 297, document A/CN.4/297, paras. 106-114) concluded at Ottawa on 15 April 1972 between Canada and the United States of America is concerned with the boundary waters of the Great Lakes system. However, in order to raise the quality of the boundary waters, it was found necessary to provide for programmes to reduce pollution from sewage, industrial sources, agricultural, forestry and other land use activities (art. V) in the entire Great Lakes system which is defined as "all of the streams, rivers, lakes and other bodies of water that are within the drainage basin of the St. Lawrence River ..." (art. 1(d)). The Convention and Statutes relating to the development of the Chad Basin (*ibid.*, paras. 51-56) were signed at Fort-Lamy on 22 May 1964 by Cameroon, Chad, Niger and Nigeria. Article 4 of the Statutes provides that the exploitation of the Basin and especially

this context, it was noted that the International Rivers Sub-Committee of the Afro-Asian Legal Consultative Committee has been basing its work on the concept of "international drainage basin".⁷²¹

117. On the other hand, the Sub-Committee report pointed out that the major multilateral convention on the subject in South America is the Treaty on the River Plate Basin,⁷²² signed by Argentina, Bolivia, Brazil, Paraguay and Uruguay at Brasilia on 23 April 1969, in which the Parties agree to combine their efforts for the purpose of promoting the harmonious development and physical integration of the River Plate Basin, and of its areas of influence which are immediate and identifiable. The agreement contemplates the drafting of operating agreements and legal instruments tending toward the reasonable utilization of water resources, particularly through regulation of watercourses and their multiple and equitable uses. One of these is the Act of Asunción of June 1971⁷²³ to which is annexed 25 resolutions which carried further the work of "promoting the harmonious development and physical integration of the River Plate Basin" as provided in article I of the River Plate Basin Treaty. In resolution No. 25, which deals with the use of international rivers, the concepts of successive international rivers and contiguous international rivers are taken as a basis for the solution of legal problems. Other recent South American bilateral agreements had adopted differing terminology for pollution problems and for utilization.⁷²⁴

118. In its report the Sub-Committee also referred to the resolution of the Institute of International Law on "Utilization of non-maritime international waters (except for navigation)" (1961)⁷²⁵ which adopted the concept of hydrographic basin as a synonym for "watercourses".⁷²⁶

the utilization of surface and underground waters has the widest meaning and refers in particular to the needs of domestic and industrial and agricultural development and the collecting of its flora and fauna products (*ibid.*, para. 54). In this case, the term "basin" may, because of the inclusion of underground waters, have a somewhat broader meaning and be the equivalent of "drainage basin".

⁷²¹ *Yearbook... 1974*, vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex, para. 9.

⁷²² *Ibid.*, vol. II (Part Two), p. 291, document A/CN.4/274, paras. 60-64.

⁷²³ *Ibid.*, pp. 322-324, para. 326.

⁷²⁴ The Act of Santiago concerning hydrologic basins (*ibid.*, p. 324, para. 327), signed on 26 June 1971 between Argentina and Chile, stipulates in paragraph 2 that "The Parties shall avoid polluting their river and lake systems in any manner". With respect to use, however, the terms "contiguous reaches of international rivers", "common lakes", and "successive international rivers" are employed (paragraphs 3-5 of the Act). The indication is that broader coverage is intended for dealing with "pollution" than for dealing with "uses".

⁷²⁵ For the text, see *Yearbook... 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

⁷²⁶ Article 1 of the resolution provides:

"The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States."

119. The Sub-Committee also made reference to the fact that the International Law Association, at its Helsinki Conference in 1966, had prepared a set of articles on the Uses of the Waters of International Rivers (the Helsinki Rules), which is based on the concept of "international drainage basin".⁷²⁷

120. In view of the variations in practice and theory, the report proposed that States be requested to comment on the following questions:⁷²⁸

[A.] What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?

[B.] Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?

[C.] Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?

121. The Sub-Committee stated that another question that must be considered at the outset was what activities are included within the term "non-navigational uses". It noted that fresh water is put to a manifold number of uses and that an exhaustive listing is not only impossible but unnecessary. The most general characterization would be to consider uses as (a) agricultural; (b) commercial and industrial; (c) social and domestic. Various sub-categories within these groupings were discussed. In addition, it was pointed out that some uses give rise to erosion problems. It was also stated that in view of the very substantial dangers and losses that result from flooding, a study of the legal aspects of international watercourses would appear to be incomplete without the inclusion of a consideration of this problem.

122. It was also pointed out that the limitation of the Commission's study to "non-navigational uses" causes certain difficulties. It would not seem feasible to consider non-navigational uses without taking account of the effect those uses have upon navigation; and, contrarywise, it would be short-sighted not to take account of the effect of navigation upon non-

Article 2 reads:

"Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

"This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin."

⁷²⁷ *Yearbook... 1974*, vol. II (Part Two), pp. 357-359, Document A/CN.4/274, para. 405.

The term "international drainage basin" is defined in article II of the Rules as follows:

"An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus."

⁷²⁸ Capital letters in square brackets preceding questions in this paragraph and in paragraphs 123, 124 and 125 below are those appearing in the final text of the questionnaire sent to Member States (see below, para. 126).

navigational uses. Thus, timber floating and navigation are, in the absence of strict control, not compatible uses, because of the dangers of collision. Hydro-electric production and navigation are also incompatible uses because the dam cuts off the passage of vessels unless locks are built to carry them round it.

123. The report concluded that the major effects of various uses upon watercourses are to change the quantity of water available, the rate of flow of water and the quality of water. All these effects are interrelated. Thus, from the point of view of irrigation, a reduction in water quality, among other consequences, may reduce the quantity of usable water available because the lower quality of the water may require the use of a larger quantity of water to produce the same effect. Because there is only a limited quantity of water available, it is also clear that increasing demand, which is a chronic condition because of increasing population, results in competition among the various uses for the available water. Because uses can be conflicting, both on the national and on the international level, the report proposed that the views of States should be sought as to the range of uses that the Commission should take account of in its work and whether certain special problems need to be considered. The Sub-Committee recommended that the following additional questions should be put to States:

[D.] Should the Commission adopt the following outline of fresh water uses as the basis for its study?

1. Agricultural uses:
 - (a) Irrigation;
 - (b) Drainage;
 - (c) Waste disposal;
 - (d) Aquatic food production.
2. Economic and commercial uses:
 - (a) Energy production (hydroelectric, nuclear and mechanical);
 - (b) Manufacturing;
 - (c) Construction;
 - (d) Transportation other than navigation;
 - (e) Timber floating;
 - (f) Waste disposal;
 - (g) Extractive (mining, oil production, etc.).
3. Domestic and social uses:
 - (a) Consumptive (drinking, cooking, washing, laundry, etc.);
 - (b) Waste disposal;
 - (c) Recreational (swimming, sport, fishing, boating, etc.).

[E.] Are there any other uses that should be included?

[F.] Should the Commission include flood control and erosion problems in its study?

[G.] Should the Commission take account in its study of the interaction between use for navigation and other uses?

124. The Sub-Committee then took up the question of the organization of its work. It was pointed out that it would be possible to concentrate first on the question of quality, that is, pollution problems, or on the question of quantity. Taking up one first, however, would not mean that all consideration of the other should be postponed. For example, establish-

ment of principles to bring waste disposal within acceptable limits would have a direct impact upon the other uses of water. The Sub-Committee said that whether to take up the study of uses in general or the problem of pollution first, was a close issue. There is a somewhat greater amount of State practice available regarding general uses, for example in respect of hydro-electric production and irrigation, than there is regarding waste disposal. On the other hand, there is the fact that waste disposal is a use that affects all the other uses of fresh water, whether as an essential element of the use, e.g. irrigation, industrial production, etc., or as destruction of the use, e.g. recreation or domestic uses, if the pollution is by dangerous chemicals or radioactive wastes. This would appear to afford a somewhat better opportunity to work out general principles and thus make it advantageous to deal with as the first stage. For these reasons, the Sub-Committee recommended that States be requested to reply to the following further question:

[H.] Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?

125. Finally, the report discussed the necessity for co-operation with other agencies in dealing with this subject. The specialized agencies of the United Nations and other international organizations have produced a great volume of technical and scientific work in the area of uses of fresh water. Such studies are currently being carried out and exhaustive work is being done in many of the fields that relate to pollution as a result of the United Nations Conference on the Human Environment, held at Stockholm in 1972, and the establishment of the United Nations Environment Programme. The Sub-Committee stated that the Commission should make full use of these studies in its work and that steps should be taken to advise all international organizations engaged in studies of international watercourses of the legal work being carried on by the Commission and to request their co-operation in this work. A further question raised was whether the technical, scientific and economic aspects of this area of study are both sufficiently complex and of such importance to the formulation of effective legal principles that special steps should be taken to ensure receipt by the Commission of the most competent and useful advice. In this connexion, the Sub-Committee suggested that the precedent of the Committee of Experts established to assist the Commission in dealing with certain aspects of the law of the sea and related conventions might be taken into account, and it recommended that the following final question be put to States:

[I.] Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required through such means as the establishment of a Committee of Experts?

126. At its twenty-ninth session the General Assembly adopted resolution 3315 (XXIX), of 14 De-

ember 1974, in which, in paragraph 4(e) of section I, it recommended that the International Law Commission should:

Continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report.

By a circular note dated 21 January 1975 the Secretary-General invited Member States to communicate to him, if possible by 1 July 1975, the comments on the Commission's questionnaire referred to in the aforementioned paragraph of General Assembly resolution 3315 (XXIX), the final text of which, as communicated to Member States, is reproduced in paragraph 6 of document A/CN.4/294 and Add.1.⁷²⁹

127. Replies to the Secretary-General's note referred to above were received from the Governments of the following States: Argentina, Austria, Barbados, Brazil, Canada, Colombia, Ecuador, Federal Republic of Germany, Finland, France, Hungary, Indonesia, the Netherlands, Nicaragua, Pakistan, Philippines, Poland, Spain, Sweden, United States of America and Venezuela. In document A/CN.4/294 and Add.1 their replies were grouped, following a section containing general comments and observations made by each responding State, on the basis of answers to the specific questions.

128. In the general comments submitted by States, the importance of the task of developing the legal principles governing the non-navigational uses of international watercourses was stressed by several States. The first three questions, which relate to the scope that should be given the term "international watercourse" gave rise to considerable discussion in the replies. A substantial number of States suggested that the study of the non-navigational uses of international watercourses should be based on the traditional definition of an international river. The classical statement of this definition is to be found in the Final Act of the Congress of Vienna of 9 June 1815. Article 108 of the Final Act provides:

The Powers whose States are separated or crossed by the same navigable river engage to regulate, by common consent, all that regards its navigation. For this purpose they will name Commissioners, who shall assemble, at latest, within six months after the termination of the Congress, and who shall adopt, as the bases of their proceedings, the principles established by the following articles.⁷³⁰

Austria, Brazil, Colombia, Ecuador, Poland and Spain supported the use of this traditional definition without qualification and for the study both of the uses of international watercourses and of their pollution.

⁷²⁹ Reproduced in *Yearbook... 1976*, vol. II (Part One).

⁷³⁰ For the text of the Final Act, see A. Oakes and R. B. Mo-wat, eds., *The Great European Treaties of the Nineteenth Century* (Oxford, Clarendon Press, 1918), p. 37.

129. *Canada* also favoured the use of the traditional concept but pointed out that a "legal definition should be a workable starting point and not a limiting factor that would preclude consideration of any appropriate geographical unit when specific, concrete problems are considered" (see A/CN.4/294 and Add.1, sect. II, question A). In discussing this definitional point of departure in relation to uses and to pollution, Canada added that "the use of a geographically narrow definition as a starting point would not preclude consideration of a natural drainage basin, or of a functional unit as described above, where the circumstances of the case so require" (*ibid.*, question B).

130. *The Federal Republic of Germany* also suggested use of the definition derived from the final Act of the Congress of Vienna and in particular with regard to pollution. The same definition was considered also to lend itself to a study of uses with this qualification:

It should not be overlooked, however, that the supply of water to countries below stream may depend just as much on water withdrawals from a national tributary as from the international watercourse concerned. It may therefore be useful to extend a legal study of questions of quantity to aspects of the river basin as a whole, taking duly into account the sovereign rights of the riparian States.

Several treaties concerning river basins have been concluded in conformity with this principle, especially in the African sphere of law (*ibid.*, question B).

131. It is interesting to note that *France* took the opposite point of view.

As far as the use of the watercourse is concerned, it would be almost unthinkable to adopt any concept of a waterway other than that of an international watercourse.

As regards pollution of the waterway, on the other hand, the drainage basin concept might be adopted for the purpose of considering measures to be taken, with the exception of such controls as would have to be organized at the individual State level. However, for reasons which are explained more fully in connexion with question H, the French Government does not consider it advisable at this juncture for the International Law Commission to undertake a study of the pollution of watercourses (*ibid.*, question A).

Nicaragua advanced somewhat similar views as *France* regarding a drainage basin concept for pollution and a somewhat more elaborate version of the traditional definition for uses.

132. States which supported adopting the concept of the drainage basin to determine the scope of the Commission's work on the uses of international watercourses included *Argentina, Barbados, Finland, Indonesia, the Netherlands, Pakistan, the Philippines, Sweden and the United States of America*. The Netherlands suggested that brackish water should be included in any definition of the scope of the Commission's work.

133. *Hungary* put forward the view that:

(a) There is no geographical term so general that it could be applied to the description of all the legal relations relating to the waters or drainage basin which are on the territory of more than one State;

(b) "International river", "international drainage basin" and "frontier waters" are geographically exactly determined and well explainable terms. Therefore, it is not necessary to study the meaning of these terms, but the question what term is suitable to the regulation of certain legal relations.

The following points can be proposed for the classification of these legal relations:

- (i) The water exploitations having effect on the quantity and quality of waters;
- (ii) Other water exploitations;
- (iii) The co-operation of States being either neighbours or on the same drainage basin in the utilization of waters (*ibid.*, question A).

The basis for this position was explained by a detailed analysis of the concept of hydrological unity.

134. *Venezuela* also put forward a searching analysis of various aspects of fresh water uses that distinguished among geopolitical criteria, socio-economic criteria and legal criteria in determining what are international watercourses and concluded that for the purpose of agreements and conventions having constitutive value, the scope of the definition of an international watercourse could be far more restrictive in that, for example, it would not cover the entire drainage basin. With respect to uses and pollution the Venezuelan reply states:

There is no doubt that, from the technical point of view, the drainage basin—as a purely geomorphological concept—is the appropriate basis for the study of problems concerning water resources and, consequently, for the study of the legal aspects of non-navigational uses of international watercourses. However, the following reservation must be reiterated once again: on the one hand, the drainage basin in the geographical sense need not necessarily serve as a basis for the application of a future international régime; on the other hand, the international rules could be applied only or specifically to cases of direct or obvious detriment or unfair advantage to any of the users (*ibid.*, question B).

Since pollution of international watercourses may be due to causes other than the use of the surface water of the drainage basin and even to other factors, or to the use or pollution of the ground water of drainage basins which may not necessarily coincide with the surface water, the basis for the technical study of pollution of international watercourses, and consequently of the legal aspects of such pollution, should be broader than that provided by the drainage basin alone (*ibid.*, question C).

135. The replies to the questions regarding the various fresh water uses that should be included in the Commission's study were, in general, in support of the proposed outline of uses.⁷³¹ Suggestions for reorganization of the outline were made by *Brazil, the Federal Republic of Germany, Indonesia, Nicaragua, Poland* and *Venezuela*. These suggestions would not, however, require substantial changes in the list of uses. A number of additional uses were proposed in

response to question E, among them commercial fishing, gravel extraction, aquatic food control, stock-raising, pollution from inland shipping, sediment discharge, forestry and heat dissipation.

136. All the States which replied to question F, with the exception of France, supported the inclusion of flood control and erosion problems in the Commission's study. *Poland* suggested that the problem of rubble movement should also be taken into account and *Spain* proposed adding the questions of the draining and reclamation of unhealthy terrain or swamplands. Furthermore, there was unanimity in the replies to question G that the interaction between the use of international watercourses for navigational purposes and their other uses should be taken into account.

137. Twenty States replied to question H, which inquired whether the problem of pollution should be given priority in the Commission's study. Thirteen States considered that the question of uses should be taken up first. A substantial number of those States pointed out that pollution was a consequence of use in many cases, and that polluting effects could be examined in conjunction with consideration of the particular use causing the pollution. Six States suggested taking up pollution problems as a first step in the study. Sweden and the United States of America, although expressing support for dealing with pollution initially, indicated no objection to dealing simultaneously with uses and pollution. Hungary suggested giving priority both to the pollution problem and to the study of how to preserve water reserves.

138. The final question (question I) was whether special arrangements should be made for the Commission to obtain technical, scientific and economic advice through such means as the establishment of a Committee of Experts. Of the 20 States which replied to this question, 18 indicated support for the establishment of a group of experts to assist the Commission in its work if it found that such assistance was needed for the successful completion of the work. A number of other States indicated that there did not appear to be an immediate necessity to establish such a group. Several States proposed that every effort be made to utilize the available resources of the United Nations and its specialized agencies.

139. At the present session, the Special Rapporteur submitted, in document A/CN.4/295,⁷³² his first report on the law of the non-navigational uses of international watercourses. The report was devoted to a consideration of Governments' replies to the questionnaire and the conclusions that might be drawn therefrom with regard to the scope and direction of the work on international watercourses. In view of the large measure of agreement in the replies to questions D through I (see above, paras. 123–125), and the substantial variations among the replies to ques-

⁷³¹ See above, para. 123.

⁷³² Reproduced in *Yearbook... 1976*, vol. II (Part One).

tions A, B, and C (see above, para. 120), which deal with the scope of the Commission's work, the major part of the report was devoted to a discussion of what is encompassed in the term "international watercourses".

140. The report suggested that the physical characteristics of water must be taken into account in considering how to define the scope of the inquiry into the legal aspects of the uses of international watercourses. It further suggested that there is a real difference when the authority of the State ends at a point on land and when it ends at a point in the water. The difference is not in the concept of authority but in its applicability to physical phenomena. State A can require that beer not be manufactured on its territory by the exercise of its own authority and this is not affected by whether or not beer is brewed in State B. However, State A's prohibition against spilling oil into waters of a lake that lies partly on State A's side of a boundary cannot be effective if State B on the other side of the lake does not also prevent such discharges into the lake. The physical properties of liquids and normal movements of the water will result in some oil crossing the border. So, too, a prohibition by State A against reducing the water level in a boundary river is ineffective if water users in State B on the other side of the river are not under any restriction as to the amount of water they can withdraw from the river. The principle of sovereignty will not keep water on one side of the river up when water on the other side goes down.

141. A number of replies to the questionnaire had suggested that there are differences in international law as it applies to waters which form a boundary and waters which cross a boundary because of the different nature of the sovereignty exercised (e.g. *Brazil, Colombia, Ecuador*). The report states that the issue is whether the concept of the boundary with an equal and opposing sovereignty on each side is the starting point or whether it is the physical characteristics of water over which different sovereignties are exercised at different times that must be taken into account.

142. The report enquired what, from the standpoint of the physical characteristics of water, is the difference if the intangible boundary line is drawn across the watercourse instead of lengthwise—if it segments a watercourse rather than bisects it? The river flows through the territory of riparian States successively rather than simultaneously. But, if an upstream State takes water out of a river flowing through its territory and does not replace it, the quantity of water that crosses the boundary will be less and the level of the river in the downstream State will be lower. The end result is a loss of water and is the same as the end result of diversion from a boundary river. If a factory in an upstream State dumps oil into a stream, which is not removed or disposed of before the oil reaches the boundary, the oil will be carried into the downstream State even as it is carried across

the frontier in a boundary lake. As far as fundamental effects upon quantity and quality of water are concerned there appears to be no basic difference in whether the act or inaction producing the effect occurs in an upstream State or in a boundary-water State. Differences that exist relate principally to timing, certainly and quantum of result. Organic wastes dumped into a trans-boundary river far enough up from the boundary may be transformed by bacterial action before reaching the boundary. The same result would be possible in a large and quiet boundary lake but unlikely in a boundary river. These variations in probability and of result, however, do not change the basic physical consequences which result from fresh water being mobile, movable and the most universal of solvents, to list only three of its qualities that give rise to legal consequences.

143. The report, however, made clear that recognition of the physical characteristics of river waters, and in particular their unity, in working out legal principles regarding their uses, would not necessarily result in barring such distinctions as are contained in the following paragraphs of resolution No. 25 of the Act of Asunción regarding the River Plate Basin, entitled "Declaration of Asunción on the use of international rivers":

1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.

2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.⁷³³

144. In that connexion, the Special Rapporteur stated in his report:

The distinction made in the two paragraphs is not contrary to the thesis that in formulating rules for an international river it is necessary to take into account the unity of the river. At this stage it would be premature to discuss the content of the legal principles contained in the two paragraphs. However, the fact that one rule is made applicable to boundary waters and another made applicable to successive international rivers is merely a recognition of what has been pointed out above. While anything affecting quantity, quality or rate of flow of water produces the same type of result across vertical boundaries as across lateral ones, there are differences in the certainty, quantity and timing of the result. Differences may well justify a more restrictive set of legal requirements for boundary waters than for successive rivers. This question is clearly one of the most important and difficult that the Commission must deal with.

Paragraph 2 of the Declaration of Asunción, nonetheless, in authorizing use of water by a State in accordance with its needs "provided that it causes no appreciable damage to any other State of the Basin", makes it crystal clear that this principle applies throughout the whole Plate Basin without reference to the particular location of any State within the Basin, whether the use of the water involves a tributary or sub-tributary, and whether the "appreciable damage" is caused by an adjacent or a non-adjacent

⁷³³ *Yearbook... 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 326.

State. The principles in paragraphs 1 and 2 of the Declaration are in accord with recognition of the hydrologic unity of the basin (A/CN.4/295, paras. 38-39).

145. In view of the differing positions of States regarding the scope of the work to be carried on regarding international watercourses, the report proposed that the Commission adopt the position that its task is to formulate legal principles and rules concerning the non-navigational uses of international river basins. The proposal was based largely upon a recapitulation of the present-day practice and doctrine that had been set forth in the report of the Sub-Committee discussed in paragraphs 115 to 125 above.

146. However, the Special Rapporteur also stated in his report:

Almost all of the States responding recognized, either expressly or implicitly, that the purpose of a definition of international watercourses should be to provide a context for examination of the legal problems that arise when two or more States are present in the same fresh water system and that a definition should not ineluctably bring with it corollary requirements as to the manner in which those legal problems should be solved. Thus some States objected to use of the drainage basin concept because they considered that its use implied the existence of certain principles, especially in the field of river management. Other States considered that traditional concepts such as contiguous and successive waterways would be too restricted a basis on which to carry out the study in view of the need to take account of the hydrologic unity of a water system.

Consequently, it would seem wise for the Commission to follow the advice proffered by a number of the commenting States that the work on international watercourses should not be held up by disputes over definitions. This approach is, of course, in line with the customary practice of the Commission in deferring the adoption of definitions, or at the most adopting them on a provisional basis, pending the development of substantive provisions regarding the legal subject under review (*ibid.*, paras. 12-13).

147. The Special Rapporteur also recommended that in dealing with the matters raised in questions D through I of the questionnaire, the unanimous or nearly unanimous positions reflected in the replies should be followed. With regard to the final question regarding expert assistance for the Commission, the Special Rapporteur stated:

As an interim measure, the Special Rapporteur has been in communication with some twelve of the United Nations family of agencies and organizations which are involved in one or another aspect of river development. They were asked whether they would participate in assisting the Commission with the technical expertise without which it will not be possible to achieve a sound and workable set of legal rules. The response has been very favourable (*ibid.*, para. 47).

148. The Commission discussed the question of the law of the non-navigational uses of international watercourses at its 1406th to 1409th meetings held on 14, 15, 16 and 19 July 1976.⁷³⁴

149. In introducing the report, the Special Rapporteur pointed out that, as he was not standing for re-election to the Commission, it would be necessary to select a new Special Rapporteur at the 1977 session of the Commission. The desirability of proceeding with work on the subject as expeditiously as possible had been emphasized by a substantial number of representatives in the Sixth Committee at the thirtieth session of the General Assembly and even more forcefully by the Economic and Social Council in its resolution 1955 (LIX) of 25 July 1975, entitled "International river basin development", which appealed to the International Law Commission to give priority to the study of the law of the non-navigational uses of international watercourses and to submit a progress report to the United Nations Water Conference, to take place in 1977.

150. To the extent that threshold issues could be settled at the present session, the new Special Rapporteur would have a basis for beginning work on the substantive aspects of the subject, and this would mitigate the effects of the delay that the changeover would inevitably produce. It must always be borne in mind that in addition to what might be termed political considerations, the mounting pressures on the available supply of fresh water also made it essential for the Commission to take a position which would enable the new Special Rapporteur to move ahead with his work. A recent study by the secretariat of the Economic Commission for Europe⁷³⁵ concerning Europe's water supply problems showed that water resources no longer covered needs in five European countries—Cyprus, the German Democratic Republic, Hungary, Malta and the Ukrainian SSR—and that seven more countries—Belgium, Bulgaria, Luxembourg, Poland, Portugal, Romania and Turkey—did not expect to be able to meet the growing demand for water from their own resources by the year 2000.

151. The Special Rapporteur pointed out that because of its self-renewing supply cycle, water could be said to be the one natural resource over which States truly exercised permanent sovereignty. Other natural resources usually thought of in connexion with that concept—for instance, minerals and oil—were finite resources. Nevertheless, a unique characteristic of water, its mobility, raised the question to what extent, if at all, the concept of permanent sovereignty over natural resources was applicable to its case. Water could be said to be the one example of perpetual motion. This mobility of water as a natural resource meant that permanent sovereignty would have to be exercised differently than in the case of resources which were not naturally mobile. The task of the Commission would be to propose how sovereignties situated in a particular river basin should be exercised over the natural resource which, because of its physical qualities, was common

⁷³⁴ See *Yearbook... 1976*, vol. I.

⁷³⁵ "Preparatory work for the United Nations Water Conference: draft report on policy options in water use and development in the ECE region" (WATER/GE.1/R.21).

to several States. In his view, in the case of a river system situated in two or more States, the principle could be applied, not in the sense of permanent sovereignty over a particular quantity of water moving through national territory, but as permanent sovereignty over a portion of the renewable and unitary resource contained in the river basin that lay within the territorial jurisdiction of the State. By nature, the process of water renewal was always confined within a certain geographical area, the boundaries of which were determined by watershed limits, rainfall patterns and other natural forces.

152. Another physical aspect of water that should be taken into account was its cohesiveness. The flowing water in any basin has a multi-national character. Actions taken regarding the water in one or several parts of the basin could produce effects hundreds of miles away. The scope of the Commission's work on the topic, it seemed to him, had to be so defined as to take account of the mobility and cohesiveness of fresh water. The proper basis for the Commission's work, which would enable the doctrine of permanent sovereignty over natural resources to be applied to water, would be to adopt the concepts of the river basin as delineated by watersheds and the system into which water gathered itself. The concepts of ownership that were generally considered applicable to natural resources had not been designed for a resource with the physical characteristics of water, and the Commission needed to formulate rules which took those characteristics into account.

153. The differences in the views of States regarding answers to questions A, B, and C of the questionnaire on the scope of the term "international watercourses" were reflected in the Commission's discussion of this aspect of its work. Several members voiced strong support for the 1815 Congress of Vienna definitions of an international river.

154. One of those members stated that the mandate of the Commission was very clear: it was to formulate rules regarding the non-navigational uses of international watercourses—and not to deal with the river basin, which was a purely territorial concept covering part of the territory of a given country or given countries. What was to be considered as international, according to the customary rules of international law embodied in articles I and II of the Regulation of 24 March 1815,⁷³⁶ concerning the free navigation of rivers, and articles 108 and 109 of the Final Act of the Congress of Vienna of 1815,⁷³⁷ were the international watercourses which separated or cut across the territory of two or more States and not the physical portion of land contained within the *divortium aquarum* of an international river.

⁷³⁶ French text of Regulation in G. F. de Martens, ed., *Nouveau recueil de Traités*, vol. II, 1814–1815 (Göttingen, Dieterich, 1887), p. 434.

⁷³⁷ For reference see above, foot-note 730.

155. It was pointed out that river basins varied from river to river, from place to place and from region to region. They might encompass very limited portions or very large portions of the territory of a State or might cover parts of the territory of different States. The Amazon basin covered an area of 4 787 000 square kilometres and the River Plate basin an area of 2.4 million square kilometres. It could not seriously be contended that the Commission had the authority to formulate rules that would be valid for the whole of such huge areas, imposing a kind of dual or multiple sovereignty.

156. Another member advanced the view that the topic under consideration was not ripe for codification because experience was rapidly accumulating and scientific progress was opening many doors, with the result that it was impossible to predict new developments in irrigation and the proper economic uses of water. Thus, although experience indicated that there were certain principles which were applicable to all States, it was difficult and dangerous to make generalizations. In supporting the 1815 traditional definition, he added that the concept of a drainage basin was too broad and should be used only for engineering and technical studies, not for a study of the legal aspects of the uses or pollution of international watercourses.

157. In discussing this problem a number of members pointed out that the nature of the problems to be dealt with and the nature of the solutions to those problems were more significant than the question of definitions. Thus, one member noted, when problems of pollution were of primary importance, that made it necessary to consider the drainage basin, because the pollution of a watercourse was usually linked with the pollution of its tributaries. Another remarked that the concept of a river basin could be accepted provisionally, but ultimate acceptance depended on the rules formulated for riparian States. A third member referred to the vast size of certain river basins. The fact that a basin was vast should not prevent the Commission from dealing with it. Rather, such vastness made it all the more necessary to formulate rules to guide States in the non-navigational uses of international watercourses.

158. A majority of the members agreed that the rules to be formulated by the Commission should not be more than basic principles which would apply to all rivers. To that end, one member suggested that the Commission should use as a basis the broad concept of a geographical basin.

159. In this connexion, he noted that, at a meeting of the Presidents of the American States, reference had been made to the development of integrated river basins. Taken as a geographical unit, a river basin included all the States concerned and it was in the interest of those States to work together to develop rules for its use.

160. Each member of the Commission participating in the discussions commented on the nature of the general principles that might be taken into account. One member remarked that what the Commission had to try to do was to determine, on the basis of the principle of international co-operation, what more specific principles could be applied to the non-navigational uses of international watercourses. That would, of course, be a difficult task; but if the Commission could affirm that the old maxim *sic utere tuo ut alienum non laedas* applied to the law of the non-navigational uses of international watercourses, it would be able to give valuable guidance. For although States had a duty to co-operate with one another, they were sometimes reluctant to agree on the principles of such co-operation because, in many disputes, they were not sure how far such co-operation should go and to what extent they had to share their water resources.

161. Another member specified the concepts of abuse of rights and the requirements of good faith as examples of principles that might be taken into account. A number of members noted the humanitarian aspects of this subject. One recalled that the resolutions of the Economic and Social Council dealing with the development and use of international river basins embodied the principle of effective and sovereign control over water as a natural resource, and referred to the principle of ecological good neighbourliness. The Commission should bear these principles in mind and try to formulate rules to encourage the use of international watercourses without damaging the interests of other States which were also entitled to use them.

162. One member stressed that sovereignty was not a basis for dealing with the uses of international watercourses. The Commission must realize that there was another principle of international law to which it should attach greater importance, namely, the principle of the development of international law in the direction of a social law dealing with the delimitation of competence and sovereignty and with the interests of the international community as a whole in using all natural resources for the benefit of all mankind.

163. The thesis was advanced that development of the law concerning international watercourses could be expected to follow a pattern similar to that of the work on the law of the sea. It would surely be generally recognized that there was a common interest in

the question so great that it transcended the interests contained within national frontiers: at the same time, the world would remain a world of sovereign States, and legal concepts would be developed through the interplay of sovereign interests.

164. This exploration of the basic aspects of the work to be done in the field of the utilization of fresh water led to general agreement in the Commission that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses. In so doing, every effort should be made to devise rules which would maintain a delicate balance between those which were too detailed to be generally applicable and those which were so general that they would not be effective. Further, the rules should be designed to promote the adoption of régimes for individual international rivers and for that reason should have a residual character. Efforts should be devoted to making the rules as widely acceptable as possible, and the sensitivity of States regarding their interests in water must be taken into account.

165. It would be necessary, in elaborating legal rules for water use, to explore such concepts as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment, which would need to be taken into account in addition to the requirements of reparation for responsibility.

166. The discussions in the Commission showed over-all concordance with the views expressed by States in response to questions D through I of the questionnaire. The Commission indicated that the Special Rapporteur could rely upon the outlines of uses suggested in connexion with question D but taking into account the various suggestions made by States for additions to, or variations in, the outlines. Flood control, erosion problems and sedimentation should be included in the study, as well as the interaction between use for navigation and other uses. Pollution problems should, so far as possible, be dealt with in connexion with the particular uses that give rise to pollution. The new Special Rapporteur should continue to maintain the relationships already established with United Nations agencies and raise with the Commission the question of securing technical advice if and when such action appears necessary.

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Question of treaties concluded between States and international organizations or between two or more international organizations

167. At its twenty-sixth (1974) and twenty-seventh (1975) sessions the Commission adopted in first reading articles 1 to 4 and 6 to 18 of its draft articles on treaties concluded between States and international organizations or between international organizations.⁷³⁸ At the present session, owing to the time required for other items, the Commission was unable to consider the topic. As indicated below,⁷³⁹ the Commission intends to resume consideration of the topic at its next session, in 1977, on the basis of the fourth and fifth reports submitted in 1975 and at the present session by Mr. Paul Reuter, the Special Rapporteur,⁷⁴⁰ as well as on the basis of further reports that the Special Rapporteur may consider appropriate to submit to the Commission. The questions contained in the fourth and fifth reports by the Special Rapporteur relate to reservations, entry into force and provisional application of treaties, and observance, application and interpretation of treaties.

B. Programme and organization of work

168. The Commission, at its twenty-seventh session in 1975, recognized the importance of improving methods for planning and carrying out its work. A small group was organized which, after consultations with the Special Rapporteurs for the subjects on the Commission's active agenda, produced a set of proposals for completing either first or second readings of draft articles in the fields of State responsibility, 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, by the conclusion of the Commission's five-year term of office ending in 1981. Plans for the fifth subject on its active agenda, the law of the non-navigational uses of international watercourses, were left open as the Commission was awaiting responses to the questionnaire on this subject which had been sent by the Secretary-General to States Members of the United Nations.

169. The Commission considered the Group's proposals and took appropriate decisions on the basis of

those proposals. The report of the Commission to the General Assembly on the work of its twenty-seventh session referred to the Group's activities and the adoption of its suggestions.⁷⁴¹ The establishment of the Group and the development by the Commission of guidelines for completion of work on the active subjects were received with approval in the General Assembly and suggestions were made that the Commission continue its efforts in this regard.⁷⁴²

170. In the light of the support in the General Assembly for these initial efforts, the Commission, at the present session, established a Planning Group composed of Mr. Abdullah El-Erian, Mr. Richard D. Kearney (Chairman), Mr. José Sette-Câmara, Mr. Senjin Tsuruoka and Mr. Nicolai Ushakov. It held four meetings, on 23 June, 9 July, 21 July and 22 July 1976. Any member of the Commission who wished to make proposals regarding the activities of the Commission was invited to attend the first meeting and to put forward his suggestions. A considerable number of members attended that meeting and a far-reaching and fruitful discussion took place. Other members, who were unable to attend, submitted written comments.

171. The Commission considered whether it would be desirable to establish the Group as a permanent committee. There was substantial support for this position, but as that would call for adjustment in the activities of other groups, it was decided to leave it to the newly constituted Commission to study the matter further and take a decision on it at its 1977 session. The Group's tasks might include: making proposals regarding the organization of the work of the Commission at the ensuing annual session; keeping under review the progress being made to achieve the goals for completion of work on the subjects on the active agenda of the Commission and reviewing with the Special Rapporteurs and, as required, making recommendations concerning any action necessary to assist in the achievement of those goals; considering, from time to time, the long-term programme of the Commission and, as appropriate, suggesting the placing of new items on the active agenda; studying the working methods of the Commission, and suggesting the adoption of methods and procedures to help the Commission in carrying on its work in an efficient and expeditious manner but without impairment of the high standards that are essential to the accomplishment of this task.

172. In the light of recommendations made by the Enlarged Bureau, on the basis of suggestions made

⁷³⁸ See *Yearbook... 1974*, vol. II (Part One), pp. 294 *et seq.*, document A/9610/Rev.1, chap. IV, and *Yearbook... 1975*, vol. II, pp. 171 *et seq.*, document A/10010/Rev.1, chap. V.

⁷³⁹ See below, para. 172.

⁷⁴⁰ See, respectively, *Yearbook... 1975*, vol. II, p. 25, document A/CN.4/285, and *Yearbook... 1976*, vol II (Part One), document A/CN.4/290 and Add.1.

⁷⁴¹ *Yearbook... 1975*, vol. II, p. 184, document A/10010/Rev.1, paras. 140-147.

⁷⁴² See *Official Records of the General Assembly, thirtieth session, Annexes*, agenda item 108, document A/10393, paras. 197-198.

by the Planning Group, the Commission considered the allocation of time for active subjects at the twenty-ninth session. The Commission took into account that the draft articles on the most-favoured-nation clause would be awaiting comments by Governments and that a new Special Rapporteur would have to be chosen for the topic of the law of the non-navigational uses of international watercourses. The available time was thus to be allocated among the topics of State responsibility, succession of States in respect of matters other than treaties and the question of treaties concluded between States and international organizations or between two or more international organizations. The Commission decided that three weeks should be allocated to each of the first two topics and four to the third, which, for lack of time, had not been discussed during the twenty-eighth session.

173. The Commission also approved the recommendation of the Group, which was submitted to it by the Enlarged Bureau, that at least three meetings should be set aside for a discussion of the second part of the topic "relations between States and international organizations". In considering the question of diplomatic law in its application to relations between States and international organizations, the Commission concentrated first on the part relating to the status, privileges and immunities of representatives of States to international organizations. The draft articles which it adopted on this part at its twenty-third session in 1971⁷⁴³ were referred by the General Assembly to a diplomatic conference. This conference met in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.⁷⁴⁴ The Commission requested the Special Rapporteur on the topic, Mr. Abdullah El-Erian, to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of international organizations and their officials, experts and other persons engaged in their activities who are not representatives of States.

174. In respect of ways and means of improving the working methods of the Commission, the following were among the problems proposed for study by the Planning Group at future sessions:

- (1) Number of subjects to be discussed at each annual session of the Commission;
- (2) Time of submission of reports by Special Rapporteurs;

⁷⁴³ See *Yearbook... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect D.

⁷⁴⁴ For the text of the convention, see *Official Record of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

- (3) Submission of written comments on reports by members in advance of the annual meeting of the Commission;
- (4) The question of methods of preparation of the text of the Commission's reports.

175. The Planning Group decided to concentrate at the present session on the possibilities of saving time through seeking to eliminate to the greatest extent possible discussion in the Commission occasioned by differences in terminology between the language texts of the articles submitted to it by the Special Rapporteurs. The members of the Group agreed that in the initial discussion of draft articles a substantial amount of time was taken up by problems which appeared to be substantive, but which after examination proved to arise from terminological differences.

176. The Planning Group thought that the best means of dealing with the problem would be by the institution of a system of advance review of the various language texts of draft articles for the purpose of achieving terminological uniformity. The Planning Group proposed that the following procedures be adopted:

(1) Reports containing draft articles should be submitted by the Special Rapporteur in sufficient time to permit distribution at the beginning of the annual session of the Commission at which the initial review is to be made.

(2) A Review Committee should be selected each year by the Commission. Initial review of draft articles should be made by a group composed of members with expertise in one of the working languages used in the Commission. The Committee should be composed of sufficient members to supply expertise in all the working languages of the Commission.

(3) The initial review should be for the purpose of harmonizing the language texts of the draft articles submitted and seeking the clearest expression of the principles and provisions proposed by the Special Rapporteur. The Review Committee should, for this purpose, meet with the Special Rapporteur who submitted the draft articles and, to the extent practicable, the Secretariat translators.

(4) The Special Rapporteur should make any changes in the draft articles appropriate on the basis of the initial review and submit a revised text to the Secretariat by 1 November following the close of the session.

(5) The Secretariat should distribute the revised articles to the members of the Commission in sufficient time to ensure that they are received by the following 31 January.

Owing to lack of time the Commission decided to consider the proposals of the Planning Group at its next session.

177. One of the suggestions made to the Planning Group was that all members should submit comments on draft articles in writing prior to consideration of the articles by the full Commission. The Group felt that this was too sweeping a proposal to be acceptable. As the members of the Commission all have other demanding occupations, the burden imposed by the suggestion upon the members, and particularly upon the Special Rapporteurs, would be

too great to be tolerable. It was agreed, however, that it would be desirable to enable members to submit written comments in advance of oral discussion if they were able and willing to do so. The procedure envisaged would promote this possibility.

178. The recommendations and suggestions of the Planning Group were considered by the Enlarged Bureau at its second and third meetings on 21 and 22 July 1976 and, on the recommendation of the Enlarged Bureau, decisions were taken by the Commission at its 1413th meeting on 23 July 1976, as indicated in the above paragraphs.

179. The Commission also decided to reaffirm the conclusions it reached at its twenty-sixth session in 1974 in connexion with the report of the Joint Inspection Unit, including those reached on the seat of the Commission, which read as follows:

As to the seat of the Commission, the General Assembly in 1955 expressly amended article 12 of the Commission's Statute to provide that the Commission was to sit at the United Nations Office at Geneva. This decision of the General Assembly was not taken lightly but after a thorough examination of all aspects of the matter and on the basis of the requirements of the Commission's work. The basic assumption on which this decision of the Assembly was taken remains as valid today as it was in 1955. The United Nations Office at Geneva affords the best possible conditions for the Commission's work. The Palais des Nations has an exceptionally specialized library, originally constituted in the days of the League of Nations and including collections of works and periodicals going back for several decades. This is an absolutely indispensable working instrument both for the special rapporteurs—some of whom come to Geneva at their own expense between sessions expressly to prepare their work—and for the members of the Commission in general. The translators, revisers, interpreters, [précis-writers] and others of the staff of the Palais des Nations have, over the years, become familiar with the Commission's work. They are acquainted with the 25 years of accumulated precedent resulting from the work of the Commission. Besides, Geneva is the most suitable place for the work of a body such as the Commission which is called upon to solve legal problems in a quiet and studious atmosphere. Geneva is also the meeting-place of the International Law Seminar, organized annually by the United Nations Office at Geneva, which is closely linked with the Commission's sessions: members of the Commission give lectures to the Seminar, and the participants have the opportunity of attending the Commission's meetings—an arrangement which constitutes one of the salient features of the Seminar.

Another important factor to be borne in mind is that the members of the Commission, a body which is not in permanent session, are persons working in the academic and diplomatic fields with professional responsibilities outside the Commission, as required by their respective Governments or professions, a fact which enables the Commission to proceed with its work not in an ivory tower but in close touch with the realities of international life. Many of the members have made permanent arrangements to be present in Geneva and during the Commission's sessions. For instance, several members have been appointed permanent representatives in Geneva or have made Geneva one of the main centres of their activities. In this connexion, it should be recalled that, as already indicated, the members of the Commission being elected by the General Assembly in their personal capacity, cannot be replaced by alternates or advisers. If the seat of the Commission were transferred outside Geneva it would be extremely difficult for many members to attend meetings of the Commission,

and this would negate one of the basic principles of the Statute of the Commission, namely to ensure the presence in the Commission of the most qualified representatives of the main forms of civilization and principal legal systems of the world.

...⁷⁴⁵

180. Recalling that the procedures and organizational patterns of the Commission, as set forth in the Commission's Statute approved by the General Assembly and as evolved in practice, were conceived and determined bearing essentially in mind the very special nature of the task performed by the Commission and its needs, the Commission expressed confidence that no modifications of such procedures or patterns would be made without its having an opportunity to express its views thereon.

C. Co-operation with other bodies

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

181. At its seventeenth session held at Kuala Lumpur (Malaysia) in June-July 1976, the Asian-African Legal Consultative Committee commemorated its twentieth anniversary. The Chairman of the twenty-seventh session of the Commission, Mr. Abdul Hakim Tabibi, attended that session and made a statement.

182. The Commission was informed by a letter from the Secretary-General of the Committee, Mr. B. Sen, that the Committee attaches the highest importance to its co-operation with the International Law Commission and that purely exceptional circumstances had prevented it from sending an observer to the Commission's twenty-eighth session. The Commission was further informed that the Committee's eighteenth session, to which the Commission has a standing invitation to send an observer, would be held at Baghdad (Iraq) in early 1977. The Commission requested its Chairman, Mr. Abdullah El-Erian, to attend the session or, if he was unable to do so, to appoint another member of the Commission for that purpose.

2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

183. The twenty-fourth session of the European Committee on Legal Co-operation was held at Strasbourg (France) in December 1975. The Commission was unable to send an observer to the session, which coincided with the thirtieth session of the General Assembly.

184. The European Committee on Legal Co-operation was represented at the twenty-eighth session of the Commission by Mr. H. Golsong, Director of

⁷⁴⁵ *Yearbook... 1974*, vol. II (Part One), p. 310, document A/9610/Rev.1, paras. 209 and 210.

Legal Affairs of the Council of Europe, who addressed the Commission at its 1407th meeting.

185. Mr. Golsong referred, first of all, to certain problems relating to the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, such as the application of its provisions to the organs of the European Communities, and the relationships between that European Convention and the International Covenant on Civil and Political rights, which had recently entered into force. On the question of the pollution of international watercourses, he also mentioned various problems caused by the co-existence of the European Convention for the Protection of International Watercourses against Pollution with three other European conventions which had recently been adopted for the protection of watercourses and oceans against pollution. He further touched on the relationship between that Convention and the directives of the European Communities concerning the discharge of dangerous substances into waters. Mr. Golsong stated that similar problems would inevitably arise if the Commission was to elaborate a universal instrument on the subject, and that the regional experience could help to find a solution on the universal level for the protection of waters. With regard to the question of the capacity of an international organization to become a party to treaties, Mr. Golsong stressed that there are two texts in force relating to the participation of the European Communities in conventions prepared by the Council of Europe. He also noted that the European Convention on State Immunity from Jurisdiction entered into force on 11 June 1976. He further stated that two draft conventions relating to a field which had never been the subject of codification, i.e. mutual administrative assistance, would soon be adopted. In the field of criminal law, he said that two instruments had recently entered into force, one of which concerned the recognition and execution of foreign criminal judgements. Lastly, Mr. Golsong referred to a draft convention adopted under the auspices of the Council of Europe in the field of extradition which broke away from the important principle of non-extradition of political offenders. That convention listed a certain number of concerted acts of violence which would not be considered as political offences for the purposes of extradition.

186. Mr. Golsong hoped that the Commission would be represented at the next session of the Committee, to which it had a standing invitation to send an observer. The Commission requested its Chairman, Mr. Abdullah El-Erian, to attend the session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

3. INTER-AMERICAN JURIDICAL COMMITTEE

187. The Chairman of the Commission's twenty-seventh session, Mr. Abdul Hakim Tabibi, attended the session of the Inter-American Juridical Commit-

tee held at Rio de Janeiro (Brazil) in January and February 1976, as an observer for the Commission, and made a statement before the Committee (A/CN.4/296,⁷⁴⁶ annex II).

188. The Inter-American Juridical Committee was represented at the twenty-eighth session of the Commission by Mr. Alberto Ruiz-Eldredge, who addressed the Commission at its 1389th meeting.

189. Mr. Ruiz-Eldredge stressed that the peoples of the third world, animated by a sincere and deep desire for harmony and peace with justice, realized that the dynamic action of a renovated law based on social and humanistic ideas was the only alternative to confrontation and insurrection, and it was against that background that the Inter-American Juridical Committee was making a contribution in the realm of law to the elimination of all forms of colonialism. He said that the Committee at its two most recent sessions had dealt with two specific subjects connected with the decolonization process. Turning to the question of transnational undertakings, on which the Committee had been continuing its study, he stated that the Committee had received several reports from its members in 1975 and a draft decision had been submitted at the last session. Mr. Ruiz-Eldredge also said that he had been entrusted with the preparation of a draft convention on the conduct of transnational undertakings for the Committee's forthcoming session. He said that a report had been submitted by one Committee member on international economic and commercial offences, on which a discussion was to be held at the next session. In the field of industrial property, the Group of Government Experts was continuing its work with a view to preparing one or more draft conventions on industrial property which would update the international instruments at present in force. Mr. Ruiz-Eldredge further referred to the Committee's work on the immunity of States from jurisdiction which had been conducted on the basis of a report submitted by himself in 1975. He also mentioned a report on the function of law in social change submitted by a member, who explored the possibilities of formulating positive programmes that would contribute to the development of the western hemisphere with the aid of legal instruments, and described some of the measures taken in Latin America and elsewhere. With regard to the draft convention on the protection of the archaeological, historical and artistic heritage of the American nations which the Committee had prepared in 1973, he reported that the Committee was now revising it, taking into account the comments received from Governments. In the field of private international law, the Committee had been entrusted with the drafting of the draft rules of procedure and draft conventions for a second Inter-American Specialized Conference on Private International Law convened by the General Assembly of the OAS. He also informed the Commission that the Committee had or-

⁷⁴⁶ Reproduced in *Yearbook... 1976*, vol. II (Part One).

ganized a third course of study on international law which was to be held at Rio de Janeiro (Brazil) in July and August 1976.

190. The Commission was informed that the next session of the Committee was to be held in July and August 1976. The Commission, which had a standing invitation to send an observer to the sessions of the Committee, requested its Chairman, Mr. Abdullah El-Erian to attend the next session of the Committee, or, if he was unable to do so, to appoint another member of the Commission for that purpose.

D. Publication of a new revised edition of the handbook, *The Work of the International Law Commission*

191. The Commission decided to ask the Secretary-General to publish, as soon as possible, a new revised edition of the handbook, *The Work of the International Law Commission*,⁷⁴⁷ and to incorporate therein a summary of the latest developments of the work of the Commission as well as the texts of new Commission drafts and codification conventions recently adopted, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Having been informed that the Office of Public Information of the United Nations Secretariat is willing to include the new revised edition of the handbook in its 1976/77 publications programme in English and in 1977 or 1978 in other languages, the Commission expressed its appreciation to that Office for its co-operation.

E. Date and place of the twenty-ninth session

192. The Commission decided to hold its next session at the United Nations Office at Geneva from 2 May to 22 July 1977.

F. Representation at the thirty-first session of the General Assembly

193. The Commission decided that it should be represented at the thirty-first session of the General Assembly by its Chairman, Mr. Abdullah El-Erian.

G. Gilberto Amado Memorial Lecture

194. In accordance with a decision taken by the Commission at its twenty-third session,⁷⁴⁸ and

thanks to another grant by the Brazilian Government, a fourth Gilberto Amado Memorial Lecture was given at the Palais des Nations on 3 June 1976.

195. The lecture, which was delivered by Sir Humphrey Waldock, Judge of the International Court of Justice, was on "Aspects of the Court's Advisory Jurisdiction". It was attended by members of the Commission and of its secretariat, other distinguished jurists, including some from permanent missions, delegations, the secretariat of the Geneva Office of the United Nations, the secretariats of the specialized agencies at Geneva and the University of Geneva, and participants in the International Law Seminar. The lecture was followed by a dinner. The Commission hopes that, as on the three previous occasions, the text of the lecture will be printed in English and French and so made accessible to the largest possible number of specialists in the field of international law.

196. The Commission is grateful to the Brazilian Government for this renewed gesture, and hopes that its financial assistance will be maintained so as to make possible the continuance of the series of lectures, during the sessions of the International Law Commission and the International Law Seminar, as a tribute to the memory of the illustrious Brazilian jurist who for many years was a member of the International Law Commission. The Commission asked Mr. Sette Câmara to convey its gratitude to the Brazilian Government.

H. International Law Seminar

197. Pursuant to General Assembly resolution 3495 (XXX) of 15 December 1975, the United Nations Office at Geneva organized, during the Commission's twenty-eighth session, the twelfth session of the International Law Seminar for advanced students of this subject and junior government officials who normally deal with questions of international law in the course of their work.

198. Between 17 May and 4 June 1976, the Seminar held 11 meetings devoted to lectures followed by discussions.

199. The following nine members of the Commission generously gave their services as lecturers: Mr. Calle y Calle (Diplomatic and territorial asylum), Mr. Hambro (The future of Antarctic co-operation), Mr. Kearney (The uses of international watercourses), Mr. Martinez Moreno (The Central American Court of Justice), Mr. Quentin Baxter (Law-making methods in the United Nations), Mr. Sette Câmara (The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character), Mr. Tammes (The binding force of international obligations of States for persons under their jurisdiction), Mr. Ushakov (International détente and the gradual development of international

⁷⁴⁷ United Nations publication, sales No. E.72.I.17.

⁷⁴⁸ See *Yearbook... 1971*, vol. II (Part One), p. 354, document A/8410/Rev.1, paras. 164-169.

law) and Mr. Ustor (The Customs Union issue). Mr. Pilloud, Director of the Department of Principles and Law of the International Committee of the Red Cross, spoke about the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.⁷⁴⁹ Mr. Raton, Director of the Seminar, gave an introductory talk on the International Law Commission and its work.

200. The 25 participants, each from a different country, also attended the fourth Gilberto Amado Memorial Lecture and the meetings of the Commission. They had access to the facilities of the United Nations Library and an opportunity to attend a film show given by the United Nations Information Service. They were supplied, free of charge, with copies of the publication entitled *The Work of the International Law Commission*,⁷⁵⁰ which is essential for those following the work of the Seminar, together with the basic documents necessary for following the discussions of the Commission and the lectures of the Seminar. Participants were also able to obtain or to

purchase at reduced cost United Nations documents which are unavailable or difficult to find in their countries of origin.

201. As in the past, none of the cost of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants. The Governments of Denmark, Finland, the Federal Republic of Germany, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. Such fellowships, ranging in value from \$2,000 to more than \$4,000, were awarded to 14 candidates. With the award of fellowships, it is now possible to achieve an adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending solely by lack of funds. The situation is not entirely satisfactory, however, despite the renewed generosity of the above-mentioned Governments. Three selected candidates were unable to attend the current session for lack of funds. It is to be hoped, therefore, that other Governments will also be able to award fellowships. It is the invariable practice of the organizers of the Seminar to inform donor Governments of the beneficiaries' names and the beneficiaries themselves are always told who has provided their fellowships.

⁷⁴⁹ In conformity with paragraph 3 of General Assembly resolution 3032 (XXVII) of 18 December 1972.

⁷⁵⁰ See above, para. 191.

**CHECK LIST OF DOCUMENTS OF THE TWENTY-EIGHTH SESSION
NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/288	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 4 above (A/31/10, para. 8).
A/CN.4/289/Add.1 and Corr.1	Filling of casual vacancies. Addendum to the note by the Secretariat—list of candidates and <i>curricula vitae</i>	Mimeographed.
A/CN.4/L.241	The law of the non-navigational uses of international watercourses: Economic and Social Council resolution 1955 (LIX), entitled "International river basin development"—note by the Secretariat	<i>Idem.</i>
A/CN.4/L.243 and Add.1 and Add.1/Corr.1	Draft articles on State responsibility: texts adopted by the Drafting Committee—title of chap. III and articles 15 <i>bis</i> and 16–18	Texts reproduced in the summary records of the 1401st and 1402nd meetings (vol. I). See also 1403rd meeting, para. 6.
A/CN.4/L.244	Draft articles on the most-favoured-nation clause (articles 1–21, E, F, B, C, D and 21 <i>bis</i>)	Mimeographed. Contains the entire set of draft articles resulting from decisions taken by the Drafting Committee at the twenty-eighth session.
A/CN.4/L.245 and Corr.1	Draft report of the International Law Commission on the work of its twenty-eighth session (chap. I)	Mimeographed. For the final text, see A/31/10 (above, p. 1).
A/CN.4/L.246 and Add.1–3, A/CN.4/L.247 and Add.1–8, A/CN.4/L.248 and Add.1–4 A/CN.4/L.249 and Add.1 A/CN.4/L.250 and Add.1 and 2	Draft report of the International Law Commission on the work of its twenty-eighth session (chaps. II–VI)	<i>Idem.</i>
A/CN.4/L.251		Draft articles on succession of States in respect of matters other than treaties: texts adopted by the Drafting Committee—title of section 2 of part I and articles 3(<i>f</i>) and 12–16
A/CN.4/L.252	Draft report of the International Law Commission on the work of its twenty-eighth session (chap. VI): amendments proposed by Mr. Kearney to document A/CN.4/L.250/Add.1	Mimeographed. See 1413th meeting (vol. I).
A/CN.4/SR.1360–1413	Provisional summary records of the 1360th to 1413th meetings of the International Law Commission	Mimeographed. For the final text, see vol. I.

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