

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1977

Volume II
Part One

*Documents of the twenty-ninth session
(excluding the report of the Commission
to the General Assembly)*

UNITED NATIONS



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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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FILLING OF CASUAL VACANCIES IN THE COMMISSION

[Agenda item 1]

DOCUMENT A/CN.4/299

Note by the Secretariat

*[Original: English]
[28 March 1977]*

1. Following the death on 1 February 1977 of Mr. Edvard Hambro, a seat has become vacant on the International Law Commission.

2. In this case, article 11 of the Commission's Statute is applicable. It prescribes:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this Statute.

Article 2 reads:

1. The Commission shall consist of twenty-five members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The term of the member to be elected by the Commission will expire at the end of 1981.

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/302 AND ADD.1-3

Sixth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

[Original: French]
[15 April, 7 June, 5 and 14 July 1977]

*The internationally wrongful act of the State, source of international responsibility (continued) **

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ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
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>
ILO	International Labour Organisation
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 C</i>	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>

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 Special Rapporteur.

* The present report is a continuation of the fifth report on State responsibility, submitted by the Special Rapporteur to the Commission at its twenty-eighth session (*Yearbook... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1-2).

CHAPTER III

Breach of an international obligation (*continued*)¹

5. BREACH OF AN INTERNATIONAL OBLIGATION CALLING FOR THE STATE TO ADOPT A SPECIFIC COURSE OF CONDUCT

1. The preceding section of this chapter was devoted to a study of the impact of the content of an international obligation on the definition of a State action committed in violation of that obligation. Specifically, consideration was given to the manner in which the degree of importance of the content of the breached international obligation for the safeguarding of the fundamental interests of the international community as a whole was reflected in the characterization of the act. On that basis, a distinction was made between two types of internationally wrongful acts, defined respectively as international "crimes" and international "delicts", to which different régimes of responsibility applied. Quite logically, the definition of these régimes was postponed until later; it was nevertheless noted that the difference between them related both to the type of consequences deriving from the internationally wrongful act attributable to the State that had committed the breach and to the subjects of law authorized to "enforce" those consequences.

2. However, the substantive aspects of an international obligation may also be viewed from another angle: not so much from the point of view of content but rather from that of the type of obligation, of the manner in which it imposes its requirements upon a State. The obligations imposed on a State under international law not only reflect duties relating to various sectors of inter-State relations, to matters of varying importance for the international community; they may also be structured differently with respect to the ways and means by which the State is expected to ensure their fulfilment. It follows that the breach by a State of an international obligation incumbent upon it does not necessarily assume the same form in each case.

3. For a better understanding of the nature of this distinction, it should be remembered that, although all obligations placed upon a State under the rules of international law are of course directed towards a particular goal, there is a vast difference between a case where the means of attaining that goal are determined at the international level and a case where they are determined at the national level. In the former case, the obligations are laid upon the State, requiring it to take or to refrain from taking some specific action: for example, to adopt or to refrain from adopting a specific legislative, administrative or judicial act. In the latter case, international law, concerned with respect for the internal freedom of the State, merely requires the State to ensure a particular situation or result and leaves it free to do so by whatever means it chooses. To quote Dionisio Anzilotti:

... as a rule, international law does not establish the means whereby the State has to ensure that its duties are carried out.

¹ For the beginning of chapter III (sections 1-4), see *Yearbook...* 1976, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1-2.

The logical necessity for respecting the internal freedom of the State means that the prescriptions of international law are usually fairly general: they have to indicate the required result, leaving it to the State to choose the means of achieving it.²

The only condition international law lays down in this case that would make it possible to say that execution of the international obligation has been ensured is that, by one means or another, the desired result must be fully attained. As has been pointed out on many occasions, one of the principles most generally recognized in the literature, in judicial decisions and in international practice is that a State may not take advantage of the shortcomings of its internal order to evade its international duties.

4. On that basis, therefore, the existence of two kinds of international obligations may be noted. In carrying out some of them, the State may employ only certain specific means; in carrying out others, it can choose from among a variety of means.³ It will be seen in the next section that, in the latter case, there are, in turn, a number of possibilities. It may make no difference with regard to international law which of the possible alternatives a State chooses, or—and this amounts to almost the same thing—the obligation in question, while implying a preference for one means, may nevertheless permit, or at any rate not rule out, the State's choice of another means. Above all, the result aimed at by the international obligation may be so defined that, once a situation inconsistent with that result has been created by the means chosen by the State, it will have to be concluded that the State has definitely failed to carry out the task incumbent upon it, whereas in a different case it may not be necessary to arrive at such a conclusion. The internationally desired result may be defined in such a way as to permit its being also regarded as achieved when, by extraordinary means, the State *ex post facto* remedies the situation created by the means originally employed and restores a situation that is fully consistent with the desired result. However, rather than anticipate, it is preferable at this stage simply to consider the basic distinction between obligations that call categorically for the use of specific means and those that leave the State free to choose among various means. As has just been said, this basic distinction

² "La responsabilità internazionale des Etats à raison des dommages soufferts par des étrangers", *Revue générale de droit international public*, vol. XIII, No. 1, (Paris, 1906), p. 26. Anzilotti adds: "That is why the State in most instances performs not so much acts prescribed by international law as acts that it has itself freely chosen as the most appropriate means of ensuring that its duty vis-à-vis other States is fulfilled." See also the same author's *Teoria generale della responsabilità dello Stato nel diritto internazionale*, reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. I, p. 117.

³ A distinction between the two types of obligations had already been made by H. Triepel, who emphasized the difference between directly ordered internal law ("unmittelbar gebotenes Landesrecht") and internationally necessary internal law ("internationales unentbehrliches Landesrecht") (H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 299) (French edition: *Droit international et droit interne*, translated by R. Brunet (Paris, Pédone, 1920), p. 297). The same distinction is necessarily implied in the passages from Anzilotti quoted in the preceding footnote. However, it was D. Donati who stated it explicitly for the first time and made it a general principle (D. Donati, *I trattati internazionali nel diritto costituzionale* (Turin, Unione tipografico-editrice torinese, 1906), vol. I, pp. 343 *et seq.*).

between two types of international obligations necessarily has an impact on the manner in which the obligation is breached. This section is devoted to analysing the first of the two possibilities indicated above; its purpose will therefore be to determine under what conditions a breach of an international obligation exists in cases where the obligation calls for the State to adopt a specific course of conduct.

5. In the situation that has just been mentioned, the specific conduct required of the State by the international obligation may be a course of action. It may involve action by legislative or, in a broader sense, regulatory bodies in the form of adoption or repeal of a law in the strict sense of the term, or at all events of a given regulation, of whatever kind. The example may be cited of the obligation imposed by one of the so-called "uniform law" international conventions. Under article I, paragraph 1, of the Convention relating to a uniform law on the international sale of goods: (The Hague, 1 July 1964)⁴

Each Contracting State undertakes to incorporate into its own legislation, in accordance with its constitutional procedure, not later than the date of entry into force of the present Convention in respect of that State, the Uniform Law on the International Sale of Goods ... forming the Annex to the present Convention.

The Hague conventions on private international law, some of the international labour conventions,⁵ some agreements relating to international law in matters of health, the provisions drawn up by some international organizations and agencies,⁶ etc. contain similar formu-

⁴ United Nations, *Treaty Series*, vol. 834, p. 107.

⁵ See, for example, ILO Convention No. 121 concerning Benefits in the Case of Employment Injury (*Conventions and Recommendations, 1919-1966* (Geneva, International Labour Office, 1966), p. 1080), which specifies the categories of persons to whom national legislation is to accord such benefits. It should be noted that some conventions do not expressly lay down, or mention only in part, the requirement for legislative action; this requirement may nevertheless be deduced from the context of the convention, as is the case with regard to articles 1 and 2 of Convention No. 55 concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen (*ibid.*, p. 333), or article 2 of Convention No. 112 concerning the Minimum Age for Admission to Employment as Fishermen (*ibid.*, p. 977), or article 4 of Convention No. 123 concerning the Minimum Age for Admission to Employment Underground in Mines (*ibid.*, p. 1117), and others. The forms addressed to States concerning observance of the provisions of these conventions confirm this conclusion. For example, that relating to Convention No. 55 contains the following injunction: "Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation ..." In reply to a question put on the subject by the Government of the United States, the International Labour Office replied, on 13 November 1950, that "the competent bodies of the International Labour Organisation have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organisation in the light of its constitutional practice and existing law". The reference to constitutional practice clearly related to those cases where, under that practice, the ratification of a convention automatically incorporates the provisions of the convention into "the law of the land", thus in fact giving the instrument of ratification the force of a domestic legislative enactment. See *The International Labour Code, 1951* (Geneva, ILO, 1952), vol. I, pp. 863 *et seq.*, foot-note 352.

⁶ Article 24 of the Convention establishing the definitive statute of the Danube, adopted at Paris on 23 July 1921 (League of Nations, *Treaty Series*, vol. XXVI, p. 187), laid down expressly that the

las. Article 10, paragraph 1, of the State Treaty for the Re-establishment of an Independent and Democratic Austria (Vienna, 15 May 1955)⁷ requires Austria, *inter alia*, to codify the principles set out in articles 6, 8 and 9 of the Treaty and to give effect to them. On the other hand, under article 2, paragraph 1 (c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,⁸

Each State Party shall take effective measures to ... amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Similarly, under article 3 (a) of the 1960 Convention against discrimination in education,⁹ States undertook to "abrogate any statutory provisions and any administrative instructions ... which involve discrimination in education". Article 10, paragraph 1, of the Austrian State Treaty required Austria to repeal or amend all legislative and administrative measures adopted between 5 March 1933 and 30 April 1945 that conflicted with the principles set forth in articles 6, 8 and 9 of the Treaty. Action by executive organs might also be involved: for example, in connexion with specific obligations to deliver arms and other objects, to deliver or scuttle ships, or to dismantle fortifications, which appear so frequently in peace treaties.¹⁰ Lastly, action by judicial organs might be involved. Examples are to be found in some international conventions on judicial competence, on recognition of foreign decisions or on legal assistance.¹¹ Even more specific examples are provided by peace treaties requiring the competent authorities to revise certain rulings and orders of prize courts.¹²

6. The specific conduct required of a State under an international obligation may also be an act of omission. Moreover, the conduct in question may relate to different areas of activity. It may be the obligation of the State not to enact certain laws or, more generally, certain regulations. An example of an international obligation requiring the State not to rescind specific laws is found, once again, in article 10 of the 1955 Treaty, under which Austria undertakes to keep in force the laws already adopted for the liquidation of the remnants of the Nazi régime; a similar case is the law of 3 April 1919 concerning the House of Hapsburg-Lorraine. Again, certain

Danube Commission should draw up navigation and police regulations and that "Each State shall bring these regulations into force in its own territory by a legislative or administrative act ...".

⁷ United Nations, *Treaty Series*, vol. 217, p. 223.

⁸ *Ibid.*, vol. 660, p. 195.

⁹ *Ibid.*, vol. 429, p. 93.

¹⁰ See, for example, article 115 of the Treaty of Versailles, which provides for the destruction of the fortifications, military establishments and harbours of the Islands of Heligoland "by German labour and at the expense of Germany" (*British and Foreign State Papers, 1919* (London, H. M. Stationery Office, 1922), pp. 71 and 72). See also articles 145 and 195 and other articles of part V of the same Treaty. See further, articles 40, 41 and 42 of the Treaty of Peace with Italy (for reference, see foot-note 12 below) and the similar provisions in the other peace treaties following the Second World War.

¹¹ See, for example, article 2, paragraph 1, and articles 31 and 32 of the Brussels Convention of 27 September 1968 concerning jurisdiction and the enforcement of civil and commercial judgments.

¹² See, for example, annex XVII (A) of the Peace Treaty between the Allied and Associated Powers and Italy, signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 3).

international obligations require that the administrative authorities, particularly the police, refrain from entering certain premises which enjoy special protection, such as the premises of a diplomatic or consular mission or an international organization,¹³ or that the authorities in question refrain from subjecting certain individuals to arrest or detention.¹⁴ Under general international law, the police forces—and, *a fortiori*, the armed forces—of any country are under an obligation not to enter the territory of another country without the latter's consent, not to make arrests there, etc. Some peace treaties even lay down the specific obligation not to maintain or assemble armed forces in a specified portion of the territory of the State in question.¹⁵ In other cases, it is the judicial authorities which are required not to exercise their jurisdiction in respect of foreign States, certain of their organs or certain categories of disputes,¹⁶ etc.

7. In the cases just envisaged, which, despite their diversity, are all characterized by the fact that the international obligation in question requires from the State a specific course of conduct in the form of an action or omission, the implications of the nature of the obligation for determining the existence of a possible breach are logically clear. Difficulties may always arise in a particular case in determining what in fact was the conduct of the State organs, and questions may always arise regarding the verification of the exact content of the obligation incumbent upon the State. There can be no doubt, on the other hand, regarding the conclusion that, when the action or omission noted is, in fact, not in conformity with the conduct specifically required of the organ responsible for the action or omission, there is an immediate breach of the obligation in question, without any other condition being required for such a finding. The finding should not be influenced by whether or not the non-conformity of the conduct adopted with the conduct which should have been adopted had harmful consequences. If, for example, as in the case of article 10, paragraph 3, of the International Covenant on Economic,

¹³ Under article 22, para. 1, of the 1961 Vienna Convention on Diplomatic Relations (*ibid.*, vol. 500, p. 95), for example, "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

¹⁴ Article 29 of the same Convention provides that "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention ...".

¹⁵ Article 43 of the Treaty of Versailles (for reference, see footnote 10 above) forbade Germany to maintain or assemble armed forces and execute military manoeuvres on the left bank of the Rhine and on the right bank to the west of a line situated 50 kilometres from the river.

¹⁶ Thus, for example, article 43, para. 1, of the 1963 Vienna Convention on Consular Relations (United Nations, *Treaty Series*, vol. 596, p. 261) forbids the judicial authorities of the receiving State to exercise their jurisdiction over consular officers in respect of acts performed in the exercise of consular functions. Article II, para. 3, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (*ibid.*, vol. 330, p. 3) requires the court of a contracting State, seized of an action in a matter in respect of which the parties have made an arbitration agreement to refrain from any exercise of jurisdiction and to refer the parties to arbitration if one of them so requests. Other conventions provide for the obligation to suspend certain sentences during the term of a parallel sentence in another State.

Social and Cultural Rights,¹⁷ an international convention imposes on a State an obligation to the effect that the employment of children and young persons "in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law", this obligation is breached simply by the fact that the law providing for punishment of such practices has not been enacted, even if no specific instance of employment of children in such work has been found in the country concerned. Similarly, if, as in the case of article 2, paragraph 1 (c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, a convention obliges a State to rescind legislative provisions which have the effect of creating such discrimination, this obligation is breached simply by the fact that the provisions in question have not officially been rescinded, even if they actually never would have been or no longer could be applied.

8. A study of both State practice and international legal precedents confirms the validity of the distinction drawn here between the nature of the international obligation which requires from the State a specific activity and the nature of the obligation which requires only that the State achieve a certain result, leaving it free to choose the means of attaining that result. In particular, this study confirms the conclusion that, when the obligation is in the first of these two categories, the activity of a State organ which proves to be not in conformity with that required of it is sufficient to constitute a breach of the obligation. The most accurate theoretical formulation of these conclusions was given by the Swiss Government in its reply to point III, No. I, of the request for information addressed to States by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930). The "point" was worded as follows:

Does the State become responsible in the following circumstances:

Enactment of legislation incompatible with the treaty rights of other States or with its other international obligations? Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations?¹⁸

In response to the second question, the Swiss Government noted:

We should ... be adopting too absolute an attitude if we merely replied in the affirmative to the second question raised under (I). Failure to enact legislation may of itself involve the international responsibility of the State if some agreement to which the State is a party *expressly obliges* * the contracting parties to enact certain legislation. On the other hand, in the absence of a contractual provision of this kind, it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, *by any means*, * to fulfil its international obligations ...¹⁹

The distinction between the two ways in which an international obligation may be breached, depending on the varying nature of the obligation, is clearly brought out

¹⁷ General Assembly resolution 2200 A (XXI), annex.

¹⁸ League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69. 1929.V), p. 25.

¹⁹ *Ibid.*, p. 29.

in this explicit statement. In particular, with regard to the case referred to in this section, the Swiss Government clearly favours the view that, when the international obligation specifically requires the State to adopt a certain measure (in this case a law), the mere negative fact of not adopting that measure constitutes in itself a breach of the international obligation in question and, if all other circumstances are equal, involves the responsibility of the State.

9. There is no doubt either about the applicability of the principle thus stated to practical cases. In this connexion, it is particularly interesting to consider cases involving the violation of certain international labour conventions, for example, when one of the States which ratified a convention has not enacted the legislative provisions required by the convention or, above all, has not rescinded the laws which the convention expressly obliged it to rescind. Let us take, for example, the report of the commission appointed under article 26 of the Constitution of the ILO to examine the complaint filed by the Government of Ghana concerning the observance by the Government of Portugal of Convention No. 105 concerning the Abolition of Forced Labour, 1957. It will be noted that the Commission (composed of Mr. P. Ruegger, Mr. E. Armand-Ugon and Mr. I. Forster) stressed in particular that the international obligations placed on the State by certain conventions require the formal rescission of a particular legislative provision and that a "situation in which a legal provision inconsistent with the requirements of the Convention subsists but is regarded as obsolete" or as being superseded *de facto* cannot be considered satisfactory for the purposes of the application of the Convention. The Commission emphasized that "*Full conformity of the law with the requirements of the Convention is therefore essential*," even if taken alone that is not enough, since it is also necessary "that the law should be fully and strictly applied in practice."²⁰ Subsequently, the report of the commission appointed under article 26 of the Constitution of the ILO to examine the complaint filed by the Government of Portugal concerning the observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29) showed that the Commission (composed of Mr. E. Armand-Ugon, Mr. T. P. P. Goonetilleke and Mr. E. Castrén) endorsed the opinion expressed by the Ghana-Portugal omission. It was in application of and with specific reference to article 23 of the Convention, which requires the competent authorities of the State to "issue complete and precise regulations governing the use of forced or compulsory labour", that the Commission concluded that:

... the legislation of Liberia until 31 August 1961, the date of filing of the complaint, was inconsistent with the obligation of Liberia under the Constitution of the Organisation to give effect to the provisions of the Convention in law and in fact and with the specific requirements of Articles 23 to 25 of the Convention".²¹

²⁰ ILO, *Official Bulletin*, vol. XLV, No. 2, Supplement II, April 1962, para. 716, p. 231.

²¹ *Ibid.*, vol. XLVI, No. 2, Supplement II, April 1963, para. 416, p. 182. Article 25 supplements article 23 by requiring that the illegal exaction of forced or compulsory labour should be punishable as a penal offence.

10. In other cases it has not been a breach of the specific obligation to enact or abrogate a legislative provision which has been the subject of a dispute between States but rather failure to observe the equally specific obligation to perform a certain act of an administrative nature or, particularly, to refrain from performing such act, such as the obligation not to enter the premises of a diplomatic mission or the private residence of a foreign diplomatic agent,²² or the premises of a foreign consulate.²³ In still other situations, the dispute has been caused by a breach of the obligation to respect the immunity from jurisdiction of diplomatic agents etc.²⁴ In all these cases, the basic principle applied has been the same, namely, that the adoption by any administrative or judicial authority of conduct different from that specifically required by the international obligation has been considered as immediately constituting a breach of that obligation.

11. The positions taken by the authors of scientific works dealing with the question examined here coincide with those deriving from the logic of the relevant principles and confirmed by State practice and by international judicial decisions. Heinrich Triepel expressly deduced from the distinction he had made concerning the possible influence of international law on internal law that, when a rule of international law or a treaty imposes on the State the duty to *have* a particular law, the non-adoption or the abrogation of such law constitutes a breach of international law or of the treaty; this obtains even if, despite the non-adoption or the abrogation of the internationally required internal law, the State is in a position "effectively to carry out everything which can or should be carried out under the law" and intends to do so.²⁵ More recently, several authors have studied the question in greater detail and have shown the effect which the form taken by an international obligation necessarily has on determining the existence of a breach of such obligation. With reference to the matter which is of concern to us in this section, the authors have stressed that, where the obligation requires of a State conduct—whether involving an action or an omission—"which must necessarily be carried out in certain ways and by specific bodies", any conduct adopted by the State which is not in conformity with that specifically required constitutes as such "a direct breach of the existing international legal obligation", so that, if all the other requisite conditions exist, we are confronted with an internationally wrongful act.²⁶

²² See in this connexion the cases cited by G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1942), vol. IV, pp. 562 *et seq.*

²³ See G. H. Hackworth, *op. cit.*, pp. 716 *et seq.*; A. C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, CNRS, 1965), vol. III, pp. 408 *et seq.*; S.I.O.I.-C.N.R., *La prassi italiana di diritto internazionale* (Dobbs Ferry, New York, Oceana, 1970), first series (1861-1887), vol. I, pp. 469-470.

²⁴ See the cases cited by G. H. Hackworth, *op. cit.*, pp. 533 *et seq.*; A. C. Kiss, *op. cit.*, pp. 340-341; S.I.O.I.-C.N.R., *op. cit.*, pp. 384 *et seq.*

²⁵ Triepel, *op. cit.*, p. 299.

²⁶ See R. Ago, "La regola del previo esaurimento dei ricorsi interni in tema di responsabilità internazionale", *Archivio di diritto*

12. One might be tempted to characterize as "international obligations of conduct" those obligations which require a State to adopt a specific course of conduct, whether an action or an omission, as opposed to those obligations which impose on the State the generic requirement that it should bring about a certain result but leave to it the choice of the ways and means by which the results are to be achieved, and which could be characterized as "obligations of result". That would simply be following the model furnished by the systems of internal private law originating in Roman law. Thus it would be possible to define as an "internationally wrongful act of conduct" and an "internationally wrongful act of result" respectively the breach by a State of an international obligation falling within the first or the second of those two categories. In our opinion, the use of this terminology might be helpful because of its concision. It might, however, be wiser to speak more precisely, with regard to the first category, of "obligations of specific conduct" and, consequently, of "internationally wrongful acts of specific conduct", for even in the case of "obligations of result" it is still the "conduct" of the State which is required in order to ensure the desired result. We feel it would be appropriate to emphasize that the meaning attributed to the distinction and the characterizations in question would be that which is made clear in this section, a meaning which seems to us to correspond to typical aspects of the international community and its law. On the other hand, there would be some risk of confusion in seeking to liken the distinction and the characterizations in question too closely to those which are familiar to jurists concerned with systems of private law and which are logically influenced by the aspects proper to these other socio-juridical systems.²⁷

(Foot-note 26 continued.)

pubblico, May-August 1938-XVI (Padua, CEDAM, 1938), vol. 3, fasc. 2, pp. 231 *et seq.*; and "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1939-II (Paris, Sirey, 1947), vol. 68, pp. 508 *et seq.* See also, in particular, G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 332; P. Reuter, "La responsabilité internationale", *Droit international public* (cours) (Paris, Les Nouvelles Institutes, 1955-1956), pp. 56 *et seq.*; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III, pp. 1533 *et seq.* For an analysis of particular aspects of the question related to the legislative activity of the State, see Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, p. 97; E. Vitta, *La responsabilità internazionale dello Stato per atti legislativi* (Milan, Giuffrè, 1953), pp. 87 *et seq.*; A. S. Bilge, *La responsabilità internazionale des Etats et son application en matière d'actes législatifs* (thesis No. 471) (Istanbul, Tsitouris, 1950), pp. 101 *et seq.*

²⁷ An ingenious application to international law of concepts proper to civil law has been proposed by P. Reuter (*loc. cit.*). But it should be noted that, while in most cases an "obligation of conduct" in the meaning which we favour is at the same time an "obligation of conduct" in the meaning which would be borrowed from civil law, this is not always the case; the same is true of "obligations of result". According to the civil law criterion which, for example, holds that the obligation of a doctor to treat a patient without necessarily being able to ensure his cure is an obligation of conduct, one would have to characterize as an international obligation of conduct the obligation of the State to protect foreigners, and particularly certain foreign persons, against attempts by third parties, an obligation which, on the contrary, would appear to be an obligation of result according to the criteria favoured in this section. The State has in fact the choice of the means which it considers most appropriate to ensure the protection in question.

13. Whatever the terminology which the Commission may choose, the Special Rapporteur thinks that, for the purposes of the present draft, the definition of the principle with which this section is concerned should not present any particular difficulties. In view of all the foregoing considerations, he therefore proposes the adoption of the following text:

Article 20. Breach of an international obligation calling for the State to adopt a specific course of conduct

A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically required.

6. BREACH OF AN INTERNATIONAL OBLIGATION REQUIRING THE STATE TO ACHIEVE A PARTICULAR RESULT

14. The previous section was devoted to cases of breach by a State of international obligations requiring it to engage in or refrain from a specific activity. In such cases—which, as stated, are relatively rare—international law, in a sense, invades the sphere of the State by requiring one or other specified component of the State machinery to adopt a particular course of conduct. It requires that the legislative organ, or at any rate some organ having a normative function, issue or revoke certain rules, or that the executive organs perform or refrain from certain acts, or that the judicial organs rule or refrain from ruling on certain situations or as regards certain persons, and so on. We showed in this way that, in all such cases, the form, as thus described, of the international obligation had obvious consequences for determining whether the obligation had been fulfilled or breached. If the course of conduct specifically required has been adopted, the obligation will have been fulfilled; if it has not, the obligation will have been breached.

15. The situation is entirely different in the cases—particularly numerous in international law—where international law stops short at the outer boundaries of the State machinery and, as we stated above, being "concerned with respect for the internal freedom of the State, merely requires the State to ensure a particular situation or result and leaves it free to do so by whatever means it chooses".²⁸ The purpose of the present section is precisely to establish how to determine that there has been a breach of an international obligation characterized by this other form, so different from the previous one.

16. It was pointed out earlier²⁹ that the cases we now propose to consider covered a vast and varied range, and the various possibilities within that range were briefly reviewed. We looked first of all at cases in which the State has some initial freedom of choice as to the means of achieving the result required by an international obligation. Among those cases, we noted that there was a distinction to be made. On the one hand were the cases where it was left entirely to the State to choose between the means available to it to achieve the result required by

²⁸ See para. 3 above.

²⁹ See para. 4 above.

the international obligation, and no opinion was expressed at the international level. On the other hand were the cases where the international obligation did at least indicate a preference and suggest that a particular means appeared as at any rate the most likely to produce the required result though without making recourse to that means compulsory.

17. There are many examples of cases in the first group. Sometimes the text of the treaty itself, in imposing certain obligations, expressly states that it is left to the State to choose the means of achieving the purpose of the obligation. Article 14 of the Treaty instituting the European Coal and Steel Community provides that:

Recommendations shall be binding with respect to the objectives which they specify but shall leave to those to whom they are directed the choice of appropriate means for attaining these objectives.³⁰

The Treaty establishing the European Economic Community provides in article 189, third paragraph, that:

Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.³¹

Again, the State's complete freedom of choice is sometimes implicit in the fact that the international obligation generally calls upon the States bound by it to take "all appropriate measures" to achieve a given result, without giving any indication as to what those appropriate measures may be. For example, the International Convention on the Elimination of All Forms of Racial Discrimination provides in article 2, paragraph 1, that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.³²

Similarly, with regard to the protection of the representative organs of other States, the Vienna Convention on Diplomatic Relations provides in article 22, paragraph 2, that:

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.³³

and in article 29 that "The receiving State . . . shall take all appropriate steps to prevent any attack on [a diplomatic agent's] person, freedom or dignity". The Vienna Convention on Consular Relations, in article 31, paragraph 3, and article 40,³⁴ and the 1969 Convention on Special Missions, in article 25, paragraph 2, and article 29,³⁵ use virtually identical language. In perhaps an even larger number of cases, the freedom of choice accorded to the State is left to be inferred from the fact that the international obligation merely specifies the result to be achieved, and the text imposing the obligation makes no mention of the means of achieving it. Examples are to be found in the 1950 Convention for the Protection of Human Rights and Fundamental

Freedoms³⁶ and certain international labour conventions; many other texts contain provisions of the same kind.³⁷ We may add that the situation described here is normal as regards international obligations, whether of customary or of treaty origin, concerning the protection of aliens and certain specific categories.³⁸

18. With regard to the second group of cases, we need only mention, among other examples, article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, which provides that:

Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures,³⁹ or article 2, paragraph 2, of the International Covenant on Civil and Political Rights, which provides that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt *such legislative or other measures* * as may be necessary to give effect to the rights recognized in the present Covenant.⁴⁰

There can be no doubt that, in these cases, the legislative means is expressly indicated at the international level as the most normal and most appropriate means of achieving the purposes of the Covenant in question. But recourse to such means is not specifically required; it is not made an exclusive condition. The State is left free to employ some other means if it sees fit, provided that such means equally enables it to achieve *in concreto* the full realization of the human rights prescribed by the Covenants.

³⁰ United Nations, *Treaty Series*, vol. 213, p. 221. Article 1 of the Convention provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

The articles of Section I provide as follows: "No one shall be held in slavery or servitude" (article 4, paragraph (1)); "No one shall be required to perform forced or compulsory labour" (article 5, paragraph (2)); "Everyone has the right to liberty and security of person" (article 5, paragraph (1)); and so on. It is implicit in these provisions that the State is free to choose whatever means it deems best calculated to ensure that no one is held in slavery, that everyone's security of person is preserved, and so forth.

³⁷ As a rule, treaty provisions binding States to extend most-favoured-nation treatment to other States in an agreed field of relations merely state the aim to be achieved, without specifying the means to be employed to achieve it.

³⁸ The Memorial of the Italian Government in the Phosphates in Morocco case (Preliminary Exceptions) refers to the obligation placed on the protecting Power by international law to ensure "that the treatment which the Protecting Power is bound by international conventions to extend to aliens, and respect for the acquired rights of aliens vis-à-vis the public administration, are guaranteed by adequate means of judicial protection". The Memorial goes on to say that: "The Protecting Power has the choice of those means; it may choose whatever means it deems most appropriate for the organization of the public authorities of the Protectorate, but they must be calculated to assure aliens of treatment in conformity with international conventions and acquired rights" (translation by the Secretariat). See *Répertoire des décisions et des documents de la procédure écrite et orale de la Cour permanente de justice internationale et de la Cour internationale de justice*, published under the direction of P. Guggenheim, *Série I*, vol. 1, *Droit international et droit interne*, by K. Marek (Geneva, Droz, 1961), p. 679.

³⁹ General Assembly resolution 2200 A (XXI), annex.

⁴⁰ *Ibid.*

³⁰ United Nations, *Treaty Series*, vol. 261, p. 140.

³¹ *Ibid.*, vol. 298, p. 11.

³² For reference, see foot-note 8 above.

³³ *Idem*, foot-note 13.

³⁴ *Idem*, foot-note 16.

³⁵ General Assembly resolution 2530 (XXIV), annex.

The reply given to the Irish Government by the ILO on 18 October 1929 is particularly instructive on this point. The Government had asked whether legislation was specifically required in order to give effect to the provisions of articles 2, 3 and 4 of Convention No. 14 of 1921 (Convention concerning the application of the weekly rest in industrial undertakings), seeing that is was already Irish practice to grant industrial workers a rest period of 24 hours. The ILO observed that "The course most usually adopted is that of passing legislation to make the application of the weekly rest compulsory in industrial undertakings", but that the Convention left considerable latitude to Governments in fulfilling the obligation. It went on to say:

A Government is therefore free to apply under the Convention any system which meets with its approval; ... it is for the Government which undertakes international responsibility as a party to a Convention to judge what is the action which in its view will secure the Convention's effective application. In the present case, it would be for your Government to decide what guarantees, if any, would be necessary after ratification to guard against changes in, or non-observance of, the existing practice.

The ILO made no secret of its view that the adoption of legislation giving the force of law to the existing practice was the most appropriate method to follow in the case in point; but it repeated that the Government was free to adopt any other method, provided it would "secure the effective fulfilment of the Convention".⁴¹

19. We also noted that the existence of a certain latitude with regard to the course to be followed to achieve the result required by international law might be demonstrated in some other way than by the existence of an initial freedom of choice.⁴² It is fairly common for a State which has initially adopted a course of conduct, by act or omission, calculated to frustrate the achievement of the result required of it by an international obligation to find itself granted another opportunity to comply with that obligation. In certain circumstances, and provided that the initial course of conduct has not made the required result impossible of attainment, international law allows the State to redress the unfortunate situation which has temporarily arisen and produce that result, albeit after some delay, by adopting, as an exceptional measure, another course of conduct capable of erasing entirely the consequences of its first course of conduct. Obviously—and this should be quite clear—the situation in this case is not the same as in the cases considered above. As we have already noted, this is not a question of freedom of choice for the State between different means on the same plane; recourse to a subsequent course of conduct designed to *remedy* the internationally unacceptable effects of the initial course of conduct partakes of the "pathology" rather than the "physiology" of the fulfilment of international obligations. It is nevertheless a fact that the existence of this possibility of making good the defects of the means which ought normally to have been applied at the outset to achieving the result required by the international obligation is sufficient in itself to warrant the conclusion that the State has at its disposal more than one means of fulfilling its obliga-

tion. For the possibility of still achieving a situation conforming with the international obligation by correcting by some other means the non-conforming situation that has momentarily arisen is not granted to the State solely in cases where it had an initial freedom of choice between different "normal means of fulfilling the obligation. The State may be provided with such an opportunity even when it had no such initial freedom of choice. In such a case, the subsequent opportunity to make good, by a fresh course of conduct, the consequences of the initial action or omission demonstrates the latitude open to the State; if the text has left any doubt on the subject, this subsequent opportunity is the factor which places the obligation in question among those whose purpose is to achieve a certain result rather than among those calling for the adoption of a specific course of conduct (which were the subject of the previous section). It should be noted in passing that it is a fairly rare occurrence for rules—even treaty rules—which lay international obligations upon the State to mention explicitly that it is open to the State, in certain circumstances, to make good *ex post facto* the situation created initially by an action or omission on the part of its organs calculated to frustrate the internationally required result. The answer to the question whether a given obligation may or may not be fulfilled, exceptionally, by some other course of conduct where the course initially adopted has failed to produce the required result will normally be found by examining the relevant clause in conjunction with the provisions of the convention as a whole, in accordance with its *ratio* and spirit, or in the light of the applicable rules of customary international law.

20. As usual, the situations just described will be made clearer by a few examples. Let us consider first of all the case of international obligations where the exceptional opportunity accorded to the State to discharge if necessary its obligation by adopting a subsequent course of conduct designed to redress the internationally unacceptable consequences of the course of conduct initially adopted is merely an addition to a normal initial freedom of choice of the means to be used to fulfil the obligation. Such initial freedom of choice, as we saw earlier, is characteristic of, for example, the majority of international obligations concerning the protection of human rights. Where the International Covenant on Civil and Political Rights⁴³ provides that "Everyone shall be free to leave any country, including his own" (article 12, paragraph 2), that "Everyone shall have the right to recognition everywhere as a person before the law" (article 16), or that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests" (article 22, paragraph 1), the first inference to be drawn from the very object of these provisions and from their formulation is that the State is free to adopt whatever measures it deems most appropriate, in its own particular case, to guarantee these freedoms and rights to individuals. In the extreme case, it may refrain from adopting any measures whatsoever, provided the same result is achieved in practice, namely, that any man or woman who wishes to leave a country is in fact free to go; that his or her existence as a person

⁴¹ *The International Labour Code, 1951 (op. cit.)*, pp. 277-278.

⁴² See para. 4 above.

⁴³ For reference, see foot-note 40 above.

before the law will not be denied; that his or her freedom of association will not be obstructed, and so on. But the spirit of the Covenant, its aim, object and context, also point to another conclusion. If we assume, for example, that the State has chosen to fulfil its obligations through the administrative channel, an adverse decision concerning the right of an individual taken by the first authority called upon to decide his case does not normally make it impossible for the State to achieve the internationally required result. That result may be considered to have been achieved even if a higher authority has had to intervene and set aside the first authority's decision, and only this subsequent action has secured for the individual concerned respect for the right he sought to exercise. If any doubt should persist as to the soundness of this conclusion, the existence in the Covenant of a clause concerning the exhaustion of domestic remedies⁴⁴ should suffice to remove it. And it stands to reason that a similar conclusion applies for all obligations imposed by conventions which contain a clause of this kind.⁴⁵ For this clause, as we shall show in the next section, should be regarded essentially as a substantive clause, the effect of which is, precisely, to prevent the establishment of definitive failure to achieve the result required of the State by the obligation the clause accompanies, so long as it is still possible to achieve that result by one of the other means at the State's disposal.

21. It would, however, be wrong to believe that the conclusion which must clearly be drawn from the example we have just been considering is only justified in cases where the agreement from which certain obligations derive contains a clause expressly providing that the State cannot be charged, at the international level, with not having fulfilled its obligations, so long as the available local remedies have not been exhausted. Even in the absence of such a clause, the conclusion reached in the example in question might also follow from the context of the agreement, its spirit, its object and purpose or, lastly, from the customary rules in the context of which the agreement is to be interpreted. Let us take as another example article 3, paragraph 1, of the General Agreement on Tariffs and Trade (GATT)⁴⁶ which reads

The contracting parties recognize that internal taxes and other internal charges ... should not be applied to imported or domestic products so as to afford protection to domestic production, and paragraph 2 of the same article, which provides that

⁴⁴ Article 41, paragraph 1 (c), provides that the Committee established by the Covenant to consider "communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant ... shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law".

⁴⁵ See, for example, article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms (for reference, see foot-note 36 above); and articles 11, para. 3, and 14, para. 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination (for reference, see foot-note 8 above). See also the agreements on economic co-operation concluded by the United States and cited by G. Gaja in *L'esaurimento dei ricorsi interni nel diritto internazionale* (Milan, Giuffrè, 1967), p. 140, note 17.

⁴⁶ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

These provisions are not accompanied by any explicit clause relating to local remedies. But their purpose, their only *raison d'être*, is to prevent domestic products from ultimately enjoying protection in practice, at the expense of like foreign products. What is required of the State party to the Agreement is that it ensure in the final result that foreign products are not placed at a disadvantage on the domestic market because their price is burdened by heavier taxation than domestic products. Hence these provisions cannot be interpreted as requiring absolute prevention of any act, even temporary, by which a foreign product is wrongly taxed. If at a given moment one of these products becomes subject to a tariff different from that applicable to a like national product, and if the duty is improperly collected, the result referred to by the obligations stated in the articles cited will also be achieved if the State takes steps to cancel or duly reduce the discriminatory taxation and refund the amounts wrongly collected. The desired purpose of equality of treatment of foreign and domestic products will thus be achieved.⁴⁷

22. The examples given so far all relate to obligations laid down in agreements. But it goes without saying that no less valid examples can be found among obligations of customary origin. Let us take the obligation which requires a State to guarantee to aliens, in certain spheres at least, equal treatment with nationals; or the obligation which, under certain conditions, requires the State to indemnify aliens whose property has been expropriated; or again, the obligation which requires the State to punish the authors of crimes against the person of aliens, especially aliens having the status of organs of their State, etc. It would obviously be going too far to say that these different obligations will not be considered as fulfilled unless the State so acts that at no time does a State organ take a discriminatory measure against an alien or carry out an act of expropriation without compensation, or pronounce a sentence acquitting the author of a crime against an alien or against an organ of a foreign State. The result required by these international obligations is that, in the last resort, the foreigner should receive the same

⁴⁷ The international obligation referred to here should be compared, from this point of view, with, for example, the obligations stated in article 34 of the Vienna Convention on Diplomatic Relations, which provides that "A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, ..." (for reference, see foot-note 13 above). Here, the *ratio* of the obligation is quite different. What the Convention requires is that, in the fundamental interests of the unhindered exercise of the functions entrusted to him, the diplomatic agent should not be hampered in his activity by the application of fiscal measures, just as he should not be hampered by the application of police measures, judicial measures, etc. No improper act of tax collection should be applied to him. Unlike the obligation considered in the text, this is one of the obligations which require the State to adopt a specific conduct of forbearance. It is one of the obligations dealt with in section 5: the State cannot consider that it has correctly performed its international duty because it has subsequently refunded to the diplomatic agent the sums unduly demanded of him, or because it has released a diplomatic agent who was improperly arrested, etc.

treatment as a national, that he should be compensated for property expropriated from him, and that anyone guilty of a crime against his person should be punished. Now it is obvious that here, too, the desired result will be achieved even where an initial measure contrary to what was required is rectified by a subsequent measure which can obliterate the consequences of the first.

23. The obligation requiring, not the adoption of specific conduct, but the achievement of a certain general result, may take an even more permissive form than that which allows the State an initial freedom of choice of the means by which the result is to be achieved or which permits the State to achieve the result by completely obliterating, through different conduct, the consequences of any initial conduct calculated to frustrate the achievement of the result. There are cases in which, when the initial conduct adopted has made the main result required impossible to achieve, the form of the international obligation allows the State to consider that it has fulfilled its international obligation by achieving an alternative result. Let us take, for example, the obligation of customary international law which requires the State to exercise a certain vigilance to prevent unlawful attacks against the person or property of aliens. If, in a concrete case, the State has been unable to prevent an attack of this kind, it can still discharge its obligation by offering reparation for the damage suffered by the alien who was attacked. A similar conclusion is reached in regard to article 9, paragraph 1, of the International Covenant on Civil and Political Rights which provides that "No one shall be subjected to arbitrary arrest or detention".⁴⁸ The obligation here set out should be read together with paragraphs 4 and 5 of the same article, which provide, respectively, that

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful and that

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

This juxtaposition of provisions shows that the State can consider that it has acted in conformity with its international duties even when, having failed to achieve the main result required by the obligation stated in article 9, it has nevertheless achieved the alternative result of making reparation for the injury unlawfully caused to the person who suffered an arrest or detention which should not have taken place.⁴⁹

⁴⁸ For reference, see foot-note 40 above.

⁴⁹ In addition, as noted above in foot-note 44, the Covenant contains in article 41, para 1 (c), a general provision making the exhaustion of domestic remedies a condition for the Committee on Human Rights to "receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant". Now any domestic remedy may put an end to arbitrary arrest or detention or provide reparation for injury suffered, but it certainly cannot prevent the arrest or arbitrary detention from having taken place. Reparation for the injury caused is clearly only an alternative result, achieved instead of the primary required result of preventing arbitrary arrest or detention.

Once again, attention must be drawn to the difference between an obligation such as that to which we are referring and another, apparently similar, obligation such as that contained in article 29

24. To sum up, the international obligations which do not go so far as to require a specific course of conduct of the State (or, one might say, conduct by specifically designated organs), but are confined to requiring the achievement of a given result, are characterized, as compared with the former, by a degree of permissiveness, which is, moreover, variable. As already seen, this permissiveness may include initial freedom to choose between the various means of achieving the desired result. In addition to this freedom of choice, or even without it, it may sometimes include the possibility of applying a remedy *a posteriori* to the effects of an initial conduct which resulted in a situation contrary to the desired result. And this faculty of applying a remedy may extend only to the belated achievement of the same result, by the obliteration of all the consequences of the initial conduct; or it may go so far as to include the achievement of an alternative result, considered, to some extent, as equivalent to that which the initial conduct has rendered impossible to achieve.

25. In the light of these findings, it must now be established how the breach of an international obligation of the kind considered in this section is to be determined. This task is much less simple than in the cases considered in the preceding section, where the existence of the breach was shown simply by comparing the conduct in fact adopted by the State with the conduct it was specifically required to adopt in the case in point. In the cases considered in the present section, it will, rather, be necessary to compare the result required by the international obligation with the result finally attained in practice by the course or courses of conduct adopted by the State. Only where the two results do not coincide must it obviously be concluded that the conduct of the State was not in conformity with what the international obligation required of it, and that there has therefore been a breach. In other words, it is the circumstance that the result required by the international obligation has not been achieved which alone characterizes the nature of the breach. It is now necessary to examine in greater detail how this circumstance applies in the different cases discussed in the foregoing paragraphs and the consequences which follow from it in each case.

26. It is natural to begin by considering the case in which the permissiveness which characterizes the international obligation as to the means of ensuring its fulfilment,⁵⁰ takes the form, as we have seen, of a simple initial freedom to choose between the different means

of the Vienna Convention on Diplomatic Relations, which lays down that "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." It is obvious that both the letter and the spirit of this provision make it impossible to accept that the State can consider it has fulfilled its obligation if it offers to pay compensation for the arrest or detention of a diplomatic agent. As we have emphasized several times, the obligation which remains in regard to the foreign diplomatic agent amounts to requiring the State to adopt a specific course of conduct of forbearance, not merely to achieve a certain result and still less to achieve a possible alternative result, such as reparation for the injury caused to the diplomatic agent by arrest or detention.

⁵⁰ It is this permissiveness which places the obligation among those which require the State to achieve a certain result, and not among those which require it to adopt a specific course of conduct.

available for achieving the result internationally required. This freedom of choice, as we have also seen, obtains both where the international obligation is completely neutral as to the choice, and where the instrument in which the obligation is embodied expresses a simple preference for one means rather than another, without that preference being binding on the State. In both cases, the State is only required to achieve the result called for by the obligation.

27. Let us take the case of an international obligation which allows the State to achieve the required result by whatever means it prefers, that is to say, either by promulgating a law, or by passing an act or issuing administrative regulations, or by following established practice or adopting a new practice, or by some other means. It seems obvious that, when an international obligation is of this nature, the State's choice of the means to be employed can in no case constitute the breach of the obligation. The breach can consist only in the fact that the State has not in practice succeeded in achieving the result internationally required by one or other of the means available to it for doing so. This logically evident conclusion comprises the following four elements:

(a) Where the State has in fact succeeded, by the means of its choice, in achieving the internationally desired result, no one can claim that it has committed a breach of the obligation on the ground that its conduct took the form of adopting one measure rather than another, or even on the ground that it achieved the desired result without having adopted any particular measure to that end;

(b) So long as it cannot be established *in concreto* that the State has failed in its task as regards the result required of it by an international obligation, the fact that it has not taken the measure which, *in abstracto*, would have appeared the most appropriate for achieving that result is not in itself sufficient grounds for charging the State with a breach of the obligation;

(c) So long as there has been no concrete failure to achieve the result required, the conclusion is the same where the State has taken a measure susceptible in principle of frustrating the achievement of that result, but has not itself created a concrete situation contrary to that result;

(d) On the other hand, where it is established that the situation actually created by the State, by one or other of the measures between which it could choose, is contrary to the result required of it by an international obligation, the State obviously cannot claim that it has fulfilled its obligation by invoking, for example, the fact that it had nevertheless adopted measures by which it could hope to achieve the required result.

28. The conclusion just stated and its different elements are inescapable from the point of view of logic and common sense; they are the obvious consequence of the fact that, in the cases considered, it is only the result actually achieved which counts, and a comparison of that result with the result which the State should have achieved is the only criterion for establishing whether the obligation has been breached or not. However, it should be emphasized that this same conclusion and its

elements are fully confirmed by an examination of State practice, international jurisprudence and the opinions of learned writers.

29. In section 5, it was noted that the difference in the form taken by the breach of an international obligation, according to whether it required the State to adopt a specific course of conduct or only required it to achieve a specific result by conduct of its own choice, had been clearly brought out in the practice of States, when examining the possibility of establishing that a breach of an international obligation has been committed by taking or failing to take legislative action. Certain States which, like Switzerland⁵¹ and Poland,⁵² stated their opinion on the matter in their replies to point III, No. 1 of the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference, pointed out that, in the second case, which in their opinion was much more common than the first, the adoption or non-adoption of a law having a specific content could only be considered as one means, among others, of achieving a result, which alone was decisive.

A similar statement of position may be noted in a letter sent on 18 October 1929 by Mr. Albert Thomas, the Director General of the International Labour Office, to the Government of the Irish Free State, in reply to an inquiry from that Government as to whether the provisions of the Weekly Rest Convention were fulfilled by existing practice in that country. While pointing out that the course most usually adopted to secure the Convention's effective application was that of passing legislation, the letter from the Director General of the International Labour Office emphasized that the State was free to follow whatever method seemed most appropriate in its particular case, provided only that that method would in fact ensure effective application of the provisions of the Convention.⁵³

⁵¹ As we recalled in paragraph 8 above, the Swiss Government emphasized the need to qualify its reply to the question whether international responsibility was engaged by the failure of a State "to enact legislation necessary for the purpose of implementing" its obligations. It replied in the affirmative only as regards the case in which an international agreement expressly required the parties to take specific legislative measures. It observed that, in the other cases, "it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations ...".

⁵² The Polish Government in its reply distinguished between the "entirely exceptional and very rare case of a State which has assumed an international undertaking to enact provisions before the expiry of a certain period" and "all other cases". It indicated that only in the first case did the fact that the provisions had not been enacted within that period constitute an offence, whereas in the other cases "the mere fact of not enacting legislation does not involve international responsibility ...". See League of Nations, *Basis of Discussion ... (op. cit.)*, pp. 28-29.

⁵³ Mr. A. Thomas's letter stated: "The Convention leaves considerable latitude to the Governments which ratify it ... A Government is therefore free to apply under the Convention any system which meets with its approval; and the existing practice in the Irish Free State would undoubtedly fulfil the requirements of the Convention ... it is for the Government which undertakes international responsibility as a party to a Convention to judge what is the action which in its view will secure the Convention's effective application ... The course most usually adopted is that of passing legislation to make the application of the weekly rest compulsory

(Continued on next page.)

Thus, these different statements of opinion expressly confirm the correctness of the conclusion stated above⁵⁴ and of its first element, according to which, if the internationally required result is achieved by the State in a particular case, it matters little whether it is achieved by legislation or by any other means.

30. The replies quoted above to the request for information by the Preparatory Committee for the 1930 Codification Conference also provide confirmation of the second element of the conclusion already mentioned,⁵⁵ which is closely connected with the first. According to this element, so long as the State has not failed to achieve *in concreto* the result required of it by the international obligation, the fact that it has not taken a specific measure to that end (and in particular has not enacted a law) cannot be held against it as a breach of the obligation.

In the continuation of the Swiss Government's reply to the request for information by the Preparatory Committee, it is stated:

... even in the absence of a law by which the State could immediately fulfil its obligations, we will not be confronted with a fact or act contrary to international law unless some circumstance arises by which the rights of other States are prejudiced.⁵⁶

In the continuation of the Polish Government's reply, it is stated that responsibility:

... ensues only if the State authorities or tribunals refuse, in the absence of relevant municipal provisions, to give effect to rights arising out of international undertakings. Until this has occurred, there is nothing to show that such provisions are required, that the authorities and tribunals, for example, will give decisions incompatible with the international undertakings of the State; it should be left to the State to decide whether the promulgation of a special law, decree or circular is necessary.⁵⁷

31. With regard to the ideas put forward in the works of learned writers, these also accord with the basic conclusion set out in paragraph 27, particularly with its first two elements, supported, as we have seen, by official expressions of the opinion of States. The authors of these works also naturally concentrate their attention on the problem as it arises in relation to the taking of, or failure to take, legislative measures. They state very emphatically

(Foot-note 53 continued.)

in industrial undertakings ... It would, however, suffice that legislation should be adopted which would be confined to giving the force of law to the existing practice ... It is for the Government of the Irish Free State to appreciate which of these methods is the best adapted to its requirements. Any of them would ... secure the effective fulfilment of the Convention." (ILO, *Official Bulletin*, vol. XIV, No. 3, 31 December 1929, pp. 125-126.) See also *The International Labour Code, 1951 (op. cit.)*, p. 277, note 464.

⁵⁴ Para. 27.

⁵⁵ Para. 27 (b).

⁵⁶ In other words, so long as the State has not actually reached a result in conflict with that internationally required of it (League of Nations, *Basis of Discussion ... (op. cit.)*, p. 29).

⁵⁷ *Ibid.* The reply of the British Government gave examples of obligations for the fulfilment of which the adoption of legislative measures constituted the appropriate and, probably, essential means. But it clearly brought out that, in view of the form of the obligations, which required only the achievement of a certain result, the failure to adopt such legislative measures should not be considered as in itself a breach of the obligations. The breach would be established only if, probably through lack of appropriate provisions, the State showed itself unable in practice to achieve the result required by its obligation.

that, in their view, no State which has specifically ensured the result required of it by an international obligation can be accused of breaching that obligation on the ground that it achieved the result without enacting a law for the purpose, and, more generally, that failure to take legislative measures does not in itself warrant the conclusion that the obligation has been breached unless it can be affirmed that the State specifically failed to ensure the result in question. These principles had already emerged clearly from the reasoning of Heinrich Triepel;⁵⁸ they have been explicitly formulated in the writings of Charles de Visscher⁵⁹ and Eduardo Jiménez de Aréchaga.⁶⁰ Some authors have explicitly stipulated that these principles are merely the necessary consequence of

⁵⁸ *Op. cit.*, pp. 301-202 (French edition: p. 299). Referring to the distinction between "immediately ordered" and "internationally indispensable" domestic law, the author observes that the latter "is indeed established in consideration of an international duty, but it is a duty which in itself leads to something other than the formation of this legal rule. The State establishes the law here, because, if it did not do so, it would not, *under domestic law*, be in a position to fulfil an international duty, for example a duty to punish ... thus, the legislator is moved to act not by *international law*, but by *domestic law*. In immediately ordered law, the act which the State was ordered to perform by international law consisted in creating law; here the State puts itself in a position, with regard to *its own* law, and through the new law, to perform an act ordered by international law. In the former case, the fact of not legislating or of repealing the law was itself already contrary to the law; in this case, the breach of the law results from the fact that the State has not performed the act which the law authorizes it to perform, or that it has performed the act which the State authorizes it not to perform."

⁵⁹ *Loc. cit.*, p. 97. "It may happen", writes this international scholar, "that the responsibility of a State is engaged ... by the failure of the legislative power to vote a law which has become indispensable for effective compliance with the State's international obligations. Suppose, for example, that an establishment treaty has guaranteed particularly favourable treatment for aliens in a particular country. That country may be compelled to introduce certain legislative provisions in its domestic law intended to ensure the fulfilment of its international obligations. A clarification should, however, be made here: the only thing of importance from the international standpoint is that the obligation incumbent on the State should be effectively fulfilled; by contrast, it is a matter of absolute indifference whether this purpose is achieved by enactment of a law, issue of a decree or any other procedure authorized by internal public law; the choice of the method by which the other contracting party places itself in a position to fulfil its international obligations is of little importance to foreign States; here international law is concerned only with the result to be achieved. Thus, if we examine the matter carefully, we see that the responsibility of a State is engaged most often, not because it has given an undertaking to another State to enact a law, but because, under the conditions established by domestic law, recourse to legislative action may be the only means by which the State can impose on its organs, officials and agents a course of conduct in conformity with its international obligations. It would only be otherwise in the rather exceptional cases in which a State had expressly bound itself by treaty to ensure that a particular reform was confirmed by its legislature."

⁶⁰ E. Jiménez de Aréchaga, "International Responsibility", *Manual of Public International Law*, ed. Sørensen (London, Macmillan, 1968), p. 545:

There is international responsibility for the non-enactment of legislation only in those cases in which it has been stipulated that a particular piece of legislation shall be enacted as the only way of implementing a treaty obligation. In other cases in which a particular obligation may be met either by legislation or by other means, responsibility arises from failure to meet the obligation, whether it is due to absence of legislation or to any other deficiency in the machinery of the State.

a distinction between obligations requiring the State to adopt a specific course of conduct and those which merely require it to achieve a particular result.⁶¹

32. At first sight, acceptance of the third element of the conclusion set out on the basis of the characteristic nature of obligations which leave the State free to choose the means of achieving the result required, may raise problems.⁶² It may be asked whether it is quite clear that the adoption of a measure or, particularly, of a law which would appear to obstruct the attainment of the result internationally required is not in itself sufficient to establish that there has been a breach of the international obligation. But there is no justification for doubt: logically, whatever the measure taken, we can say that there has been a breach of an obligation requiring a particular result to be actually attained only if it is in fact established that this result has not been attained, not if it has merely been found that there is an obstacle to its attainment. The difficulties experienced by certain writers seem to us to be really due to the fact that they have not borne in mind the distinction to be made between the different types of obligation, and that they have taken an undifferentiated position on the whole question whether the promulgation of a law "contrary to international law" is in itself a breach of its obligation by the State, or whether the breach only occurs later, when the law is applied in practice. It is therefore logical that those among these writers who had mainly in mind obligations specifically requiring the State to enact or not to enact a certain law should naturally have reached the conclusion that the breach occurs when the law is promulgated⁶³ and that, conversely, those who were thinking mainly of obligations which require only the attainment of a concrete result should have reached the conclusion that the breach occurs only when the law is applied to a specific case.⁶⁴ But most writers have found it necessary to make a distinction between different situations and have maintained that either conclusion could be justified, depending on the content of the obligation⁶⁵ and the circumstances of the particular case.⁶⁶ However, the criteria put forward on both sides for establishing in which specific cases the mere fact of having passed a law with a particular content constitutes a breach of an international obligation, and in which cases the opposite

⁶¹ See, in particular, Bilge, *op. cit.*, pp. 103-104; and Vittar, *op. cit.*, p. 95 *et seq.*

⁶² See para. 27 (c) above.

⁶³ This applies, for example, to U. Scheuner, who nevertheless qualifies his assertion by the words "as a general rule" ("L'influence du droit interne sur la formation du droit international", *Recueil des cours ...*, 1939-II (Paris, Sirey, 1947), vol. 68, p. 121 *et seq.*).

⁶⁴ See L. Kopelmanas, "Du conflit entre le traité international et la loi interne", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XVIII, No. 1, pp. 118 and 122; G. Ténékides, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 787.

⁶⁵ B. Cheng, for example, observes that the answer to the question raised here "depends upon what is in fact prohibited by the particular rule of international law and upon whether the municipal law actually contravenes it or merely enables some other organ of the State to do so" (*General Principles of Law as applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 174-175).

⁶⁶ This applies to G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 614 and 615.

conclusion is warranted, vary and do not always seem pertinent.⁶⁷ The writers who have based their solution of the problem on the distinction between the breach of obligations "of conduct" and the breach of obligations "of result" are undoubtedly those who have provided the valid criterion for deciding the question we are considering.⁶⁸

33. In the opinion of the Special Rapporteur, the criterion of differentiation advocated by these writers is not only the most logical: it also permits the most plausible interpretation of State practice and international jurisprudence. State practice, it must be admitted, does not abound in explicit statements of position on the question under consideration. The replies from Governments to point III, No. 1 of the request for information by the Preparatory Committee of the 1930 Conference were bound to be influenced on this point by the rather superficial manner in which the question was drafted. Many countries accordingly confined themselves to answering in the affirmative, without giving any information as to the extent of the agreement they were expressing. However, we think it would be quite wrong to believe that, by such answers, the Governments concerned meant to express their conviction that, in the event of legislative action by the State, its international responsibility would immediately and in all cases be engaged by the promulgation of the law. On the contrary, the reply of the South African Government, for example,⁶⁹ shows that it regarded the request submitted to it as referring to the application, not the promulgation of the law. Two other Governments, those of Great Britain and Switzerland, explicitly stated that, in their view, the mere fact of the adoption of a measure, such as the promulgation of a law, which constituted an obstacle to the fulfilment of the obligation, would not in itself warrant the conclusion that there was a breach of an international obligation. The British Government stated that "*It is not the enactment but the enforcement of the legislation so enacted which engages*

⁶⁷ Some writers make a distinction according to whether the law can be applied direct or whether it requires the enactment of regulations for its application (for example, P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 7-8). Others base the distinction on the fact that the law "directly violates existing rights or rules", as in the case of an illegal revocation of a concession granted to a foreign company, or that it produces wrongful effects only when there is "implementation *in concreto*", as in the case of a law laying down directives for future nationalizations (see J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), vol. VI, pp. 621-622, 641-642). Others, again, emphasize that, in the case of injury to a State, the promulgation of the law may be sufficient in itself, whereas when the injury is suffered by foreign individuals, responsibility generally arises at the time of its application (E. Jiménez de Aréchaga, *loc. cit.*, pp. 547-548; I. Brownlie, *Principles of Public International Law*, 2nd ed. (London, Oxford University Press, 1973), pp. 435-436).

⁶⁸ These are, in particular, the writers who have published monographs on the question of State responsibility for the acts of legislative organs. See Bilge, *op. cit.*, pp. 101 *et seq.*; and Vittar, *op. cit.*, pp. 89 *et seq.* See also Sereni, *op. cit.*, pp. 1538-1539; and A. Fabre, *Principes du droit des gens* (Paris, Librairie de droit et de jurisprudence, 1974), pp. 650-651.

⁶⁹ See League of Nations, *Bases of Discussion ...* (*op. cit.*), p. 25. The South African Government stated that the "enforcement" of legislation incompatible with the provisions of a treaty concluded with another State or with its other international obligations engaged the responsibility of a State.

the responsibility of the State".*⁷⁰ while the Swiss Government held that "Generally speaking . . . we should not consult the various laws as such in order to ascertain and establish international responsibility, but rather the facts deriving from these laws, which affect the rights of other States".*⁷¹ We may add that the view expressed by the British and Swiss Governments, like the request to which they were replying, related only to responsibility for the breach of obligations concerning the treatment of foreigners, which are in fact obligations requiring only the achievement of a particular result. If their replies had related to the breach of obligations in any sphere in general, they would no doubt have been more detailed. The two Governments would probably have found it necessary to distinguish between cases in which the enactment of a law constitutes the "specific conduct" which itself constitutes the fulfilment or breach of an international obligation, and the more frequent cases in which the enactment of a law is only one of the ways in which the State can arrive at the concrete result which is the real object of the international obligation.⁷² It seems probable that, had other Governments given their views in more detail, they would have endorsed the views of the British and Swiss Governments. It can therefore be accepted that the codification work done by the League of Nations in 1929 and 1930 does not provide sufficient evidence to establish with certainty what States considered, at that time, to be the correct solution to our problem. It must, nevertheless, be recognized that the results of this work are certainly not incompatible with the conclusion that, where an international obligation only requires the achievement of a specific result by the State, it cannot be concluded that this obligation has been breached merely because the State has enacted a law which may be an obstacle to the attainment of the result required.

34. When the positions taken by Governments in specific cases are examined, it is interesting to note those of the United States and Great Britain in the controversy which arose between the two countries in 1912-1913 concerning the *Tolls on the Panama Canal*. In 1912, the United States Congress passed an Act regulating tolls on the Canal on the basis of criteria which Great Britain considered incompatible with the provisions of article III, paragraph 1, of the Hay-Pauncefote Treaty of 18 November 1901, which provided for equality of treatment for the flags of all nations parties to the treaty, without discrimination.⁷³ Invoking article 1 of the Arbitration Treaty

⁷⁰ *Ibid.*, p. 27.

⁷¹ *Ibid.*, p. 29.

⁷² Thus, the fact that the Preparatory Committee proposed as a "basis of discussion", in the light of the replies received, a text which affirms that "A State is responsible for damage suffered by a foreigner as the result . . . of the enactment of legislation incompatible with its international obligations" (basis No. 2) (*ibid.*, p. 30, and *Yearbook... 1956*, vol. II, p. 223, A/CN.4/96, annex 2) does not prove that, in the Committee's view, responsibility would always arise from the mere enactment of "incompatible" legislative provisions. This also applies to article 6, which was adopted on first reading by the Third Committee of the Conference, and which reproduces the text of basis No. 2.

⁷³ The relevant paragraph read:

"The Canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire

of 1908, the Government in London therefore proposed that the question be submitted to arbitration. The United States Government did not go into the substance of the matter, but opposed that British proposal, saying:

When, and if, complaint is made by Great Britain that the effect of the act and the proclamation together will be to subject British vessels as a matter of fact to inequality of treatment, or to unjust and inequitable tolls in conflict with the terms of the Hay-Pauncefote Treaty, the question will then be raised as to whether the United States is bound by the treaty both to take into account and to collect tolls from American vessels, and also whether under the obligations of that treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States. Until these objections rest upon something more substantial than mere possibility, it is not believed that they should be submitted to arbitration.⁷⁴

The British Government expressed a different view, in the following terms:

... international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that a nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a conclusive instance has been taken, which in the present instance would, according to your argument, seem to mean until tolls have been actually levied upon British vessels from which vessels owned by citizens of the United States have been exempted ...

... the Act of Congress, when it declared that no tolls should be levied on ships engaged in the coasting trade of the United States, and when, in further directing the President to fix those tolls within certain limits, it distinguished between the vessels of citizens of the United States and other vessels, was in itself, and apart from any action which may be taken under it, inconsistent with the provisions of the Hay-Pauncefote Treaty for the equal treatment of the vessels of all nations.⁷⁵

In the end, there was no arbitration in this case, as the United States agreed to amend the law which had given rise to the exchange of notes. But it is nevertheless interesting to consider the positions taken by the two Governments. The United States view was fully consistent, at least from the formal standpoint, with the general principle which seems to us to compel recognition in this matter: the principle that it cannot be concluded that there has been a breach of an obligation requiring a State to achieve a particular result *in concreto*, on the ground that the State has taken a legislative or other measure which falls short of creating a specific situation not in conformity with the desired result, even if such a measure introduces an obstacle to the attainment of that result. The British view, on the other hand, seems to

equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable." (*British and Foreign State Papers, 1900-1901*, vol. XCIV (London, H.M. Stationery Office, 1904), p. 47.)

⁷⁴ Instructions of Secretary of State Knox to the United States Chargé d'affaires in London, dated 17 January 1913 (Hackworth, *op. cit.* (Washington, D.C., United States Government Printing Office, 1943), vol. VI, p. 59).

⁷⁵ Note from the British Ambassador at Washington to United States Secretary of State Knox, dated 28 February 1913 (A. D. McNair, *The Law of Treaties*, 2nd ed. (Oxford, Clarendon Press, 1961), pp. 548-549).

contradict that criterion. It may, however, be noted that the measure taken by the United States Government in this case did not impose higher tolls on British vessels than those levied on United States vessels, but exempted United States vessels from the tolls which continued to be levied on the vessels of other nations. It could therefore be maintained with some justification that the situation which resulted for British vessels was already a discriminatory situation *in concreto*, which was unlawful under the Treaty, which explains President Wilson's prompt action to change the situation by the 1914 Act. Moreover, as Lord McNair's comment on the British Note states:

... the British Note did not go so far as to allege that a violation of the Treaty had already occurred, and ... the following paragraphs are rather in the nature of the assertion of a right, *quia timet*, to protest and demand arbitration.⁷⁶

Indeed, the purpose of the British protest and its proposal for arbitration seem to have been to prevent an internationally wrongful act from occurring, rather than to invoke the consequences of a wrongful act already committed.⁷⁷ And, as already noted, in 1929 the British Government was to adhere firmly to the principle that it is not the law as such which gives rise to State responsibility but the facts deriving from that law.⁷⁸

35. As regards international jurisprudence, it may be recalled that the United States-Panama General Claims Commission, established by the Convention of 28 July 1926, took the problem before us directly into consideration in its decision of 27 June 1933 in the *Mariposa Development Company* case. It stated that:

The Commission does not assert that legislation might not be passed of such a character that its mere enactment would destroy marketability of private property, render it valueless and give rise forthwith to an international claim, but it is the opinion of the Commission that ordinarily, and in this case, a claim for expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible.

Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a *locus penitentiae* for diplomatic representation and executive forbearance, and claims should arise only when actual confiscation follows.⁷⁹

The criterion adopted by the United States-Panama Claims Commission is thus in full conformity with that set out in subparagraph (c) of the conclusion reached in paragraph 27 above. In the case submitted to the Commission, the result intended was clearly respect for the

⁷⁶ *Ibid.*, p. 548.

⁷⁷ A note of protest and a proposal that the existence of a right should be established by an objective authority may very well be justified as a means of preventing an internationally wrongful act. See Schwarzenberger, *op. cit.*, p. 614; Vitta, *op. cit.*, p. 95; Favre, *op. cit.*, p. 651.

⁷⁸ See para. 33 above.

⁷⁹ United Nations, *Reports of international arbitral awards*, vol. VI. (United Nations publication, Sales No. 1955.V.3), pp. 340-341.

property of foreigners. And, in the Commission's view, it could not already be maintained that this result had not been achieved merely because a law had been enacted which would permit future confiscations of property belonging to foreigners ("legislation is passed which makes the later deprivation of possession possible"). It could not be held that there had been failure to achieve a result, and subject to the existence of subsequent possibilities of obtaining that result—a point which will be dealt with specifically later—it could not be held that an obligation had been breached, unless there had been actual interference with the property of a foreigner ("the possession of the owner is interfered with"). As the Commission pointed out, the only case in which, from another standpoint, the acquired result could be regarded as wanting, as soon as the law authorizing expropriation was enacted, would be that in which the enactment of the law seriously reduced the commercial value of the foreigner's property.⁸⁰ Otherwise, in the Commission's view, a breach would occur when the foreigner was deprived of his property *in concreto*, not when all that had been done was to adopt a measure making such deprivation possible *in abstracto*.

36. In other international judicial decisions, acceptance of the principle to which we are referring is, if not *expressis verbis*, at least implicit. This is so, for example, where the Permanent International Court of Justice, asked to rule on whether a particular law constituted a breach of an international obligation or not—an obligation requiring the achievement of a particular result by the State, not the adoption of a specific course of conduct—referred to the *application* of this law, not to its *enactment*. In its very well-known judgment of 25 May 1926, in the case concerning *Certain German interests in Polish Upper Silesia (the merits)*, the Court stated that:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case ... The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, *in applying that law*,* Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.⁸¹

The European Court of Human Rights appears to endorse the same criterion when stating, in its judgment of 27 March 1962 on the *De Becker* case:

... the Court is not called upon, under articles 19 and 25 of the Convention, to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on *the specific case of the application** of such an Act to the Applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention ...⁸²

⁸⁰ On this point, see Reuter, *loc. cit.*, pp. 95-96.

⁸¹ *P.C.I.J.*, series A, No. 7, p. 19. In the advisory opinion of 4 February 1932, concerning the *Treatment of Polish nationals in Danzig (ibid., series A/B, No. 44, p. 24)* the Court also considered that:

"The *application** of the Danzig Constitution may, however, result in the violation of an international obligation incumbent on Danzig".

⁸² *Yearbook of the European Convention on Human Rights, 1962 (The Hague)*, vol. 5, 1963, pp. 334 and 336.

Lastly, very similar positions may be noted in a series of decisions of the European Commission on Human Rights.⁸³

37. We may therefore sum up the result of our investigation by noting that the writers of learned works, State practice and international jurisprudence all confirm what we first logically deduced from the characteristic nature of obligations requiring the State to achieve a specific result. The fact that a State under an obligation of this kind has adopted a measure or, in particular, that it has enacted a law constituting *in abstracto* an obstacle to the attainment of the result required is not in itself a breach or even the beginning of a breach of the obligation in question.⁸⁴ A breach will exist only if the State is found to have failed *in concreto* to ensure the said result.

38. Lastly, we may refer to the fourth element of the conclusion reached regarding determination of the existence of a breach of an obligation requiring the State not to adopt a specific course of conduct but to achieve *in concreto* a certain result.⁸⁵ This is the element according to which a State having failed to achieve the required result cannot escape the charge of not having fulfilled its international obligation by claiming that it did, nevertheless, adopt measures by which it hoped to achieve the result required of it. As has been said repeatedly, what is important is that the concrete result should be achieved: if it is not, a breach has been committed, regardless of the measures taken by the State.⁸⁶ We have seen, for example, that article 2, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination provides that

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms ...⁸⁷

Now it is obvious that, if the executive authorities of a State Party to the Convention in fact commit acts of racial discrimination, the State will not escape the

⁸³ The decisions on applications No. 290/57 against Ireland and No. 867/60 against Norway all contain the following statement:

"... the Commission can examine the compatibility of domestic legislation with the Convention only with respect to its application to a person, non-governmental organization or group of individuals and only insofar as its application is alleged to constitute a violation of the Convention * in regard to the applicant person, organization or group in question; ...".

(*Yearbook of the European Convention on Human Rights, 1960* (The Hague), vol. 3, 1961, p. 221; *Yearbook of the Convention... 1961* (The Hague), vol. 4, 1962, p. 276.)

⁸⁴ Except, of course, in instances such as that referred to by the Claims Commission in the Mariposa Development Company case (*supra*, para. 35), where the law in question would itself create a specific situation incompatible with the internationally required result.

⁸⁵ See para. 27 (d) above.

⁸⁶ The result to be achieved must obviously be that which the international obligation requires of the State and nothing else. This point should be stressed, particularly in connexion with the possible breach of an obligation requiring the State, for example, to provide adequate protection against certain external events by the means it considers most appropriate. It is obvious that the result required in such a case is that the system of protection should be established and made operative, not that the event feared should be avoided in all circumstances. In a later section, we shall consider more particularly internationally wrongful acts constituted by events, and their distinguishing characteristics.

⁸⁷ For reference, see foot-note 8 above.

consequence of being charged with a breach of the Convention by taking refuge behind some law prohibiting such acts which it may have adopted.⁸⁵ It is, moreover, unnecessary to dwell further on this point, since the truth stated in the last element of the conclusion set out above⁸⁹ (an element which deals with the opposite situation from that previously considered and settles the case according to the same principles) is self-evident.

39. At the beginning of our examination,⁹⁰ we said that it would begin with consideration of the case in which, to achieve the result required by a specific international obligation, the State has initial freedom of choice as to the means to be used for this purpose, but is allowed no other latitude than this initial freedom. It is obvious in a case of this kind that, if, through the active or omni-verse conduct it adopts in taking one of the courses it is free to choose, the State creates a situation incompatible with the result required of it by its international obligation, it thus loses the opportunity of fulfilling that obligation. It is not allowed to remedy the effects of its conduct *ex post facto* or to change the situation it has created by recourse to another means.

40. It is not impossible that this limitation of the discretion given to the State—for the fulfilment of its obligation—to an initial choice of the different means which could be used to achieve the internationally required result, should be expressly stated in the text of the instrument which establishes the obligation in question. But such a limitation is more likely to be implicit in the context of the instrument or its object and purpose. Most frequently, no doubt, it follows automatically from the specific nature of the result required by the international obligation in question, because, owing to the nature of that result, the creation of a situation which is contrary to it will make it definitively impossible to achieve. As an illustration of this case, let us take one of the examples referred to above,⁹¹ namely, the requirement of article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, which provides that "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity". As regards customary international obligations relating to the status of foreigners in general, we can also take the case of the obligation by which the State is required to take minimum preventive measures to protect foreigners against attacks due, for example, to an outbreak of xenophobia. There is no doubt that both of those obligations merely give the State an indication of the result to

⁸⁸ It should also be noted that, even where an obligation specifically requires the State to enact a law with a certain content, that obligation is usually accompanied by an obligation to apply the law. The fact of having enacted the prescribed law then constitutes fulfilment of the first obligation, but possible failure to apply the law in practice constitutes a breach of the second obligation. See, in this connexion, the position stated at the end of the part of the report of the Ghana-Portugal Inquiry Commission, cited in paragraph 9 concerning violation of ILC No. 105 on the Abolition of Forced Labour.

⁸⁹ See para. 27 (d) above.

⁹⁰ See para. 26 above.

⁹¹ See para. 17 above.

be achieved and that the State does certainly have initial freedom to choose the means by which to establish the required system of protection. However, when, whatever the means used to provide such protection, its manifest inadequacy permits the occurrence of an invasion of the premises of an embassy, the lynching of a foreigner or a massacre of nationals of a particular country by a rioting crowd, it can only be concluded that the State has failed irremediably in its task and that there is no further possibility of using other means to restore a situation *ab initio* in conformity with the result required by the international obligation. It must then be recognized that the result to be achieved by the State has not, and will not, be achieved and that it has thus committed a breach of the obligation.

41. The cases considered in the two preceding paragraphs are, however, the exception rather than the rule. As we have seen, where international law defines the obligation it lays on the State by a simple indication of the result to be achieved, the discretion it gives the State as to the means of achieving this result usually goes beyond mere initial freedom of choice. So long as the required result has not become finally unattainable by reason only of the fact that the initial conduct of the State failed to achieve it, international law does not usually preclude a State, one of whose organs has created a situation incompatible with the result required by an international obligation, from still achieving this result through a new course of conduct by State organs, which eliminates the existing situation and replaces it by another that will *ab initio* be in conformity with the required result. In this case, the possibility of subsequent action open to the State is added to, and supplements, its initial freedom of choice.⁹² The latitude left to the State in regard to the fulfilment of its obligation is thus defined in its entirety.

42. One reservation must, however, be made before conclusions are reached on the conditions for recognizing the existence of a breach of an international obligation in the case considered. It may well be that, internationally, there is nothing to prevent the State from still fulfilling its obligation by remedying, *ex post facto*, by the adoption of different conduct, a situation incompatible with the internationally required result which was created by its initial conduct. But it is also possible that the State may encounter an obstacle to this solution in its own system of internal law. This is the case especially when the situation which is incompatible with the internationally required result has been created by means whose effects cannot be obliterated. For example, if the situation was created by the enactment and effective application of a law, there is, in most cases, no hope of finding, in the internal legal system, any means of changing this situation retroactively and thus still achieving the result to which the law ran counter. It would be otherwise only if there existed, in the machinery of the State, a judicial authority empowered to declare legislative acts null and void and to

⁹² This is not necessarily always so, however, for as pointed out in paragraph 6 above, the State may still remedy, *a posteriori*, the consequence of initial conduct opposed to the achievement of the internationally required result, even in cases where, originally, the particular nature of the result to be achieved did not permit of a real choice between different means of action, since the result could, in fact, initially be achieved in only one way.

obliterate their effects retroactively. The obligation to respect the property of foreigners, which is imposed by some treaties, is the typical example of an obligation which requires the State to achieve a certain result, but leaves it complete latitude as to the means of doing so. But if the State passes a law providing for the expropriation, without compensation, of certain classes of foreigner, or of certain kinds of property belonging to them, and applies that law to the property of persons covered by such a treaty, it cannot reasonably be expected that the obligation imposed by the treaty can still be fulfilled since it is hard to see what organs or authorities would have the power to fulfil it. The same conclusion is valid for cases in which the action that created a situation incompatible with the required result takes the form of a measure by the executive power which can be neither repealed nor amended by another State organ, of a judicial decision against which there is no appeal, or of an administrative or judicial measure which has merely correctly applied a mandatory provision of the law. For it should be stressed—and not in these cases only—that the impossibility of rectifying the consequences of initial conduct by new conduct which obliterates them may result, not from any real lack of means that can be used for this purpose in the internal legal system, but from the fact that the availability of such means is purely formal, since, in the case in point at least, they offer no real prospect of achieving the required result. In all these cases, the obstacle which makes it impossible to remedy the situation created by the initial action or omission of the organ concerned thus has the same paralysing effect as the obstacle which, as we saw in the preceding paragraph, is encountered when the initial action or omission of the State has made it impossible, in fact, to achieve the result required by the international obligation. In both cases, the State does not really have any means of wiping out the consequences of its initial conduct. Hence, it can only be concluded that the result which the State was required to achieve has not been and will not be achieved: the existence of a breach of the obligation will thus inevitably be established.

43. Thus, when the initial conduct of an organ of the State has created a situation incompatible with the result required by an international obligation, for that situation itself not to be a complete and definitive breach of the obligation, three conditions must be met: (a) the obligation itself must, in principle, give the State discretion to pursue the achievement of the required result, even after a situation incompatible with that result has been created by an action or omission of one of its organs; (b) the required result must not in fact have become unattainable in consequence of that action or omission; and (c) the internal legal system must not place any formal or real obstacles in the way of subsequent efforts nevertheless to fulfil the obligation. If all these conditions are satisfied, it clearly cannot yet be concluded that the State has finally failed to achieve the result properly expected of it. The fact that the organ which first intervened in the case created, by its action or omission, a situation incompatible with the required result is only a beginning or adumbration of a breach of the international obligation, since the State has not yet

exhausted all its available means of achieving that result. This adumbration will, moreover, come to nothing if the State can seize the opportunity still open to it and fully achieve the required result by new conduct which eliminates, entirely and *ab initio*, the incompatible situation created by its previous conduct. In this connexion, we need only refer to the international obligations cited as examples.⁹³ Let us suppose that, contrary to the requirements of international conventions on human rights, the police authorities of a State deny certain persons freedom to reside in the place of their choice, freedom of association or freedom to profess their religion etc., or that, contrary to the provisions of an establishment treaty, the competent administrative authority refuses, or withdraws from, a foreign national a permit to exercise a certain profession or activity. In both these cases, the State can still, if it wishes, create a situation which conforms to the internationally required result, provided that the country has a higher administrative authority, or an administrative or civil court which is competent, and in fact able, to revoke the prohibition of residence or association, to remove the obstacles to the practice of the chosen religion, or to revoke the decision refusing or withdrawing a permit. Let us also suppose, again, that, contrary to an obligation laid down in an international convention, which requires the national law of a particular country to be applied to certain relations involving nationals of that country, a court of first instance applies a different law in a given case, or that, contrary to obligations imposed by international custom, a court obstructs the normal course of an action brought by a foreigner or acquits persons known to have committed a crime against the representative of a foreign Government or for that matter against any foreigner.⁹⁴ The State will still be able to fulfil its obligations provided that there is a higher authority able to reverse the wrongful decision and thus create a situation which in every respect conforms to the internationally required result.

44. Thus, in all these different cases, the initial conduct of a State organ which has created a situation incompatible with the internationally required result becomes a complete breach of the international obligation only if the State refrains, despite the possibility open to it, from eliminating this situation or confirms it by further action. It will be as a result of this later action or omission that the existence of the breach will be definitely established and that the responsibility of the State will be directly engaged. However, since the beginning of the breach represented by its initial conduct will not have been effaced but rather completed by the State's subsequent conduct, the breach will finally be brought about by a complex act,⁹⁵ combining all the successive actions and omissions of the State in the case in question.

⁹³ See paras. 20-22 above.

⁹⁴ See para. 22.

⁹⁵ The concept of a "complex" act of the State has been illustrated by the Special Rapporteur in his fifth report (see *Yearbook... 1976*, vol. II (Part One), p. 23, document A/CN.4/291 and Add.1-2, para. 67) and by the Commission itself in its draft articles (see *Yearbook ... 1976*, vol. II (Part Two), pp. 88 and 94, document A/31/10, chap. III, sect. B, article 18, paras. 5 and 23 of the commentary).

45. It only remains to refer briefly to the last of the three possible cases successively considered in the first part of this section, namely, the case involving the category of obligations whose characteristics have been described and examples of which have been given above.⁹⁶ As stated, these obligations, as compared with those mentioned previously, are characterized by an even greater degree of permissiveness as regards the latitude left to the State for their fulfilment. By reason of their nature and purpose and their field of application, when the initial conduct of a State bound by such an obligation, besides creating a situation incompatible with the internationally required result, has made the attainment of that result materially impossible, the State still has a last opportunity of discharging its international duties. It is allowed, as an exception, to produce an alternative result, instead of that originally required—a result different from that required under the obligation, but in a way equivalent to it. The conclusion as to the recognition of a breach of one of these obligations is self-evident. As has already been said, a State cannot be charged with a complete breach of the obligation to exercise vigilance to prevent unlawful attacks against the person or property of foreigners, or of the obligation to protect every person against arbitrary arrest and detention, merely because it has not been able to prevent such wrongs from occurring. In order to be able to conclude that such a breach has been committed, it must be established that the State, not having achieved the priority result, has also failed to achieve the alternative result, namely, full and complete compensation of the victims for the injury sustained.⁹⁷ It is this second failure which, added to the beginning of a breach constituted by the first, makes it into a complete and definitive breach. And, as in the case previously considered, the breach is constituted by a "complex" act of the State.

46. In view of the information provided and the arguments set out in this section, to define its difficult subject-matter the Special Rapporteur proposes the adoption of the following text:

Article 21. Breach of an international obligation requiring the State to achieve a particular result

1. A breach of an international obligation requiring the State to achieve a particular result *in concreto*, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.

2. In cases where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation, either by achieving the originally required result through new conduct or by achieving an equivalent result in place of it, a breach of the obligation exists if, in addition, the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct.

7. EXHAUSTION OF LOCAL REMEDIES

47. The preceding section of this chapter was devoted to a consideration of how, in general, a breach of an

⁹⁶ See para. 23.

⁹⁷ *Idem*.

international obligation occurs when the latter does not require the State to adopt a specific course of conduct, but merely to take positive steps to ensure a particular result. We pointed out that, in this case, it is logical that both the fulfilment and the breach of the obligation should be assessed by that result. We therefore began by emphasizing the fundamental criterion that a breach exists when there is no tangible evidence of the required result having been achieved. In the light of this criterion, we asked ourselves in what respect the more or less generous latitude allowed the State in achieving this result is decisive for concluding that there has been a breach of an international obligation. Our analysis enabled us to define the basic principles indicating the conditions in which it may be considered that such a breach has been committed, whether in cases where the State only has freedom of choice at the outset, or in the more frequent cases where the State, having created by its initial conduct a situation incompatible with the result required by the obligation, has the faculty to remedy that situation and still fulfil its obligation by subsequent conduct.

48. Having thus established the basic rules, we now have to study, in particular, in connexion with the last-mentioned cases, the specific conditions of a breach of obligations falling within a given category. We propose to discuss those obligations which are designed to protect individuals, natural or legal persons, and which, at the international level, formulate certain requirements and establish certain guarantees as regards the treatment to be accorded by States, at the internal level, to the persons in question and to their property. A further condition is then added, for the purpose of determining whether a breach of an obligation in this category has been committed, to those required in connexion with a breach of the other obligations which, moreover, are termed obligations "of result". And in our view, the special aspect of these obligations, due precisely to the beneficiaries of their provisions, is also the cause of the special character of the conditions of their breach.

49. For where the result which the State is required to achieve is fixed essentially in the interest of individuals and affects their situation in the internal legal order of the State in question, it is natural that the co-operation of the persons concerned should be sought to get the State to comply with the stipulation laid down for their benefit by the international obligation. It is natural that, in case of difficulty, it is they who should be responsible for taking the initiative to promote action by the State to remedy the effects possibly engendered by an initial action or omission by a member of the State machinery, such action or omission being attributable to the State and running counter to the achievement of the internationally required result.⁹⁸ Hence there will be a breach of the international obligation if the individuals who

⁹⁸ Where, on the other hand, the result to be achieved is required in the direct interest of other subjects of international law, the obligation to institute for this purpose action to enable the State still to fulfil its obligation, can only rest with the State, provided it has the possibility of remedying the effects of an initial course of conduct incompatible with that result. Indeed, it would hardly be natural that promotion of such action at the level of the internal legal order of the State should be left to another State and subject of international law.

consider themselves injured through having been placed in a situation incompatible with the internationally required result, do not succeed, even after exhausting all remedies open to them at the internal level, in getting that situation duly rectified. In this case, the result sought by the international obligation becomes definitely unattainable by reason of the act of the State. However if, for various reasons, individuals who should and could set the necessary wheels in motion neglect to do so,⁹⁹ the State can hardly be blamed for having failed to take the initiative to obliterate the specific situation which conflicts with the internationally required result, and which was created by its initial conduct. It follows, therefore, that, if the necessary action by the individuals concerned was not taken, the situation engendered by conduct of the State running counter to the internationally desired result could not be rectified by a subsequent action of the State capable of replacing it by a situation compatible with the said result. But the fact that there has been no such corrective action, simply because those on whom it was incumbent to take the necessary initiative have failed to do so, cannot be blamed on the State. The case here is quite different from that where, despite the necessary initiative having been taken to obtain redress, the situation created by the initial course of conduct is confirmed by a new conduct of the State, likewise incompatible with the internationally required result. In the case we are now envisaging, it cannot be concluded that there has been a breach of its obligation by the State, precisely because in fact one of the conditions for the completion of the breach has not been fulfilled. The absence of this condition has the effect of excluding the wrongfulness of the failure to achieve the internationally required result. In this case, therefore, no international responsibility can arise for the State. That, in our opinion, is what is meant by the condition known as "exhaustion of local remedies".

50. The principle setting forth this condition has been the subject of special and sometimes very penetrating studies. Moreover, it is one of the principles which have attracted most attention from authors of general works on the responsibility of States for breach of their obligations concerning the treatment of aliens or their protection from injury to their person or their property. International courts have often stated this principle. It occurs frequently in international conventions designed to ensure that the contracting States accord a certain situation to private persons, whether aliens or even nationals. In view of the keen interest aroused and this abundance of formulations and analyses, it is only to be expected that different approaches should have emerged in the consideration and explanation of the principle, and that different ideas should have been put forward on the subject. Conflicting views have appeared, particularly as to the conventional or customary origin of the principle, as to whether it should be regarded as a substantive rule or a rule of procedure, and so on.

51. In our opinion, many of these differences are more apparent than real. They are often due to the fact that

⁹⁹ Provided, of course, that the State itself is not to blame for this inaction by individuals.

the question has been badly put or, especially, to the fact that the specific framework within which the problem has been considered has suggested conclusions which would probably not have been reached if the analysis had been carried out in a wider framework. For no one disputes that the principle of the exhaustion of local remedies by private persons who consider themselves injured by measures or decisions incompatible with the treatment to which they are entitled under international law, makes such recourse, in the last resort, a condition for the "implementation" of international responsibility, whether the form taken by such implementation is the submission of a claim through the diplomatic channel, or the lodging of an appeal to an international judicial or arbitral tribunal. Thus no one can dispute that the principle has an obvious impact on the possibility of utilizing the procedures for implementing responsibility. But this does not warrant the conclusion that the principle itself is merely a "practical rule" or a "rule of procedure", as some contend, even to the point of disagreeing on the question whether this "rule" should concern diplomatic protection in general or only the procedure for instituting proceedings before an international tribunal. The undeniable impact of the principle on these different procedures is a corollary, and a logical one, of the principle in question, but the main proposition it states cannot, in our view, be reduced to this corollary.

52. It is our contention that the principle of the exhaustion of local remedies applies necessarily, and primarily, to the determination of the existence of an internationally wrongful act arising through the breach of an international obligation, and thus to the genesis of international responsibility. To establish, for example that a State has committed a breach of an obligation laid on it by a treaty, to guarantee a certain situation to a national of another State is tantamount—as we have already noted from the beginning of our work—to establishing that an international subjective right of that other State has been infringed: the right that its own national shall be accorded the situation provided for in the treaty. Hence, if a State has completely breached its obligation towards another State, and if the right of the latter has, in consequence, been definitively infringed, international responsibility is inevitably generated, imputable to the author of the misdeed in question.¹⁰⁰ Now, generation of responsibility means generation of those new subjective legal situations by which it is reflected. In our case, it is the generation of a new international subjective right of the injured State to reparation for the infringement of the right accorded to it by the treaty. But, it would be inconceivable that this new international subjective right of the State, generated by the infringement, should remain, as it were, suspended in mid-air pending the result of proceedings instituted by a private person at the internal level, proceedings which may lead to the restoration of the right of that individual but not to the restoration of a

¹⁰⁰ It is impossible to conceive, at least in the international legal order, of a wrongful act not engendering responsibility. And certainly international law, so essentially realistic and so practical in its aims, would never provide for the generation of a responsibility which only existed in the abstract, that is to say, without another State having the faculty to enforce it as soon as it became apparent.

right belonging to the State at the international level and which has been infringed at that level. A right, in the subjective meaning of the term, is essentially a faculty to require from someone else a particular conduct or service. If the State is not authorized to require reparation for an internationally wrongful act committed to its detriment so long as local remedies have not been invoked and exhausted by the individual concerned, it is because for the time being it is not entitled to such reparation; in other words, it is because the wrongful act does not yet exist or, at least, has not yet been completed, and the international responsibility has not yet been generated. As we have stated, it is only the final rejection of all appeals which engenders such responsibility, by completing through its effects those of the initial conduct adopted by the State in the case in point and thereby rendering the result required by the international obligation definitely impossible of achievement. For we repeat, it is by rendering definitely impossible the achievement of the required result that the State completes its wrongful act. To think otherwise would be to fail to take into account the essential characteristic of an obligation designed to secure, not the adoption of a specific course of conduct, but the final achievement of a particular result. It would be to overlook the concept of a complex act of the State and of the point of time at which an act of this kind is completed and entails international legal consequences. In conclusion, it seems logically undeniable that the application of the principle with which we are concerned precedes the completion of the breach of an international obligation and the genesis of international responsibility, and does not follow them.

53. To the foregoing considerations should be added the undeniable fact, which we have emphasized, that the requirement of the exhaustion of local remedies is explicitly stipulated in a growing number of international conventions. Mention should first be made of establishment and other treaties which provide for the treatment to be accorded to natural or legal persons of one of the contracting States in the territory of the other, international treaties having as their general or particular object to ensure to all individuals, without distinction as to nationality, respect for certain basic prerogatives of the human person, treaties regulating recourse by States to international arbitral or judicial tribunals following offences committed in one of the above-mentioned fields, and so forth. However, the confirmation and development of this principle in treaty law should not be allowed to obscure the fact that the so-called "exhaustion of local remedies" requirement has its roots in international custom, where its affirmation is of longer standing than is its formulation in written instruments of voluntary origin. The reason is, once again, that the principle concerned lays down a requirement for the generation of international responsibility for breach of an obligation relating to specific subjects much more than a requirement for the practical enforcement of that responsibility.

54. We have so far endeavoured to explain, in terms of the logic of principles, how the expression of the requirement of exhaustion of local remedies should in our opinion be understood, justified and interpreted as

regards both its direct scope and that of its corollaries, a requirement which is affirmed by international law in specific relation to the breach of international obligations relating to the treatment accorded to individuals by the State. Having done so, we now propose to consider, as was done in the preceding section, whether it may not be that international case-law and State practice formally contradict the ideas which we have expressed and, hence, oblige us to modify our conclusions. We mention case-law and practice because, as already stated, the authors of specific works dealing with the subject adopt different approaches and often reach conflicting conclusions. Under these circumstances, taken as a whole, the explanations of the principle given by those writers are not such as to tip the scale towards one solution rather than another. It will be recalled that the Institute of International Law arrived at somewhat inconclusive findings on the matter in 1927, in 1954 and in 1956.¹⁰¹ Suffice it to say only that the writers who have explained the principle of the exhaustion of local remedies mainly in terms of the generation of international responsibility include Borchard,¹⁰² Strisower,¹⁰³ Ago,¹⁰⁴ Pau,¹⁰⁵ Durante,¹⁰⁶ Donner,¹⁰⁷ Simpson and Fox,¹⁰⁸ Sereni,¹⁰⁹ Morelli,¹¹⁰ Giuliano,¹¹¹ Gaja,¹¹² and Thierry, Combacan, Sur and Vallée.¹¹³ The procedural aspects of this principle have

been brought out by de Visscher,¹¹⁴ Panayotakos,¹¹⁵ Urbanek,¹¹⁶ Law,¹¹⁷ Amerasinghe,¹¹⁸ Haesler,¹¹⁹ Chappetz¹²⁰ and Strozzi.¹²¹ Nor should it be overlooked that there is a third current of opinion, according to which the rule concerns the origin of responsibility in cases where the breach of the international obligation derives exclusively from the acts of judicial organs which have failed in their duty to ensure to an individual the internationally required legal protection against injuries sustained in breach of internal law. In other cases, according to this opinion, the same principle would relate only to the procedures for enforcing the responsibility. This view is expressed by Eagleton,¹²² Eustathiades,¹²³ Freeman,¹²⁴ Fawcett¹²⁵ and Verzijl.¹²⁶ These divergences of opinion—or, as in many cases, of emphasis and presentation—find their natural reflection in the draft provisions for the codification of the international responsibility of States drawn up by jurists or by authoritative organizations.¹²⁷ To speak of schools of thought

¹⁰¹ *Annuaire de l'Institut de droit international, 1927* (Brussels), vol. 33-I, pp. 455 *et seq.*; and vol. 33-III, pp. 81 *et seq.*; *Annuaire de l'Institut... 1954* (Basel), vol. 45-I, pp. 5 *et seq.*; and *Annuaire de l'Institut... 1956*, vol. 46, pp. 1 *et seq.*, and pp. 265 *et seq.*

¹⁰² E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, Banks Law Publishing, 1928), pp. 817 *et seq.*; "Theoretical aspects of the international responsibility of State", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin), vol. I, 1st part (1929), pp. 233 *et seq.*, 239 *et seq.* and "La responsabilité des Etats à la Conférence de codification de La Haye", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XII, 1931, pp. 47 *et seq.*

¹⁰³ L. Strisower, Report on "La responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne ou aux biens des étrangers", *Annuaire de l'Institut de droit international, 1927* (Brussels), vol. 33-I, pp. 492 and 498.

¹⁰⁴ R. Ago "La regola del previo esaurimento ..." (*loc. cit.*), pp. 181 *et seq.*, and more particularly pp. 239 *et seq.*; "Le délit international" (*loc. cit.*), pp. 514 *et seq.*; and "Observations on the preliminary statement of J. H. W. Verzijl", *Annuaire de l'Institut de droit international, 1954* (Basel), vol. 45-I, pp. 34 *et seq.*

¹⁰⁵ G. Pau, "Responsabilità internazionale dello Stato per atti di giurisdizione", Istituto di scienze giuridiche, economiche e politiche dell'Università di Cagliari, *Studi economico-giuridici*, vol. XXXIII (1949-1950) (Rome, Pinnaro, 1950), pp. 45 *et seq.*

¹⁰⁶ F. Durante, *Ricorsi individuali a organi internazionali* (Milan, Giuffrè, 1958), p. 137.

¹⁰⁷ B. Donner, "Kotázce nutnosti vyčerpání vnitrostátních právních postředku před diplomatickým zákrokem" (Concerning the exhaustion of local remedies prior to diplomatic representations), *Studie Z mezinárodního práva* (Prague), vol. IV (1958), pp. 5 *et seq.*

¹⁰⁸ J. L. Simpson and H. Fox, *International Arbitration Law and Practice* (New York, Praeger, 1959), pp. 111-112.

¹⁰⁹ A. P. Sereni, *op. cit.*, p. 1534.

¹¹⁰ G. Morelli, *op. cit.*, p. 350.

¹¹¹ M. Giuliano, *Diritto internazionale* (Milan, Giuffrè, 1974), vol. I, p. 593.

¹¹² G. Gaja, *op. cit.*, pp. 5 *et seq.*

¹¹³ H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1975), pp. 660 *et seq.*

¹¹⁴ Ch. de Visscher, Note sur la "responsabilité internationale des Etats et la protection diplomatique d'après quelques documents récents", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VIII (1927), pp. 245 *et seq.*, and "Le déni de justice en droit international", *Recueil des cours...*, 1935-II (Paris, Sirey, 1936), vol. 52, pp. 421 *et seq.*

¹¹⁵ C. P. Panayotakos, *La règle de l'épuisement des voies de recours internes, en théorie et en pratique* (Marseille, Imp. Moullot, 1952), pp. 29 *et seq.*, 113.

¹¹⁶ H. Urbanek, "Das völkerrechtsverletzende nationale Urteil", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. IX, fasc. 2, 1958-1959, pp. 213 *et seq.*

¹¹⁷ C. H. P. Law, *The Local Remedies Rule in International Law* (Geneva, Droz, 1961), pp. 32 *et seq.*, 131 *et seq.*

¹¹⁸ C. F. Amerasinghe, "The formal character of the rule of local remedies", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 25, fasc. 3 (1965), pp. 445 *et seq.*

¹¹⁹ T. Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (Leyden, Sijthoff, 1968), pp. 92 *et seq.*, 131 *et seq.*

¹²⁰ J. Chappetz, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972), pp. 9 *et seq.*

¹²¹ G. Strozzi, *Interessi statali e interessi privati nell'ordinamento internazionale; la funzione del previo esaurimento dei ricorsi interni* (Milan, Giuffrè, 1977), p. 104.

¹²² G. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 95 *et seq.*; and "Une théorie au sujet du commencement de la responsabilité internationale", *Revue de droit international et de législation comparée*, (Brussels), 3rd series, vol. XI, No. 2 (1930), pp. 643 *et seq.*

¹²³ C. Th. Eustathiades, *La responsabilité internationale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Paris, Pedone, 1936), pp. 243 *et seq.*, 331 *et seq.*

¹²⁴ A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans Green, 1938), pp. 407-408.

¹²⁵ J. E. S. Fawcett, "The exhaustion of local remedies: substance or procedure?", *The British Year Book of International Law, 1954* (London), vol. 31, pp. 452 *et seq.*

¹²⁶ J. H. W. Verzijl, "La règle de l'épuisement des recours internes", *Annuaire de l'Institut de droit international, 1954* (Basel), vol. 45-I, pp. 23 *et seq.*, 30 *et seq.*; *International Law in Historical Perspective* (*op. cit.*), p. 635.

¹²⁷ Articles 6, 7 and 8 of the draft drawn up in 1929 by the Harvard Law School, under the influence of Borchard, very clearly present the exhaustion of local remedies as a requirement for the generation of State responsibility (*Yearbook... 1956*, vol. II, p. 229, document A/CN.4/96, annex 9). The same can be said of article IX of the draft prepared by G. O. Murdock and approved in

is also inappropriate, since the arguments advanced by writers for or against a particular thesis vary so greatly that they sometimes arrive at similar conclusions from virtually opposite directions. In addition, the particular concerns of individual writers have often led them to extend the scope of their analysis far beyond the limits of the matter which now concerns us. There is therefore no need to emphasize the impossibility of undertaking in this report a critical review of all the arguments expounded in the various works in support of the theses which they uphold. We shall confine ourselves to taking into consideration, at the appropriate time, those arguments which might, in one way or another, have a direct effect on the concepts which in our view compel recognition in this area.

55. With regard to the positions taken by States, it seems desirable first to consider the general opinions they have expressed in the abstract, without relation, therefore, to the specific disputes in which these States have been involved. The question whether the exhaustion of local remedies is, in certain conditions, a *sine qua non* for the generation of international responsibility or only for the enforcement of responsibility through the diplomatic channel or by legal proceedings, was considered at the Conference for the Codification of International Law (The Hague, 1930). Point XII of the request for information addressed to Governments by the Preparatory Committee of the Conference reads as follows:

Is it the case that the enforcement of the responsibility of the State under international law is subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?¹²⁸ The terms of this request were not very clear. They seem to reflect a certain hesitancy over the ideas to be expressed and a concern not to prejudge the question. It is not surprising therefore that the replies from Governments

(Foot-note 127 continued.)

1965 by the Inter-American Juridical Committee as reflecting the views of the United States of America (*Yearbook...* 1969, vol. II, p. 153, document A/CN.4/217 and Add.1, annex XV).

Other draft provisions, by contrast, deal with the exhaustion of local remedies from the point of view of its effects on the exercise of diplomatic protection: the resolution of the Institute of International Law of 1927 (article XII) (*Yearbook...* 1956, vol. II, p. 228, document A/CN.4/96, annex 8); the draft of the Deutsche Gesellschaft für Völkerrecht of 1930 (article 13) (*Yearbook...* 1969, vol. II, pp. 150-151, document A/CN.4/217 and Add.1, annex VIII); the draft prepared by A. Roth in 1932 (article 9) (*ibid.*, p. 152, annex X); the resolution of the Institute of International Law of 1956, specifically concerned with the rule of the exhaustion of local remedies (*ibid.*, p. 142, annex IV); the draft prepared for the International Law Commission in 1958 by F. V. García Amador (article 15) (*Yearbook...* 1958, vol. II, p. 72, document A/CN.4/III, annex) and the revised draft which he prepared in 1961 (article 18) (*Yearbook...* 1961, vol. II, p. 50, document A/CN.4/134 and Add.1, addendum); the draft prepared by Sohn and Baxter for the Harvard Law School in 1961 (article 1) (*Yearbook...* 1969, vol. II, p. 142, document A/CN.4/217 and Add.1, annex); the *Restatement* drawn up in 1965 by the American Law Institute (para. 206) (*Yearbook...* 1971, vol. II (Part One), pp. 197-198, document A/CN.4/217/Add.2). In the case of the latter draft, the character accorded to the principle does not really emerge very clearly from the text of the paragraph, but was specified in the commentary (*American Law Institute, Restatement of the Law, Second: Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute, 1965, p. 612).

¹²⁸ League of Nations, *Bases for Discussion*, *op. cit.*, p. 136.

are not always formulated in such a way as to give a clear idea of the opinion on the question, but it is apparent, however, that Austria, Belgium, Bulgaria, Germany,¹²⁹ Czechoslovakia and Poland¹³⁰ considered that international responsibility did not come into being until after the fruitless exhaustion of local remedies. On the other hand, Great Britain seems to have expressed the opinion that only the enforcement of an already established responsibility was subject to the exhaustion of local remedies.¹³¹ In the light of the replies, the Preparatory Committee formulated the following Basis for Discussion:

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision ...¹³²

That text in turn seems to have been drafted deliberately to provoke discussion, and it certainly did. During the discussion at the Conference,¹³³ some delegations, namely, those of Egypt,¹³⁴ Spain,¹³⁵ Mexico,¹³⁶ Colombia,¹³⁷ and Romania, expressed the opinion that the exhaustion of local remedies was a prerequisite for the generation of responsibility. It is particularly interesting to read the declaration by the representative of Romania, whose statement of position was distinguished by the clarity and precision of the ideas expressed and language used:

The responsibility of the State arises from the disregard of an international obligation. It is therefore proportionate or subordinate to the measure of the non-fulfilment of that obligation.*

So long, however, as some organ of the State is in a position to fulfil the obligation, its non-fulfilment is not proved. Accordingly, the condition for the coming into being of such responsibility*—namely, the evidence of non-fulfilment—does not exist.**

Consequently, it is quite correct to say that *responsibility itself comes into being only after it has become patent that there has been no fulfilment** i.e. that the international requirement or obligation has not been met.

...

*So long as there is a possibility of its fulfilment by some internal means of redress, it cannot be said that the international obligation has not been fulfilled.*¹³⁸

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, p. 139.

¹³¹ *Ibid.*, p. 137. Norway (*ibid.*, p. 138) distinguished between two cases: damage caused to a foreigner as a result of an act contrary to national laws, and damage caused by an act in breach of a treaty or some other indisputable obligation of international law. The Norwegian Government considered that, in the first case, international responsibility did not come into being until all internal remedies had been exhausted, and that, in the second, the principle of exhaustion was not applicable.

¹³² Basis No. 27 (*ibid.*, p. 139).

¹³³ The discussion on this Basis for Discussion is to be found in League of Nations, *Acts of the Conference for the Codification of International Law, volume IV, Minutes of the Third Committee (C.351 (c) M. 145 (c), 1930 V)*, pp. 63 *et seq.*, 162 *et seq.*

¹³⁴ *Ibid.*, p. 64. The Egyptian Government proposed an amendment to the text on the lines advocated by it (*ibid.*, p. 210).

¹³⁵ *Ibid.*, pp. 64-65.

¹³⁶ *Ibid.*, pp. 72-73. The Mexican Government also proposed an amendment (*ibid.*, p. 223).

¹³⁷ *Ibid.*, pp. 78-79.

¹³⁸ *Ibid.*, p. 77.

Other representatives, like those of Italy¹³⁹ and Germany,¹⁴⁰ although fewer in number, expressed a contrary opinion without, however, taking up such a clear and substantiated position. A third group (e.g. the representatives of the United States¹⁴¹ and Norway¹⁴²) was of the opinion that exhaustion of local remedies was sometimes a prerequisite for responsibility and sometimes for enforcement.

56. At the end of the discussion, the delegations agreed on the adoption of a formula that did not take any position on the question whether international responsibility came into being before or after the exhaustion of local remedies.¹⁴³ The proposal of the sub-committee dealing with the question,¹⁴⁴ and adopted by the committee on first reading, was embodied in article 4, paragraph 1, and read as follows:

The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.¹⁴⁵

There can be no doubt that the formula thus adopted ended by being deliberately ambiguous and, indeed, proponents of each of the schools of thought represented in the discussion subsequently invoked it in support of their own point of view.¹⁴⁶ Consequently, we cannot draw any clear and final conclusions from the work of the 1930 Codification Conference on the point which concerns us. That does not prevent us, however, from noting that the majority of Government representatives who expressed their views on the subject considered that the exhaustion of local remedies, in cases where that is provided for, amounts to fulfilling a condition for the breach of an international obligation to arise (and thus for international responsibility to come into being), and does not simply give the green light to the Faculty to initiate the procedure for the implementation of an already existing responsibility.

¹³⁹ *Ibid.*, pp. 74-75.

¹⁴⁰ *Ibid.*, pp. 79-80. It should be noted that, in its reply to the request for information, Germany supported the view that responsibility does not come into being until after all local remedies have been exhausted.

¹⁴¹ *Ibid.*, pp. 73-74.

¹⁴² *Ibid.*, p. 76.

¹⁴³ Several delegations acquiesced in that solution in the belief that the problem was of no major practical consequence. See the statements by the representatives of Greece (*ibid.*, pp. 66-67), Belgium (p. 69), Great Britain (pp. 69-71), United States (pp. 73-74), Mexico (pp. 72-73), Colombia (p. 78) and Germany (pp. 79-80). The participants in the Conference had obviously failed to weigh the consequences which the adoption of one point of view rather than another might have on such matters as the determination of the moment at which an internationally wrongful act was committed and the duration of the commission of the act. The practical implications of the reply to these questions may be decisive as regards such important points as knowing whether the dispute arising out of a particular act is or is not one which an international tribunal is competent to judge, or of knowing from what moment any damage caused should be taken into consideration for the purposes of assessing the amount of reparation.

¹⁴⁴ *Ibid.*, p. 162.

¹⁴⁵ *Ibid.*, p. 236.

¹⁴⁶ See, for instance, E. M. Borchard, "*La responsabilité des Etats ...*" (*loc. cit.*), p. 49 and Chappetz, *op. cit.*, p. 23.

57. A further reflection is called for on the subject of the opinion put forward by some Governments, such as those of the United States and Norway, that the principle of the exhaustion of local remedies is not a condition for the existence of international responsibility except in the case where a judicial appeal has been instituted following an ordinary violation of internal law.¹⁴⁷ Leaving aside the curious notion that a principle can change its character according to the case to which it is applied, what is still more interesting is that, even in the case considered, the application of the principle of the exhaustion of local remedies is also and inevitably extended to the case of an appeal to the court to reverse a decision that conflicts with an international obligation. Let us suppose, in order to make this clearer, that the individual who originally complained of the violation of an internal law to his detriment appeals to a court of first instance, and his appeal is dismissed in circumstances that conflict with the requirements of international law regarding the administration of justice to foreigners. According to the opinion to which we referred at the beginning of this paragraph, an act of this kind certainly does not give rise to international responsibility: an internationally wrongful act as understood in the term "denial of justice" is not considered as complete until the higher courts have successively given their judgment and confirmed the decision of the court of first instance. This means recognizing, in the case in point, that, even if conduct has taken place which is contrary to what was required by an international obligation, that obligation will not be completely breached and responsibility will not arise until all available local remedies against such conduct have been employed and exhausted by the individual concerned. Such conduct, let us repeat, may amount to an embryonic breach of an international obligation, but it does not constitute a completed breach, which alone gives rise to the international responsibility of States.

58. This seems an appropriate point at which to analyse some of the more significant positions taken up on other occasions by State organs or international tribunals, particularly in disputes over concrete cases. However, we feel that some reflections are called for to begin with, in order to avoid errors of interpretation that might lead us to draw arbitrary conclusions.

59. In international diplomatic and judicial practice, we sometimes come across the unequivocal statement that the exhaustion of local remedies is a condition for the genesis of the international responsibility of the State. We shall see some striking examples of this. Now it is obvious that the authority of these statements of position varies considerably depending upon whether they are to be found in the written decision of a court, or in the argument put forward by the representative of a State party to a dispute, and, in the latter case, whether the statement of position is accepted or rejected by the opposing party. But, in any case, there can be no doubt that the mere fact that an affirmation of this belief is made at all is strong support for the argument that, in

¹⁴⁷ This opinion obviously reflects that of the third school of thought mentioned above (para. 54).

the cases we are considering in this section, the international responsibility of the State is not engaged until the condition is fulfilled that all local remedies have been exhausted by the individual concerned. In other words, any affirmation of this kind is grist to the mill of those who see in this initiative by the individual an indispensable element in enabling the breach of an international obligation to be completed and produce its consequences.

60. Only an assertion flatly denying that the principle of exhaustion of local remedies may affect the formation of international responsibility would lend support to the contrary opinion. On the other hand, there are no grounds for regarding as evidence of the validity of this other opinion the fact that, in various cases, international courts in their decisions, and Governments in the position they have adopted, have relied on the exhaustion of local remedies as a condition for the exercise of diplomatic protection of certain persons or of the faculty to submit claims on their behalf to an international tribunal.¹⁴⁸ It would be wrong to interpret this as concrete evidence of an implicit conviction that the condition of the exhaustion of local remedies does not affect in any way whatever the genesis of responsibility and is merely of a purely practical and procedural character. It must be remembered that the aim of the State in invoking failure to employ local remedies against a claim asserted against it before an international court is mainly to block consideration of the substance of the claim by entering a plea of inadmissibility. And in turn, the aim of the State submitting the claim, when it contests the existence of such failure or its effect in the case in point, is precisely to remove the preliminary obstacle thus placed in the way of consideration of the substance of its claim. Thus, both States have to take into consideration the principle of exhaustion of local remedies, not from the point of view of its effect on the formation of responsibility but from that of its impact on the admissibility of the claim. The distinction now generally made between the procedure relating to preliminary objections and that relating to substance

¹⁴⁸ See, for example, the statement in the United Kingdom Government's Memorandum of 28 August 1931 submitted to the League of Nations concerning the Finnish Vessels case (League of Nations, *Official Journal*, 12th year, No. 11 (November 1931), p. 2217) "that a State is not entitled to make any diplomatic claim on behalf of its nationals against another State in respect of any matter where, if the claim is valid, the municipal law affords a remedy, unless such municipal remedies have been exhausted", or the reference in the note from United States Secretary of State Hull to Senator Ellender, of 25 April 1942 (reproduced in M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967), vol. VIII, p. 772) to "The generally accepted principle of international law which requires, as a precedent to the establishment of a valid international claim, the exhaustion of such legal remedies as may be available in the courts of the country against which a claim is asserted". See also the passages of the judgment of the International Court of Justice in the *Interhandel* case (*I.C.J. Reports 1959*, p. 27) reading: "Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system" and "local remedies must be exhausted before international proceedings may be instituted", or the comment in the message of the Swiss Federal Council of 15 December 1967 (*Swiss Yearbook of International Law, 1968* (Zurich, 1970), vol. XXV, p. 271), that "a claim may not be taken before an international authority until local remedies have been exhausted".

also means that the international court called on to pronounce on the question within the framework of the former procedure cannot but approach it from the same point of view. Discussion on this point usually centres on interpretation of the agreement establishing the jurisdiction of the international tribunal involved and its scope; therefore, if the agreement mentions the principle of exhaustion of local remedies when defining the conditions in which a claim may be held as admissible by the tribunal in question, the latter will necessarily have to settle the question whether or not local remedies have been exhausted from the point of view of the existence of a condition of admissibility of the claim rather than that of existence of a condition of the international responsibility of the respondent State. It is obvious, however, that any assertion of the effect of failure to exhaust local remedies on the admissibility of an international claim in no way implies an intention to deny the effect of such failure on the substantive question of the generation of international responsibility.¹⁴⁹ On the contrary, recognition of the invalidating effect of such failure on the question of admissibility represents, as was stressed above,¹⁵⁰ the application of a simple corollary to the main thesis of the principle of exhaustion of local remedies, which, far from denying, confirms the effect of this main thesis on the commission of a breach of an international obligation and, thus, on the generation of responsibility.

61. It is moreover a fact that, in many cases, the condition of prior exhaustion of local remedies is simultaneously invoked at two levels: directly, as a condition for the determination of international responsibility and only indirectly as a condition for the legitimate assertion of an international claim. This is the case every time that the internationally wrongful act invoked by the claim is a denial of justice to an individual who has previously suffered injustice only in breach of internal law.¹⁵¹

¹⁴⁹ The same is true in cases where the respondent State or the international tribunal has maintained that the claimant State was not authorized to submit a claim because, in the case in question, no international obligation had been breached. In making such an assertion, they were not of course maintaining that the existence of a breach of an international obligation was only the condition of the admissibility of an international claim and not, first and foremost, the condition of the existence of international responsibility. They merely wished to make clear the effect on the use of the claim procedures of an act which relates primarily to the generation of responsibility.

¹⁵⁰ See para. 51 above.

¹⁵¹ Assertions of the following type are, for example, quite frequently noted: "... claims arising out of contractual relationships between a national of this Government and a foreign government do not, generally speaking, provide a proper subject for diplomatic intervention on the part of this Government in the absence of a clear showing that the American national has exhausted such legal remedies as may be open to him and has sustained a denial of justice as that term is understood in international law" (Letter from United States Attorney Adviser Matre to Hershel Davis, 14 May 1956, M. Whiteman, *op. cit.*, p. 907), or: "... A legal basis for an international claim against the Cuban Government or for representations by this Government to the Cuban Government would not arise unless an American national attempted to collect a debt by exhausting the legal remedies provided by Cuban law and sustained a denial of justice ..." (Department of State, Memoranda of information concerning debts owed to American nationals (by private parties and concerns) in Cuba (*ibid.*)).

Breach by the State of an international obligation occurs, therefore, only when and if the individual appeals to the courts of the country against a failure, to his detriment, to observe internal law. The use of local remedies is thus presented both as the condition for the existence of a denial of justice, a clear example of an internationally wrongful act, and as the condition for the submission of a claim to enforce the international responsibility generated by this wrongful act. Obviously, the second aspect presupposes the first from which it logically derives. In conclusion, the fact that international arbitrators and tribunals, like State organs, have often invoked exhaustion of local remedies as a condition for the implementation rather than the generation of responsibility cannot as such be adduced as evidence of an opinion that international responsibility is in any case generated before local remedies have been initiated and pursued, and irrespective of their exhaustion. There is nothing in this to permit the conclusion that, in the opinion of these tribunals and organs, the only thing that depends on the exhaustion of local remedies is the possibility of enforcing, at the diplomatic or judicial level, a responsibility generated before such exhaustion.

62. All that can be taken into account, therefore, in support of the argument that the exhaustion of local remedies is only a condition for the exercise of diplomatic and legal protection, are statements of position clearly favouring this view. Probative value can be attributed only to unequivocal statements of rejection of the idea that, before being a formal condition of the possibility of enforcing international responsibility through the presentation of an international claim, exhaustion of local remedies is a substantive condition of the generation of such responsibility. Now, it must be said that such statements are very hard to find, and in view of the circumstances in which they are encountered, less conclusive than those supporting the opposite thesis.

63. Let us, to convince ourselves of this, examine the statements of Governments or international tribunals on the rare occasions when they were specifically faced with the question of the possible effect of the exhaustion of local remedies on the generation of the international responsibility of the State. Decision No. 21 of February 1930 of the Great Britain-Mexico Claims Commission, set up by the Convention of 19 November 1926, in the *Mexican Union Railway* case, contains the statement that:

... the responsibility of the State under international law can only commence * when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.¹⁵³

Unquestionably, what was being clearly stated there was that exhaustion of local remedies was a condition for the generation of international responsibility.

64. On the occasion of the proceedings instituted by Germany before the International Court of Justice in connexion with the case concerning the *Administration of the Prince von Pless*, the Polish Government raised a preliminary objection in which, after opposing the action

of the German Government, which amounted to bringing a claim "to an international court when the person concerned possesses a means of recourse to national courts where he may find satisfaction", it went on to say:

... until the legal means made available by internal legislation to individuals to defend their interests have been exhausted, there can be no question of the international responsibility * of the State.¹⁵³

Thus, the Polish Government clearly adopted the position that the principle laying down the condition of exhaustion of local remedies directly concerns the existence of international responsibility, even though at the same time it emphasized the corollary of that principle relating to the formal possibility of taking a claim to an international court. It should also be noted that the German Government maintained that, by reason of a conventional derogation therefrom, the principle of exhaustion of local remedies was inapplicable in that particular case, but in no way contested the Polish Government's definition of the principle.

65. Interpretation of the arbitral award in the *Finnish Vessels* case is less easy. We saw above¹⁵⁴ that the British Government, in its Memorandum to the Council of the League of Nations, had invoked the principle of the exhaustion of local remedies for the purpose of blocking the submission by the Finnish Government of the diplomatic protest addressed to it by that Government. We then showed that invocation of the principle for that purpose in no way excluded the possibility of invoking it for other purposes also, particularly that of challenging the existence, in a specific case, of a completed breach of an international obligation and, thus, of an international responsibility already established against the respondent State. The Finnish Government, in turn, had questioned the very existence of the principle which the United Kingdom regarded as unchallenged. As a result of the discussion before the Council, the parties submitted the following concrete question to arbitration: "Have the Finnish shipowners or have they not exhausted the means of recourse placed at their disposal by British law?"¹⁵⁵

This was the question that the Arbitrator, A. Bagge, had to decide, and he began by noting that the Finnish Government did not claim that the breach of international law alleged by it was represented by the rejection by the British courts of the claim by the Finnish shipowners, but by the "initial breach of international law"¹⁵⁶ constituted, in its view, by the seizure and use without payment of the vessels belonging to them. Having said this, the Arbitrator concentrated on determining what points of law and fact should be submitted by the claimants to the municipal courts in a case of the kind. He commented that, where "an initial breach of international law" was alleged, the sole *raison d'être* of the principle of exhaustion of local remedies was to enable the municipal courts, up to the highest court of appeal, to inquire into

¹⁵³ P.C.I.J., Series C, No. 70, pp. 134-135 (translation by the Secretariat).

¹⁵⁴ Foot-note 148.

¹⁵⁵ G. F. de Martens, ed., *Nouveau Recueil de traités* (Leipzig, Buske, 1933), 3rd Series, vol. XXVIII, p. 116.

¹⁵⁶ United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1502.

¹⁵² United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 122.

and decide all questions of law and of fact alleged by the claimant State in international proceedings to prove that a breach had occurred. The purpose of this was to allow the respondent State the opportunity of doing justice "in their own ordinary way". Without entering here into the substance of the question, which is outside our subject, we note first that, by the very fact of taking into consideration the possibility that the principle requiring the exhaustion of local remedies was applicable to cases where the claimant alleges "an initial breach" of international law, the Arbitrator seemed to be leaning towards the idea that the principle in question did not state a condition for the generation of responsibility,¹⁵⁷ but only a condition for recourse to a claims procedure. Nevertheless, immediately afterwards the Arbitrator declared that he was not unaware of the fact that, in the works of learned writers, at sessions of the Institute of International Law and, in particular, at the 1930 Codification Conference, the theory had been maintained: that no responsibility of the State can come into existence until the private claim has been rejected by the local courts, whether the basis brought forward for the international claim may be a failure of the local courts of law to fulfil the requirements of international law, or the basis is an initial breach of international law, and he finally concluded that:

If this proposition means that the responsibility of the State does not come into existence until the grounds upon which the claimant Government in the international procedure base their contention of an initial breach of international law have been rejected by the municipal courts, this proposition does not seem to result in any difference as to the question which contentions of fact or propositions of law should be considered under the local remedies rule.¹⁵⁸

Arbitrator Bagge thus maintained a sort of neutrality¹⁵⁹ between the two approaches to the requirement of the exhaustion of local remedies, since both led to the same conclusion as regards the point he had to decide. It would thus be quite arbitrary to regard his considerations

¹⁵⁷ The expression "initial breach of international law", in the language used by the Arbitrator, Mr. Bagge, probably meant a breach of international law committed at the beginning of the case. The expression is ambiguous, however, since it might also mean the "beginning, inception or first stage of a breach of international law"; it would then express a different idea, namely, precisely the one that seems to us appropriate for describing a concrete situation such as that to which the Arbitrator was referring.

¹⁵⁸ United Nations, *Reports of International Awards*, vol. III (*op. cit.*), p. 1502.

¹⁵⁹ Arbitrator Bagge confined himself to saying that he could not understand how this argument could be reconciled with the fact that, in certain decisions of the 1871 United States/United Kingdom Conciliation Commission, the individuals concerned had been excused for not having appealed against decisions of lower courts because they had been unable to communicate with their lawyers or because the time-limits fixed were too short. If the breach of an international obligation actually occurs only after rejection of the claim of individuals by the highest municipal court of law, he said, recourse to municipal courts is a "matter of substance and not of procedure". It is difficult, however, to follow the Arbitrator's reasoning on this point. According to the opinion to which he was referring, the principle requiring recourse to and the exhaustion of local remedies indeed constitutes a substantive condition for the generation of international responsibility, but admittedly this does not mean that the abusive employment of procedural obstacles in order to impede normal recourse to local remedies may not release the parties from their obligations and that the required condition may thus be held to be fulfilled.

as a clear, reasoned stand in favour of rejection of the theory that, in cases where the principle of the exhaustion of local remedies comes into play, such exhaustion is a condition for the coming into being of international responsibility.

20. The two theories as to the function attributed to the exhaustion of local remedies by the principle which states that condition came face to face in the *Phosphates in Morocco* case between Italy and France. In its preliminary application of 30 March 1932 to the Permanent Court of International Justice, the Italian Government asked the Court to judge and declare that the decision by the Mines Department dated 8 January 1925¹⁶⁰ and the denial of justice which had followed it were inconsistent with the international obligation incumbent upon France to respect the acquired rights of the Italian company *Miniere e Fosfati*.¹⁶¹ The French Government had accepted the compulsory jurisdiction of the Court by a declaration dated 25 April 1931, for "any disputes which may arise after the ratification of the present declaration with regard to *situations or facts subsequent to this ratification* *."¹⁶² The question thus arose whether the internationally wrongful act of which the Italian Government was complaining could or could not be regarded as a "fact subsequent" to the critical date. The Italian Government contended that the breach of an international obligation initiated by the decision in 1925 only became a completed breach following certain acts subsequent to 1931, particularly a note of 28 January 1933 from the French Minister for Foreign Affairs to the Italian Ambassador and a letter of the same date addressed by the same Minister to the Italian individual concerned. The Italian Government saw that note and that letter as an official interpretation of the acquired rights of Italian nationals which was inconsistent with the international obligations of France. It saw in them a confirmation of the denial of justice to the Italian nationals concerned, constituted by the refusal of the French Resident-General to permit them to submit to him a petition for redress in accordance with the terms of article 8 of the *dahir* of 12 August 1913. The new denial of justice now consisted in the final refusal of the French Government to make available to the claimants an extraordinary means of recourse, whether administrative or other, in view of the lack of ordinary means.¹⁶³ On the basis of these facts, the Italian Government clearly opted for the theory that an internationally wrongful act, though initiated by a first State conduct contrary to the result required by an international obligation, is completed only when the injured individuals have tried unsuccessfully to make use of all existing appropriate and effective remedies. It was thus from that moment that, in its view, the responsibility came into existence.¹⁶⁴

¹⁶⁰ This decision had rejected the claim of an Italian citizen, Mr. Tassara, to be recognized as the discoverer of the phosphate deposits in Morocco.

¹⁶¹ *P.C.I.J.*, Series A/B, No. 74, p. 15.

¹⁶² *Ibid.*, p. 22.

¹⁶³ *Ibid.*, pp. 27-28.

¹⁶⁴ The Italian Government's argument was developed mainly in its oral statement of 12 May 1938 (*P.C.I.J.*, Series C, No. 85, pp. 1231-1232), but taken up again in its statement of 16 May (*ibid.*, pp. 1332-1333).

67. In opposition to the Italian Government, the French Government maintained that if, as the former affirmed, the decision of 1925 by the Mines Department really merited the criticisms levelled against it—violation of treaties, violation of international law in general—it was at that date that the breach by France of its international obligations had been committed and completed, and at that date that the alleged internationally wrongful act had come into being. The French representative affirmed that:

Here, the rule of the exhaustion of local remedies is nothing more than a rule of procedure. The international responsibility is already in being, even if it cannot be enforced through the diplomatic channel or by resort to an international tribunal and appeal to the Permanent Court of International Justice until local remedies have first been exhausted.¹⁶⁵

68. In its judgment of 14 June 1938, the Court indicated that it did not discern in the action of the French Government subsequent to the decision of 1925 any new factor giving rise to the dispute in question, and that the refusal by the French Government to accede to the request to submit the dispute to extraordinary judges did not constitute an unlawful international act giving rise to a new dispute. The Court went on to say:

The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act, because that decision was inspired by the will to get rid of the foreign holding and because it therefore constituted a violation of the vested rights placed under the protection of the international conventions. That being so, it is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly involve international responsibility. . . . In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.¹⁶⁶

69. Despite certain indications to the contrary, the Court, in rejecting the Italian claim that the “unlawful international act” invoked by the Italian Government was an act subsequent to the crucial date and in considering, as a consequence, that it had no jurisdiction to adjudicate on the case, was not in any way taking a stand against the argument of principle put forward by the Italian Government. According to the Court, the decision taken in 1925 by the Department of Mines, against which there

¹⁶⁵ The French Government’s argument was set out in its oral pleading of 5 May 1938 (*ibid.*, Series C, No. 85, p. 1048). Assuming that the French Government was correct in stating, in its note of 28 January 1933, that the decision of the Mines Department was not subject to appeal, the French position was probably well-founded when it contended that the internationally wrongful act in question must have been completed in 1925 and that, consequently, the Permanent Court had no jurisdiction. Where it would seem that the French Government’s argument appears contradictory is when it maintained that the principle requiring the exhaustion of local remedies could still apply in the case in point but purely as a rule of procedure. If no appeal is possible, then the principle of exhaustion of local remedies is clearly not susceptible of any practical application whatsoever.

¹⁶⁶ *Ibid.*, Series A/B, No. 74, p. 28.

was in fact no legal or other redress,¹⁶⁷ was, by that very fact, a definitive violation of the international obligation to grant Italian nationals full equality of treatment in respect of mining concessions. Consequently, the Court did not accept that the “unlawful international act” attributed to France by the Italian Government had culminated in an alleged “denial of justice” in the form of the French Government’s note of 28 January 1933, which merely confirmed, at the diplomatic level, that there was no redress against the decision of 1925. Neither did it accept that the request by the individuals to the French Government to make available to them extraordinary legal means not provided for by law could be regarded as a “local remedy” within the meaning of the principle. Finally, the Court did not concede that the “unlawful international act”, alleged by the Italian Government to have commenced in 1925, had been dependent upon the note of 1933 for its completion. This point of view can certainly be defended but, although it necessarily culminates in the rejection of the Italian application, it does not constitute a rejection of the opinion put forward by the Italian Government as a general principle, concerning the effect of local remedies where they are available—on the establishment of the definitive nature of a breach of an international obligation and, as a consequence, on the genesis of international responsibility.

70. After the *Phosphates in Morocco* case, neither the Permanent Court of International Justice nor, subsequently, the International Court of Justice had any further occasion to pronounce on the question with which we are concerned. The Court cannot be regarded as having taken a position on the question in the passage of its judgment of 21 March 1959 in the *Interhandel* case where, after stating that the exhaustion of local remedies was provided for by “a well-established rule of customary international law . . . generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law”, it goes on to say:

Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.¹⁶⁸

It is perfectly clear that the expression “violation” used by the Court was intended, as in the previous phrase, to refer to the violation of the individual’s rights under internal law and not to a violation of the State’s rights under international law. The principle so succinctly stated by the Court is therefore perfectly compatible with the idea that a violation by a State of its international obligation, justifying an appeal to an international tribunal, is only completed upon the State’s refusal of redress, within the framework of its domestic legal system, for the injury caused by its initial conduct to the rights of an individual.

¹⁶⁷ Clearly, the Court did not consider that the “petition for redress” to the French Resident-General in Morocco could be regarded as a real remedy.

¹⁶⁸ *I.C.J. Reports 1959*, p. 27.

71. On the other hand, the European Commission of Human Rights has several times had occasion to pronounce on the principle of exhaustion of local remedies. In the case-law of the Commission, we find from time to time affirmations of the need to allow the State "an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done . . .". Here, the Commission is obviously referring to the wrong done to the individual and is not claiming that such a wrong in itself constitutes a definitive breach of an international obligation. Such affirmations therefore form part of the series already considered;¹⁷⁰ and while they illustrate the effect of failure to resort to local remedies on the admissibility of an international claim, they are certainly not intended to deny the effect of such failure on the creation of international responsibility. Indeed, the justice of this observation is, if need be, further borne out by the Commission itself, which is responsible for the most recent and, at the same time, very clear and direct confirmation of the principle upheld in this section. In its decision of 1958 on Application No. 235/56, the Commission stated that:

... the responsibility of a State * under the Human Rights Convention does not exist * until, in conformity with article 26, all domestic remedies have been exhausted * ...¹⁷¹

Although the above statement was made in relation to a particularly clear case of the application of the principle in question,¹⁷² it is couched in terms which obviously cover all possible cases of application of article 26 of the Convention, in which the rule requiring the exhaustion of local remedies is set out in the most general terms. There cannot, therefore, be the slightest doubt that this decision may be regarded as a general interpretation of the principle requiring the exhaustion of local remedies as essentially laying down a condition for the coming into being of the international responsibility of the State.

72. Before concluding an analysis of the positions adopted by official representatives of States, by tribunals and other international courts on the point in question, it may be useful to note the views expressed, in separate or dissenting opinions, by judges of the International Court of Justice and its predecessor, the Permanent Court of International Justice. These opinions are all the more interesting as the Court itself has not taken a direct and clear stand on the matter with which we are concerned in the cases to which they are related.

73. Some of these opinions are not particularly clear. The dissenting opinion of Judge Armand-Ugon in the *Interhandel* case, for instance, is open to various interpretations. It states that:

¹⁶⁹ Application No. 343/57, *Yearbook of the European Convention on Human Rights, 1958-1959* (The Hague), vol. II (1960), p. 438. Almost identical affirmations are to be found in decisions rendered in subsequent years.

¹⁷⁰ See para. 60 above.

¹⁷¹ *Yearbook of the European Convention on Human Rights* (op. cit.), p. 304.

¹⁷² It was a case of maladministration of justice, and almost everybody agrees that in such cases the rule requiring the exhaustion of local remedies amounts to a substantive principle.

The purpose of the local remedies rule is simply to allow the national tribunals in the first stage of the case to examine the international responsibility of the defendant State as presented in the Application; that examination would of course have to be made by a national court.¹⁷³

This may be understood as meaning that a national tribunal should "examine" an international responsibility already formed, which would be somewhat surprising since it is hard to see how a national tribunal could determine the consequences of a responsibility created at the level of inter-State relations. But it can also be interpreted—and it is more likely that this is its real meaning—as signifying that the purpose of the principle requiring the exhaustion of local remedies is to allow national tribunals to examine the situation created by the conduct of a State which has embarked upon the complex process of breach of an international obligation and, consequently, of the creation of international responsibility, the purpose being to intervene with an effective remedy before any international responsibility is established.

74. The separate opinion of Judge Tanaka in the case of the *Barcelona Traction, Light and Power Company, Limited* (second stage) stresses the idea that the exhaustion of local remedies rule possesses a procedural character in that it sets forth a condition for enabling the State to espouse before an international tribunal the claim of the person it seeks to protect. However, the fact that Judge Tanaka also mentioned the procedural aspect that the principle in question assumes in relation to the exercise of diplomatic and judicial protection does not seem to indicate that he intended to exclude the existence of the substantive aspect which the principle assumes in relation to the question of the generation of international responsibility.¹⁷⁴

75. Opinions which were absolutely clear, and which were all along the same lines as the ideas upheld here, have been expressed by three other judges. In his dissenting opinion in the *Panevezys-Saldutiskis Railway* case, Judge Hudson wrote:

It is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. *This is not a rule of procedure. It is not merely a matter of orderly conduct. It is part of the substantive law as to international, i.e. State-to-State, responsibility.* * If adequate redress for the injury is available to the person who suffered it, if such a person has only to reach out to avail himself of such redress, *there is no basis for a claim* * to be espoused by the State of which such a person is a national. *Until the available means of local redress have been exhausted, no international responsibility can arise.* *¹⁷⁵

Furthermore, Judge Cordoba, in his separate opinion in the *Interhandel* case, expressed himself as follows:

The right of the State ... to protect its national ... for an alleged wrongful act of a foreign government ... does not legally arise

¹⁷³ *I.C.J. Reports 1959*, pp. 88-89.

¹⁷⁴ *I.C.J. Reports 1970*, p. 143. Some other passages of his "opinion" might, at first sight, convey the impression that such was his intention, but, in reality, this is very doubtful, particularly since the question of the force of the local remedies rule had no bearing whatsoever on the point dealt with by Judge Tanaka in his opinion.

¹⁷⁵ *P.C.I.J.*, Series A/B, No. 76, p. 47.

until the judicial authorities of the latter decide irrevocably upon such wrongful act through a decision of its judicial authorities. *Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated.** This principle informs all systems of law—civil as well as criminal, local as well as international.¹⁷⁶

Finally, Judge Morelli, in his dissenting opinion in the case of the *Barcelona Traction, Light and Power Company, Limited (preliminary objections)*, gave a definition of the exhaustion of local remedies rule which, in our view, is the most thorough and the most precise yet written by an international judge:

The local remedies rule, as a rule of general international law, is in my view *substantive* and *not procedural*.* It is indeed a rule which is *supplementary** to other rules, which also themselves possess the character of substantive rules, namely *the rules concerning the treatment of foreigners*.*

Those rules require from the State to which they are directed a *particular final result** in respect of the treatment of foreign nationals, leaving the State which is under the obligation *free** as regards the *means to be used*.* Consequently, if an organ of the State which is under the obligation performs an act contrary to the desired result, *the existence of an internationally unlawful act and of the international responsibility of the State cannot be asserted so long as the foreign national has the possibility of securing, through the means provided by the municipal legal system, the result required by the international rule.**¹⁷⁷

76. We are gratified to have been able to conclude our examination of the statements of position of government representatives and international judges by quoting an opinion which is so clear, explicit and imbued with the true spirit of the principle which we are studying. We undertook earlier,¹⁷⁸ as a precaution, to make a careful and thorough analysis of international case-law and State practice in order, as we said, to ascertain whether, by chance, they conflicted with the conclusions we had first reached, by a process of deduction, from the nature, purpose and beneficiaries of a given category of international obligations and, consequently, the conditions in which a breach might occur. There is no longer any reason for this precaution, since the very least that can be said is that our analysis has produced no refutation of the ideas advocated by us. On the contrary, looking at them as a whole after having sought the exact meaning of assertions which had initially misled certain observers, the practice and the case-law seem, despite some uncertainties, to lend solid support to the views dictated by the logic of the principles.

77. Some additional considerations will enable us to dismiss certain objections to the conclusions which may have been suggested by various premises. For instance, mention has been made of the fact that, when a State complains of a breach by another State of an international obligation concerning the treatment to be granted to individuals, the injury for which it requests reparation

is that caused by the original conduct of the State and not that caused by the refusal of local remedies sought by the injured individuals. This is put forward as evidence that international responsibility irrevocably arises from the first conduct of the State and, accordingly, before the exhaustion of local remedies by the individuals concerned. In point of fact, this reasoning does not stand up. First of all, on more than one occasion in earlier reports of the Special Rapporteur and of the Commission, attention has been drawn to the danger of trying to draw, from the "damage" element and the criteria for determining its existence and its amount, conclusions regarding the determination of the existence of an internationally wrongful act, its constituent elements, and its effects.¹⁷⁹ The obligation to provide reparation which devolves upon a State pursuant to an internationally wrongful act concerns—let us stress this again—reparation for the failure of the State to fulfil its own obligations towards another State. The reparation which may be requested and obtained by the State injured in its right to have international obligations concerning the treatment to be accorded to individuals respected is one thing; the reparation which one of those individuals, whose enjoyment of his rights has been impaired by the conduct of State organs which have acted in a manner contrary to the result required by an international obligation, may request and obtain from a national tribunal of the same State, is another. These reparations have different bases and are at different levels. Even if the amount of the reparation requested by the State at the international level conformed materially to that of the reparation requested by the individual at the national level, even if the first was actually assessed on the basis of the second, the difference in nature between the two reparations would still remain.

Aside from these considerations of principle, the objection examined here obviously does not take into account the complex situation brought about for the State by the breach of an international obligation in cases where the requirement that local remedies be exhausted enters into play. When the individual injured by conduct of a State incompatible with the result required by an international obligation seeks a remedy by using and exhausting unsuccessfully the means of redress available to him under internal law, the breach of the international obligation is not constituted solely by the final stage in the process of its perpetration, any more than it is constituted solely by the first stage.

¹⁷⁶ *I.C.J. Reports 1959*, pp. 45-46. This opinion is of particular interest, since it expresses fairly clearly the idea that the impact of the principle of local remedies on the exercise of diplomatic protection is merely a corollary of the impact which the same principle has on the birth of international responsibility.

¹⁷⁷ *I.C.J. Reports 1964*, p. 114.

¹⁷⁸ See para. 54 above.

¹⁷⁹ See the Third Report of the Special Rapporteur (*Yearbook... 1971*, vol. II (Part One), p. 223, document A/CN.4/24 6 and Add.1-3, paras. 73-75) and the Report of the International Law Commission on the work of its twenty-fifth session (*Yearbook... 1973*, vol. II, pp. 183-184, document A/9010/Rev.1, chap. II, sect. B, article 3, para. 12 of the commentary), concerning the conditions for the existence of an internationally wrongful act. See also the Fourth Report of the Special Rapporteur (*Yearbook... 1972*, vol. II, pp. 98-99, document A/CN.4/264 and Add.1, paras. 68-70) and the Report of the Commission on the work of its twenty-seventh session, (*Yearbook... 1975*, vol. II, pp. 72-73, document A/10010/Rev.1, chap. II, sect. B, subsect. 2, article 11, paras. 9-10 of the commentary) regarding the error in relying on the criteria used in specific cases to determine the amount of reparation due, for the purpose of drawing conclusions concerning determination of the act to be attributed to the State as source of responsibility.

It results from the whole series of successive acts of State conduct, from the first which sets it in motion to the last which completes it and renders it final, so that the injury suffered by the individual—which may eventually be used as an element of appreciation to determine the amount of reparation which the State in its capacity as diplomatic or judicial protector may demand—is the injury caused to the individual by the aggregate of State conduct conflicting with the internationally required result. Even if the only basis is the injury caused by the original conduct, it is because successive acts of conduct have added nothing to that injury and not because the process of performance of the internationally wrongful act has been completed with the first stage.¹⁸⁰

78. Other objections seem to us even less well-founded—for example, the objection that the moment when the breach of an international obligation is completed and when, as a result, international liability is established, necessarily coincides with the moment when the dispute between the States involved originates.¹⁸¹ Whatever concept of “international dispute” one may adopt, international practice clearly shows that disputes—and we are speaking of legal disputes only—may well arise before the definitive perpetration of an internationally wrongful act, or even without any such act happening at all. To link the genesis of the dispute with that of the existence of international responsibility already fully established, and then to draw from the fact that disputes arise before exhaustion of local remedies the conclusion that such exhaustion has nothing to do with the genesis of responsibility is, in our view, a purely arbitrary procedure.

79. Again, we can attach no value to the view that the argument that the exhaustion of local remedies is a substantive condition for the generation of international responsibility is invalidated by the fact that international tribunals normally deal with that point when considering preliminary objections.¹⁸² The Special Rapporteur is fully convinced that questions of substance also can be raised as preliminary objections, and that is undoubtedly the prevailing opinion in the International Court of Justice itself. But even for those who, like Judges Hudson

¹⁸⁰ Conversely, even if, and equally wrongly in our view, the last act only is considered as constituting the breach of the international obligation and, consequently, as being the source of international responsibility, there is no reason why the reparation which the State may request for this breach should be established on the basis of the injury caused to the individual by this last act. The criteria of justice and equity which normally govern the determination of the amount of reparation for internationally unlawful acts may very well lead to the basis adopted for this purpose being the injury caused by the first act. And this does not exclude those cases where it is only subsequent acts that are incompatible with the requirements of an international obligation, as when the internationally wrongful act attributed to the State is exclusively a denial of justice. In that case, an estimate has to be made of the extent to which the determination of the reparation due for the breach of an international obligation is independent of the determination of the “damage” and particularly of the economic damage directly caused by the breach itself.

¹⁸¹ See Amerasinghe, *loc. cit.*, pp. 448-449, 463; and *contra* Gaja, *op. cit.*, pp. 22-23.

¹⁸² See again Amerasinghe, *loc. cit.*, pp. 449-450, 462-463; Chappetz, *op. cit.*, p. 25.

and Morelli, have expressed a different view,¹⁸³ the inevitable conclusion is that it is impossible for the parties to invoke, and for the Court to consider, failure to exhaust local remedies as a preliminary objection. In their view, such failure should be treated as a substantive objection, when considering the substance. The two judges in question are in fact among the firmest upholders of the idea that the exhaustion of local remedies constitutes a substantive condition of responsibility, and not just a procedural condition.

80. Finally, we do not feel obliged to take into consideration the objection that a purely declaratory judgment may be pronounced even before local remedies have been exhausted. Indeed, this is more a theoretical than a practical possibility since it has never actually happened.¹⁸⁴ Apart from this, we are aware that there is a school of thought which holds the much debated view that the requirement of exhaustion of local remedies applies only where a claim is made for restitution of property or indemnification and not, therefore, where all that is asked for is a purely declaratory judgment.¹⁸⁵ But it is hard to see on what grounds certain writers maintain that, for those who hold such an opinion, the exhaustion of local remedies is excluded *a priori* as a condition for the completion of a breach of an international obligation,

¹⁸³ See their joint dissenting opinions in, respectively, the judgment in the Panevezys-Saldutiskis Railway case (*P.C.I.J.*, Series A/B, No. 76, p. 47) and that in the case of the Barcelona Traction, Light and Power Company Limited (preliminary objections) (*I.C.J. Reports 1964*, pp. 114-115), where they criticize the majority decision to treat local remedies as a preliminary objection.

¹⁸⁴ In the *Interhandel* case, the Court gave no decision on the subsidiary request of the Swiss Government that the Court should confine itself to declaring that there had been a breach of an international obligation, in the event of its not recognizing that, in that particular case, local remedies had been exhausted (*I.C.J. Pleadings, Interhandel case*, p. 405). The United States had reconsidered in the oral proceedings (*ibid.*, pp. 501-502) what it had allowed on that point in the written proceedings (*ibid.*, p. 317). In the award of the Arbitral Tribunal (and the Mixed Commission) between Switzerland and the Federal Republic of Germany, rendered on 3 July 1958, for the agreement on German External debts, the Tribunal observed, but only as a principle, that “appeal to the principle of exhaustion of local remedies as a recognized rule of general international law is admitted in law only when a claim is made against a State, particularly a claim for restitution of property or indemnification” (*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 19 (1958), p. 770. See also *International Law Reports, 1958-1* (London), vol. 25 (1963).

¹⁸⁵ Writers are divided in their views as to the possibility of a declaratory judgment before the exhaustion of local remedies. At the Institute of International Law, P. Guggenheim (*Annuaire de l'Institut de droit international, 1956* (Basel), vol. 46, pp. 299-300) and J. H. W. Verzijl (*ibid.*, p. 301) spoke in favour of such a possibility, E. Giraud and C. de Visscher against it (*ibid.*, pp. 300-301). The majority of members shared the view expressed in the text (*ibid.*, p. 302). Those in favour included Fawcett (*op. cit.*, p. 457), and against C. H. P. Law (*op. cit.*, p. 110) and, with reservations, Amerasinghe (*op. cit.*, pp. 450-451). All of these, however, based their views, whether for or against, on the desirability or otherwise of the consequences of such a judgment rather than on international practice. Chappetz thinks it can be affirmed that the practice of States recognizes the possibility of such a judgment, (*op. cit.*, p. 94 *et seq.*). Haesler, on the other hand, maintains that there are no significant precedents (*op. cit.*, p. 125). According to Gaja, if the possibility of a declaratory judgment is admitted, then the possibility of a judgment on some of the conditions of the wrongful act or of responsibility or of diplomatic protection must also be admitted (*op. cit.*, p. 25, foot-note 15).

which thereby becomes a source of responsibility.¹⁸⁶ It is entirely possible to envisage a purely declaratory judgment for the purpose of establishing, before any consideration at all of a possible infringement and the resulting responsibility, the existence of an international obligation on the State and the scope and content of that obligation. It is also possible to envisage a judgment of that kind being pronounced for the purpose of recognizing that an initial course of conduct by the State towards an individual is in contradiction with the result required by the obligation.

81. Our brief but adequate survey of the assertions regarding an alleged incompatibility of our views with the alleged conclusions which some would like to draw from certain premises has not induced us to modify our views in the slightest, any more than has our detailed analysis of the positions adopted by Governments and judges of international tribunals. We can therefore confirm our initial reasoning as our conclusion on the question examined so far. Among the multifarious international obligations which require a State not to adopt a specific course of conduct but to achieve a particular result, there is one special category that has to be distinguished: those designed specifically to ensure that, within the jurisdiction of the State, a given treatment is accorded to natural or legal persons and their property. The very fact of this qualification means that, as indicated above,¹⁸⁷ a supplementary condition must logically be added to the others normally required in order to be able to establish the breach of an obligation requiring the State to achieve a particular result. The point to be borne in mind here is the fact that the aim and purpose of international obligations of this particular category are to ensure that the State guarantees a specific situation to individuals, subjects of its internal law. There cannot therefore be a complete and final breach of an international obligation of this category so long as the persons intended as the beneficiaries of the required result have not done everything in their power to bring about that result. In particular, there cannot be a breach of the obligation so long as those persons have not employed, for that purpose, the remedies available to them under internal law to rectify a situation incompatible with the required result and obtain redress, and so long as they have not exhausted those remedies without achieving their aim. Only then can it be said that the State has finally failed to achieve the internationally required results, that it has committed a complete breach of its international obligation, and that it thus incurs international responsibility.

82. In the light of these conclusions, it seems almost superfluous to consider whether or not the requirement of the exhaustion of local remedies is primarily a general principle of unwritten law, even though it is expressly

¹⁸⁶ According to Amerasinghe, "it is only when the rule of local remedies is conceived as having a procedural nature that such a judgment will be available before local remedies have been exhausted" (*loc. cit.*, p. 451). Similarly, Chappetz, "The ability, widely recognized in practice, of a court to render a declaratory judgment without local remedies having been exhausted beforehand invalidates the approach which treats such exhaustion as a substantive rule" (*op. cit.*, p. 17).

¹⁸⁷ See para. 48 above.

provided for in innumerable conventions. As we have already emphasized, this is in fact one of those principles which command recognition as the logical consequence of the nature and specific object and purpose of the obligations concerned. While it is true that many conventions enunciate, refer to and confirm the principle, stipulate its scope and effect, extend or restrict its limits and, in some cases, wholly preclude its application to the obligations laid down in those instruments, they do so precisely on the basis that the requirement of the exhaustion of local remedies is a pre-existing principle of general application, albeit open to derogation, a principle which, to repeat, has its roots in custom or, still more, in the very logic of the mode of performance of a particular type of international obligation and which is, therefore, certainly not of purely conventional origin.

83. Some recent writers have demonstrated the validity of this assertion in highly conscientious and exhaustive studies.¹⁸⁸ It will suffice to recall briefly the main elements of their demonstration.

84. There would appear to be no doubt that, in general international law, the establishment of the principle of the exhaustion of local remedies is closely related to the development of international obligations regarding the treatment accorded by a State to foreign natural or legal persons and the prevention of injury to such persons and their property. A perusal of the decisions handed down by the Permanent Court of International Justice shows that, in its judgment in the *Mavrommatis Palestine Concessions* case (1924), the Court defined the requirement that aliens injured by acts of the State which are contrary to international law should seek to "obtain satisfaction through the ordinary channels" as "an elementary principle of international law",¹⁸⁹ while, in its judgment in the *Panevezys-Saldutiskis Railway* case (1939), it noted that the two parties recognized the existence of "the rule of international law requiring the exhaustion of the remedies afforded by municipal law *."¹⁹⁰ In its judgment in the *Interhandel* case (1959), the International Court of Justice took a very explicit position on the matter when it affirmed that:

... The rule that local remedies must be exhausted ... is a well-established rule of customary international law *.¹⁹¹

International arbitration case-law clearly follows this approach. In his award in the *British Property in Spanish Morocco* case, rendered in 1925, the Arbitrator, Max Huber, held the requirement of the exhaustion of local remedies to be "a recognized principle of international law".¹⁹² In its decision of 1930 in the *Mexican Union Railway* case—already cited¹⁹³ for its definition of the principle as indicating that "the responsibility of the State under international law can only commence *" after recourse to local remedies—the Great Britain/Mexico Claims Commission stated that the principle in question was "one of the recognized rules of international

¹⁸⁸ See, in particular, Gaja, *op. cit.*, p. 37 *et seq.*

¹⁸⁹ *P.C.I.J.*, Series A., No. 2, p. 12.

¹⁹⁰ *P.C.I.J.*, Series A./B., No. 76, p. 18.

¹⁹¹ *I.C.J. Reports 1959*, p. 27.

¹⁹² United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 731.

¹⁹³ See para. 63 above.

law *.”¹⁹⁴ In its award of 1956 in the *Ambatielos* case, the Greece/United Kingdom Commission of Arbitration described the requirement of the full utilization of local remedies as a rule “well established in international law *.”¹⁹⁵ In its decision of 1958, the Tribunal set up by Switzerland and the Federal Republic of Germany for the *Agreement on German External Debts* affirmed that:

There can be no doubt that the rule of exhaustion of local remedies ... is also a generally accepted rule of international law *.”¹⁹⁶

International case law thus reveals a unanimous recognition of the existence of the principle of the exhaustion of local remedies in general international law, independently of any special provisions embodied in treaty instruments. At the same time, it is a fact that all the specific cases considered by international courts which have given rise to expressions of recognition of the principle are cases involving the breach or alleged breach of international obligations concerning the treatment accorded by a State in its territory to aliens or their property.

85. There are just as many statements of position in the matter to be found in State practice, all of these virtually unanimous in recognizing the general character of the principle of the exhaustion of local remedies. It is clear from an examination of the opinions expressed by representatives of Governments in the course of codification work concerning the responsibility of States for damage caused in their territory to the person or property of foreigners. It also emerges from the attitude taken by Governments in disputes involving the breach of an international obligation relating to the treatment of nationals of another State.

86. During the 1930 attempt at codification no Government expressed the slightest doubt that the rule which it was sought to codify was first and foremost a rule of general international law. The scope of the rule had been determined in advance by the limits of the subject-matter of the Codification Conference. The replies of Governments to the request for information addressed to them by the Preparatory Committee,¹⁹⁷ the statements by delegations in the Third Committee of the Conference and the proposals made during its deliberations,¹⁹⁸ and the text of article 4 adopted on first reading at the close of the discussions,¹⁹⁹ were all based on a fundamental conviction of the existence of the principle of the exhaustion of local remedies as a rule of general international law. The limitations placed on the principle in the text

adopted,²⁰⁰ as well as those proposed by certain representatives, were grounded in the same conviction.

87. With regard to the positions taken by Governments in the many cases in which the problem of the non-exhaustion of local remedies arose in a particular dispute, the most interesting feature is the convergence of views, not only of respondent Governments but also of claimant Governments, concerning recognition of the principle in question as a general rule of international law. The inevitable divergences related only to the problem of the applicability of the principle in the particular circumstances of the specific case. In any event, it was never maintained that the requirement of the prior exhaustion of local remedies could be invoked only if specifically provided for in a convention. To mention only the most explicit statements before the Permanent Court of International Justice or the International Court of Justice, in the case concerning the *Administration of Prince von Pless*, the Polish Government expressed the view, which was never challenged by the German Government, that the requirement of the exhaustion of local remedies was “a generally accepted principle of international relations *;”²⁰¹ in the *Losinger* case, the Yugoslav Government referred to a “universally admitted rule *” and the Swiss Government stated that it was not unaware of that “rule of international law*;”²⁰² in the *Phosphates in Morocco* case, the French Government affirmed that it was “a well-established rule of international law *” and the Italian Government stated that it “did not intend to challenge the existence of that rule*;”²⁰³ in the *Panevezys-Saldutiskis* case, the Lithuanian Government maintained, without opposition from the Estonian Government, that “the rule of the exhaustion of local remedies is firmly established in the positive international law of our time”;²⁰⁴ in the *Anglo-Iranian Oil Company* case, the Iranian Government referred to the “prior exhaustion of local remedies” as a condition to be met “in accordance with general international law * and the British Government recognized that it was “in general a condition *;”²⁰⁵ in the *Interhandel* case, the United States invoked the “well-established principle of international law requiring the exhaustion of local remedies * and the Swiss Government replied that it in no way contested that assertion;²⁰⁶ finally, in the *Aerial Incident of 27 July 1955* case, the Bulgarian Government emphasized the “incontestable” nature of the “rule of the prior exhaustion of local remedies”, without being challenged on that point by the Governments of the United States and Israel.²⁰⁷ Similar positions were implicit in many other cases.²⁰⁸

¹⁹⁴ *Ibid.*, vol. V, p. 122.

¹⁹⁵ *Ibid.*, vol. XII, pp. 118-119.

¹⁹⁶ *International Law Reports, 1958-I* (London, Butterworth, 1963), vol. 25, p. 42.

¹⁹⁷ For the text of point XII of the request for information, see paragraph 55 above. For the replies of Governments, see League of Nations, *Bases for Discussion...*, (*op. cit.*), pp. 136 *et seq.*, and *Supplement to volume III* (C.75(a).M.69(a).1929.V), pp. 4 and 23. Basis for Discussion No. 27, drafted by the Committee on the basis of those replies, is also reproduced above (para. 55).

¹⁹⁸ For the statements made during the debates, see League of Nations, *Acts of the Conference...* (*op. cit.*), pp. 63 *et seq.*, 162 *et seq.*; for proposals and amendments, see *ibid.*, pp. 209 *et seq.*, 217, 220, 227 *et seq.*, and 251.

¹⁹⁹ See para. 56 above.

²⁰⁰ The limitations on the application of the principle provided for in article 4, paragraph 2, concerned self-evident cases in which the judicial authorities had definitively refused to administer justice or had rendered final judgments.

²⁰¹ *P.C.I.J.*, Series C., No. 70, pp. 134 and 182.

²⁰² *Ibid.*, No. 78, pp. 129 and 156.

²⁰³ *Ibid.*, No. 84, pp. 209 and 440.

²⁰⁴ *Ibid.*, No. 86, p. 143.

²⁰⁵ *I.C.J. Pleadings, Anglo-Iranian Oil Company*, pp. 291 and 155.

²⁰⁶ *Ibid.*, *Interhandel*, pp. 315 and 402.

²⁰⁷ *Ibid.*, *Aerial Incident of 27 July 1955*, pp. 276-277, 326, 454.

²⁰⁸ In only one case did a Government express any doubts concerning the existence of the principle as a general rule—Belgium

88. The positions taken by Governments parties to disputes referred to other international tribunals are equally conclusive. For example, it is clear from the arbitral award in the *Central Rhodope Forests* case, that the Bulgarian Government based its argument on "the well-known principle of international law of exhaustion of local legal remedies*" and that the Greek Government challenged only the applicability of that principle to the case in point;²⁰⁹ the decision in the *Anglo-Iranian Oil Co.* case, between Iran and Great Britain, shows that the British Government recognized that the requirement that all local remedies be exhausted, which the Iranian Government had invoked, was, indeed, "an established principle*."²¹⁰ There was one occasion when the existence of the rule as part of general international law was challenged, and that was the initial challenge by the Finnish Government in the *Finnish Ships* case, which, as stated above,²¹¹ was referred to the Council of the League of Nations in 1931. When the British Government reiterated that the rule was an undisputed principle of international law, however, the Finnish Government accepted that view and agreed to refer to arbitration the question whether, in the case in point, local remedies had been exhausted.

89. We would also point out, *ad abundantiam*, that significant positions have been taken by Governments on other occasions. Particularly interesting is the position taken by the Swiss Government during the 1957 debate in the Federal Assembly on approval of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States. Commenting on article 26 of the Convention, the Federal Council referred to exhaustion of local remedies as "a general principle of international law*."²¹² Moreover, the practice of certain Governments, particularly the United States and Canadian Governments, of considering themselves as precluded from endorsing claims by their nationals until the latter have exhausted local remedies, attests to their firm belief in the existence of the principle as one of general application.²¹³ Lastly, even some bilateral

in the Borchgrave case (*P.C.I.J.*, Series C., No. 83, p. 65). However, the Belgian Government later adopted a clearly positive attitude in the case concerning the Electricity Company of Sofia and Bulgaria (*ibid.*, No. 88, p. 37) and in the case concerning the *Barcelona Traction, Light and Power Company Limited (I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, vol. 1, pp. 215 *et seq.*

²⁰⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1419 (translated by the Secretariat).

²¹⁰ *I.C.J. Pleadings*, p. 122.

²¹¹ See para. 65 above.

²¹² See the message of the Federal Council of 15 December 1967 in the *Annuaire suisse de droit international*, 1968 (Zurich, 1970), vol. 25, p. 271. It is clear from the statements made by the Federal Council in 1968 concerning article 26 of the European Convention on Human Rights (*Annuaire suisse de droit international*, 1969-1970 (Zurich, 1971), vol. 26, p. 172) and in 1970 concerning the Treaty of Conciliation, Judicial Settlement and Arbitration, concluded between Switzerland and Chile on 14 January 1970 (*Annuaire suisse de droit international*, 1971 (Zurich 1977), vol. 27, p. 198) that Switzerland recognizes exhaustion of local remedies as a customary rule.

²¹³ For an example of United States practice, see M. Whiteman, (*op. cit.*), pp. 769 *et seq.*, 906 *et seq.*, and, for an example of Canadian practice, see *Canadian Yearbook of International Law*, 1968 (Vancouver), vol. VI, pp. 263 *et seq.*

and multilateral treaties refer to the exhaustion of local remedies as a general principle of international law. Article 26 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms²¹⁴ for example, refers to the exhaustion of all local remedies, "according to the generally recognized principles of international law".²¹⁵

90. In view of the unanimity of opinion reflected in international case-law and State practice, it hardly seems necessary to add that the character of the principle with which we are concerned as a principle of general international law is also recognized by virtually all the learned writers who have considered the question. We see no need to quote further from the numerous writers who have studied this subject since all, with very rare exceptions, recognize that, under general international law, exhaustion of local remedies is a condition for the generation of international responsibility or at least for its implementation.²¹⁶

91. Lastly, it is as a principle applicable under general international law that this condition was taken into consideration in the resolution adopted in 1956 by the Institute of International Law.²¹⁷ And it was on the same understanding that the principle stating this condition was included in the codification drafts on the international responsibility of States for injury caused on their territory to the person or property of aliens, adopted

²¹⁴ For reference, see foot-note 36 above.

²¹⁵ Article 5 of the General Claims Convention between the United States and Mexico of 8 September 1923 speaks of the "general principle of international law that legal remedies must be exhausted". (*British and Foreign State Papers* (London, H.M. Stationery Office, 1926), vol. CXVIII, p. 1105.)

²¹⁶ C. G. Ténékidès did express doubts in an article published in 1933 ("Exhaustion of local remedies as a precondition for international proceedings", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIV, No. 3 (1933), pp. 514 *et seq.*) but later changed his opinion ("'Patently unjust' national judgments as sources of international responsibility of States", *Revue générale de droit international public* (Paris), 3rd series, vol. XIII, No. 4 (July-August 1939), p. 376). W. Friedman, in his article "Exhaustion of local remedies" (*Revue de droit international (op. cit.)*, pp. 318 *et seq.*), denied the existence of the principle of exhaustion of local remedies in general international law but this article appears to be out of date now. J. H. W. Verzijl, in his report to the Institute of International Law ("The rule of the exhaustion of local remedies ..." (*loc. cit.*), pp. 5 *et seq.* and, in particular, 22 and 23) accepted that the rule was a principle of general international law but considerably restricted its scope. In his opinion, it would be justified only in the event of a denial of justice in the true sense. In other cases, the possibility open to the State of avoiding international responsibility by referring a foreigner who has suffered injury to its national courts can be explained only "on the grounds of expediency". A young Italian international jurist, G. Strozzi, has very recently published an extensive study, already referred to in foot-note 121 above, on this question: he considers that, except in a very few cases, the principle of exhaustion of local remedies originates in treaties. Consistent with this line of thought, the only value which he sees in the principle, about which he expresses very restrictive ideas in general, is as a condition for the institution of proceedings before an international tribunal. This author's position is, however, unique among Italian legal writers who are among those who have devoted most attention to our subject.

²¹⁷ See *Annuaire de l'Institut de droit international*, 1956 (Basel), vol. 46, p. 358; and *Yearbook.. 1969*, vol. II, p. 142, document A/CN.4/217 and Add.1, annex. IV.

under the auspices of international organizations²¹⁸ or by private scientific associations.²¹⁹ The same principle is also included in drafts on the international responsibility of States for wrongful acts generally.²²⁰

92. It therefore seems to be clearly established that general international law has traditionally affirmed the principle known as exhaustion of local remedies in relation to respect for international obligations which require the State to ensure that foreign natural and legal persons are accorded certain treatment. In the first part of this section, we stated that, in our view, the principle consists of a main proposition and a corollary. The proposition is that the breach of an international obligation, and the international responsibility arising from that breach, cannot be established so long as the individuals who complain of a situation due to the action or omission of a State organ and running counter to the result required by an international obligation have not endeavoured to redress that situation by resort to the other local remedies capable of still achieving the internationally required result. The corollary is that the State of which the said individuals are nationals is not authorized, so long as the condition referred to has not been met, to espouse their cause, that is to say, to take steps for their diplomatic or legal protection; in particular, it is not authorized to institute proceedings before an international tribunal.

²¹⁸ In addition to articles 4 and 9 adopted on first reading in 1930 by the Third Committee of the Hague Codification Conference (*Yearbook... 1956*, vol. II, pp. 225-226, document A/CN.4/96, annex 3), see article 15 of the draft prepared in 1958 by F. V. García Amador (*Yearbook... 1958*, vol. II, p. 72, document A/CN.4/111, annex) and article 18 of the revised draft prepared in 1961 (*Yearbook... 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum); paragraph 3 of the resolution adopted in 1933 at the Seventh International Conference of American States (*Yearbook... 1956*, vol. II, p. 226, document A/CN.96, annex 6); number VIII of the principles adopted in 1962 by the Inter-American Juridical Committee referring to the opinion of Latin American countries (*Yearbook... 1969*, vol. II, p. 153, document A/CN.4/217 and Add.1, annex XIV); and number IX of the principles adopted in 1965 by the same Committee, referring to the opinion of the United States (*ibid.*, p. 154, annex XV).

²¹⁹ See article XII of the resolution prepared in 1927 by the Institute of International Law (*Yearbook... 1956*, vol. II, p. 228, document A/CN.4/96, annex 8); articles 6 and 7 of the draft prepared in 1929 by Harvard Law School (*ibid.*, p. 229, annex 9); article 13 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht (*Yearbook... 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII); article 1, paragraph 2, and article 19 of the draft prepared in 1961 by the Harvard Law School (*ibid.*, pp. 143 and 146, document A/CN.4/217 and Add.1, annex VII); and paragraphs 206-210 of the Restatement adopted in 1965 by the American Law Institute (*Yearbook... 1971*, vol. II (Part One), pp. 197-198, document A/CN.4/217/Add.2). See also articles III and IV of the draft on diplomatic protection prepared in 1925 by the American Institute of International Law (*Yearbook... 1956*, vol. II, p. 227, document A/CN.4/96, annex 7).

²²⁰ This applies to the bases for discussion on the international responsibility of States, prepared in 1956 by F. V. García Amador (Basis No. V, para. 2) (*Yearbook... 1956*, vol. II, p. 220, document A/CN.4/96, para. 241) and the draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932 (article 9) (*Yearbook... 1969*, vol. II, p. 152, document A/CN.4/217 and Add.1, annex X). The drafts prepared by K. Strupp (*ibid.*, p. 151, annex IX) and by B. Graefrath and P. A. Steiniger ("Kodifikation der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin, 1973), No. 8, p. 227), which also deal with the international responsibility of States in general, do not mention the rule, but this certainly does not mean that their authors exclude the rule from general international law.

93. The question may be asked, however, whether our finding that the requirement of exhaustion of local remedies has been affirmed in customary international law concurrently with the development of the rules concerning the status of aliens may not have led us to conclusions which sin both by over- and by understatement, particularly if it is applied exactly as it stands to existing international law. It may, for instance, be asked whether general international law itself does not nowadays provide at least for exceptions to the applicability of the principle in the determination of a breach of international obligations concerning the treatment of foreign natural and legal persons. Again, it may be asked whether the condition of exhaustion of local remedies by the individuals concerned should not likewise obtain in the determination of a breach of international obligations concerning persons other than those for whom the principle has traditionally been affirmed, and particularly for national natural and legal persons. Obviously, we ask these questions only in relation to general international law, for we are well aware that States sometimes avail themselves of the possibility of restricting or extending the scope of the principle by means of bilateral or even multilateral treaties.

94. Let us begin by considering the first aspect. Two different cases invariably prompt the question whether exhaustion of local remedies by the individuals concerned does or does not constitute a condition precedent for a State to find that there has been a complete breach by another State of an international obligation concerning the treatment to be accorded to its nationals, and so for the first State to be able to invoke the international responsibility incurred by the other State. The first case is where an initial course of conduct by organs of the State in whose territory the act took place (referred to here as the 'territorial State') has created a situation incompatible with the result required by an international obligation and injurious to certain persons as nationals of a particular foreign country. The second case is where the injury caused to the rights of foreign individuals has been done outside the territory of the State or to the detriment of persons either not resident in the territorial State or not having some voluntary link with the territorial State.

95. Admittedly, where there is a situation brought about by the conduct of a State organ which is injurious to a person through his possession of the nationality of a State which is the object of some special discriminatory intention, the State of which that person possesses the nationality sometimes reacts by invoking the responsibility of the territorial State, without waiting till the victim has had recourse to the local tribunals.²²¹ Pertinent to this subject is a sentence from Denmark's reply

²²¹ G. Gaja (*op. cit.*, p. 79), cites, as recent examples, the communiqué of 31 July 1964 issued by the French Ministry of Foreign Affairs regarding the demonstrations in Saigon against French subjects (for text, see Ch. Rousseau, "*Chronique des faits internationaux*", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXV, No. 4 (October-December 1964), p. 943), and the note by the Netherlands Government of 18 December 1959 concerning discriminatory nationalization measures adopted by Indonesia (*American Journal of International Law* (Washington, D.C.), vol. 54, No. 2 April 1960), pp. 487 *et seq.*

to the request for information by the Preparatory Committee for the 1930 Codification Conference. In accepting the proposal that the right to invoke State responsibility under international law should be subject to the exhaustion, by those concerned, of the remedies available to them under the internal law of the State whose responsibility is alleged, the Danish Government adds:

It is understood, however, that the national authorities must not allow the matter to drag on unconscionably and there must be no obvious neglect of the foreigner's right because he is a foreigner or a national of some foreign State.²²²

But it would be reading too much into this observation to ascribe to it an intention clearly to affirm the existence in general international law of an exception to the general condition of exhaustion of local remedies. Like the attitude of some States in certain cases, it simply fits in with a normal and reasonable application of the principle. In other words, it may be that, in certain specific cases where the injury due to the action or omission of a State organ occurred within the context of a general feeling of hostility towards the nationals of some other foreign country, the State of which the injured persons were nationals did not wait, before intervening, until those persons had had recourse to the local remedies. The reason for that, however, is much simpler than any intention to claim an alleged exception to the principle. It is that, in the specific cases in question, the State of nationality of the injured persons realized that the situation in which its nationals were placed was beyond remedy at the level of internal law. It was convinced that it was impossible, in the circumstances, to secure the correction, by effective local remedies, of a situation created by the initial attitude of the territorial State.²²³ In the light of these considerations, it is the Special Rapporteur's firm belief that there is no reason to make express provision, in order to meet this particular case, for an exception to the normal application of the principle of exhaustion of local remedies, since this principle applies only, as we shall have occasion to show once more, to "effective" remedies.

96. With regard to the second case mentioned in paragraph 94 it must be said at the outset, and no one would think of denying, that the principle of exhaustion of local remedies has often been defined with reference to a situation injurious to foreigners which has arisen in a State's territory. Should that be taken to imply that the principle requiring such exhaustion would not apply in the case of injury caused by a State to foreigners outside its territory? Certainly not! Cases of injury caused by a State to foreigners in its own territory are, of course,

²²² League of Nations, *Bases for Discussion...* (op. cit.), p. 136. The Rapporteur of the Sub-Commission, Ch. de Visscher, pointed out that affirmation of the principle does not prevent the State from claiming reparation, before the local remedies are exhausted, for prejudice suffered by the State which was distinct from but consequential upon the damage caused to persons because they were of a particular nationality.

²²³ It was difficult in these cases for the respondent State itself seriously to challenge the ineffectiveness of the available remedies. See again Gaja (op. cit.) on the possibility of explaining the very few cases that have occurred in practice in another way than by recognizing the alleged exception.

by far the most common, which explains the formulation of the definitions in question, but there is no justification for reading into those definitions any intention to exclude the principle's applicability to other cases. Neither State practice nor international jurisprudence offer the slightest explicit support for such a view, while analysis of alleged implicit affirmations of the inapplicability of the requirement of exhaustion of local remedies in such cases as damage caused to the property of foreigners on the high seas has proved most inconclusive.²²⁴ In legal literature, some authors have rejected the notion that the exhaustion of local remedies principle is applicable in cases of injury caused by State organs to foreigners or their property outside the territory of that State. However, they cannot be said to have provided convincing support for their argument.²²⁵ It should be added that codification drafts whose scope was not limited in advance to international responsibility for injury caused by the State in its own territory to foreigners or their property have not excluded the application of the principle to cases of injury caused to foreigners outside the territory of the State.

97. It must be said that, generally speaking, there is no real justification for such limitation. Those writers who have upheld it obviously have not considered the reason for and the true significance of the principle of requiring exhaustion of local remedies in cases where such requirement is justified. Why, indeed, should the act of an organ of the State constitute a completed breach of an international obligation relating to the treatment of aliens

²²⁴ In cases of the seizure of ships, especially private fishing vessels, on the high seas, the flag State has sometimes demanded immediate release of the vessel or compensation. That is what happened in the S.S. *I'm Alone* case between Canada and the United States tried by a court of arbitration in 1933 (United Nations, *Reports of International Arbitral Awards*, vol. III (op. cit.), pp. 1609 et seq.). In other cases, however, the flag State has refrained from intervening immediately (see the cases cited by Law, op. cit., pp. 103 et seq., and by Gaja, op. cit., pp. 90 et seq.). Practice in regard to fishing catches seems to support the idea of the applicability of the principle of the exhaustion of local remedies (see Reuter, loc. cit., pp. 161 et seq., and Gaja, op. cit., p. 91, note 17). In cases of aircraft shot down over the high seas, compensation has often been claimed and obtained without prior exhaustion of local remedies but by amicable settlement. Moreover, the private character of the aircraft shot down was often open to question. Instances of injury to aliens in the territory of another State are sometimes illustrated by reference to the case of the Consolidated Mining and Smelting Company at Trail, British Columbia ("Trail Smelter case") (United States v. Canada; for the arbitration court's award, see United Nations, *Reports of International Arbitral Awards*, vol. III (op. cit.), pp. 1907 et seq.), in which the fumes from a foundry situated in Canada had caused damage in United States territory. However, the international obligation claimed to be breached was that of respect for the territory of another State rather than that of the treatment of individual aliens. Lastly, it should be remembered that, in many cases, non-application of the principle of the exhaustion of local remedies was due only to the absence of remedies really available to those concerned.

²²⁵ See for example C. Parry, "Some considerations upon the protection of individuals in international law", *Recueil des Cours...* 1956-II. (Leyden, Sijthoff, 1957), vol. 90, p. 688; T. Meron., "The incidence of the rule of exhaustion of local remedies". *The British Year Book of International Law*, 1959 (London), vol. 35, p. 98; Law, op. cit., p. 104; I. L. Head, "A fresh look at the local remedies rule", *Canadian Yearbook of International Law*, 1967 (Vancouver), vol. V, p. 153; and C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), pp. 185 et seq.

when the act affects property outside the State's territory, but not when it affects property within its territory? Why should international responsibility and the faculty of invoking it arise from such an act immediately in the first case, but only after a subsequent act in the second case? In fact, the only valid criterion for determining, in the case of injury caused by a State to the person or property of foreign individuals, whether the principle of exhaustion of local remedies should or should not apply is the existence or absence of adequate and effective remedies available to those individuals. Admittedly, it is sometimes more difficult for injured foreigners to avail themselves of such remedies in case of damage to their property outside the territory of the State which has committed the injurious acts.²²⁶ However, where suitable effective remedies exist and those remedies are available to the individuals concerned, we can see no reason why the State should be denied the opportunity of discharging its obligation by taking, when appealed to by those individuals, the necessary steps to rectify the situation created by the initial conduct of its organs. It seems to us inconceivable that it should be denied that possibility solely because the situation to be rectified arose outside rather than within the State frontiers. Moreover, even if the principle of the exhaustion of local remedies is regarded as a purely "procedural" rule—which we dispute—it is difficult to see why the location of an individual's property at the time when the damage is sustained should be decisive in determining whether or not the individual's home State must wait until he has exhausted local remedies before being permitted to intervene itself on the ground of offering diplomatic protection.²²⁷

98. The above arguments apply equally to the claim that an exception to the principle of exhaustion of local remedies should be made in the case of injury to foreigners not resident in the territory of the State causing the injury. This is just another attempt to introduce a territorial element which has nothing to do with the *ratio* of the principle of exhaustion of local remedies. The theory that the principle is not applicable to cases of injury to non-resident foreigners was upheld in practice by the French Government in the *Norwegian Loans* case in order to release French nationals who were holders of Norwegian bonds but resident in France from the obligation to resort to the remedies provided by Norwegian law. The French Government's reply of 20 February 1957 states:

Although the rule under consideration is sometimes formulated in terms of the "prior exhaustion of domestic remedies", it also, and perhaps more often, appears with such terms as "exhaustion of local remedies" and "local redress", suggesting a nuance affecting the very substance of this rule and its justification.

...

²²⁶ But in some of the decisions in specific cases, apparently based on the notion of the inapplicability of the principle of exhaustion of local remedies to cases of injury caused outside the territory of the State, the decisive factor seems in fact to have been the degree of effectiveness of the local remedies actually available.

²²⁷ Would there be any justification, for example, for requiring the owner of a private ship who has suffered injury by the act of organs of a State to exhaust the local remedies of that State if the act which caused the injury to his ship was committed within territorial waters, but not if it was committed in international waters?

... the only explanation of this rule lies in the requirement that a foreigner in dispute with *the State under whose sovereignty he has chosen to live** may not have his case submitted to an international tribunal without having first exhausted all local means of settlement.²²⁸

The Norwegian Government strongly contested that view and maintained that there was no precedent to be found in the practice for the limitation attributed to the rule by the French Government.²²⁹ The Court was not called on to give any ruling on the point, but Judge Read strongly criticized the French Government's position in his dissenting opinion, remarking that:

France has not been able to put forward any persuasive authority for accepting this limitation on the application of the rule and, indeed, the weight of authority is the other way.²³⁰

It is not true, at present at least, that the exhaustion of local remedies requirement has been applied only to cases of injury caused to foreigners resident in the territory of the State causing the injury. To mention only two well-known cases, in the *Finnish Ships* case and the *Ambatielos* case the individuals injured were not resident in the territory of the State causing the alleged injury. Nevertheless, neither of the claimants—the Finnish Government in the first case and the Greek Government in the second—invoked that circumstance to establish inapplicability of the principle.

99. It may be added that article 4 of the draft adopted on first reading by the Third Committee of the 1930 Hague Conference²³¹ made no distinction between resident and non-resident foreigners. The same applies to all the other codification drafts adopted under the auspices of international organizations and drafts of private origin. And finally most writers reject the idea of a distinction on that basis.²³² There is no need to say more about this limitation, which in our opinion is not justified by the logic of the principle and, in practice, would have unacceptable effects. It would exclude from the sphere of application of the principle many cases of nationalization of foreigners' property or prejudice to foreigners' investments, on the sole ground that the foreigners were not resident in the country. The desire to avoid imposing too heavy a burden on an individual who considers that he has suffered injury, by requiring him to exhaust the local remedies in a country other than the one in which he resides cannot warrant such a conclusion.

²²⁸ *I.C.J. Pleadings, Certain Norwegian Loans*, vol. I, p. 408. (Translation from French.)

²²⁹ *Ibid.*, pp. 452 *et seq.*

²³⁰ *I.C.J. Reports 1975*, p. 97.

²³¹ League of Nations, *Acts of the Conference... (op. cit.)*, p. 236. Text reproduced in *Yearbook... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

²³² With the exception of D. R. Mummery ("The content of the duty to exhaust local judicial remedies", *American Journal of International Law* (Washington D.C.), vol. 58, No. 2 (April 1964), pp. 390 *et seq.*), who considers the principle to be applicable in the case of resident aliens and in that of non-resident aliens whose property is in the territory of the accused State. According to D. P. O'Connell (*International Law*, 2nd ed. (London, Stevens, 1970), vol. II, pp. 950 *et seq.*), the principle would not apply if the foreigner was outside the jurisdiction of the State. Definitely against any limitation of this kind are A. D. McNair (*International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 219) and Gaja (*op. cit.*, pp. 87 *et seq.*).

100. The idea of an exception which would exempt from application of the requirement of exhaustion of local remedies only foreigners not connected by any voluntary link to the State whose remedies are to be used is very similar in spirit to the idea of an exception for non-resident aliens, but is more restrictive in scope. This idea was developed before the International Court of Justice by the Government of Israel in connexion with damage caused to Israeli nationals by the Bulgarian anti-aircraft defence in shooting down an Israeli civil aircraft which had entered Bulgarian air space by mistake.²³³ The Bulgarian Government disputed the existence of this limitation;²³⁴ the United States, some of whose nationals had also been injured by the action of the Bulgarian authorities, claimed that the principle was not applicable in that specific case, but did not take the exception put forward by the Government of Israel.²³⁵ The Court did not have occasion to rule on this question, but the idea of introducing this exception subsequently found a few supporters in legal literature.²³⁶ At the present stage, however, it does not seem that an exception thus conceived, even of a very limited nature, has yet found support in international practice, and we would hesitate to propose its adoption, even from the point of view of the progressive development of international law. Even if this line were to be taken, it would seem to us more consistent with the reason for the existence of the principle of exhaustion of local remedies, and with the logic of that principle, to provide, in a form to be worked out, that the collaboration of individuals should not always be required in order to set in motion machinery enabling the State to redress, by a new course of conduct, a situation which is contrary to the result internationally required of it and which has been brought about by its original conduct. Such a provision would apply, for example, in the case of injury caused to a foreigner brought into the territory of a State, or conveyed in transit by air or over land, against his will. It might be found in fact that the burdens that would otherwise devolve upon such an individual would be too heavy to be justified. However, even without expressly providing for an exception which might compromise the soundness

²³³ In his oral argument, the agent of the Government of Israel stated the following:

"There are a number of important limitations to the application in practice of this rule. In my submission ... it is essential, before the rule can be applied, that a *link should exist* between the injured individual and the State whose actions are impugned. I submit that all the precedents show that the rule is only applied when the alien ... has created ... a *voluntary, conscious and deliberate connection* between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there ... or by virtue of his having made some contract with the government of that State, such as the cases involving foreign bondholders; and there may be other instances." (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 531 *et seq.*)

²³⁴ *Ibid.*, p. 565.

²³⁵ *Ibid.*, pp. 301, 326 *et seq.*

²³⁶ Meron (*loc. cit.*, pp. 94 *et seq.*), Head (*loc. cit.*, p. 153), Jiménez de Aréchaga (*loc. cit.*, p. 583) and Chappetz (*op. cit.*, pp. 48 *et seq.*) have expressed themselves to that effect. Law (*op. cit.*, p. 104) links the proposed exception to the case of absence of voluntary submission by the foreigner to local law and jurisdiction. *Contra*, Gaja, *op. cit.*, p. 89.

of the principle, would it not be possible to regard these few extreme cases as covered by the general requirement that local remedies should be *effective*, that requirement being understood to include the further requirement that such remedies should also be effectively usable, in the cases submitted, by the individuals concerned? And would it not be possible to envisage that, for such cases, the State should be able to establish procedures for the *ex officio* use of local remedies in order to avoid being placed, for reasons for which it is not to blame, in a situation involving its international responsibility?

101. Having examined the first of the two aspects mentioned above,²³⁷ let us now consider the second. The question is whether the traditional area in which the principle under discussion took shape has not been widened in modern international law. Is it not considered feasible nowadays to apply in other sectors too the requirement that the persons interested in the performance by the State of international obligations of concern to them must use and exhaust the available local remedies before the State can be accused of having breached one of those obligations and it can be claimed that the State has an international responsibility and may be called upon to discharge it?

102. Let it be said at the outset that there can be no question of extending the applicability of the principle to cases of injury suffered by persons acting in the country as organs of the State to which they belong. Mention has been made of an alleged exemption from applicability of the rule of exhaustion of local remedies for foreigners enjoying "special international protection" in the country. The 1956 resolution of the Institute of International Law was expressed in these terms.²³⁸ The expression may, however, be misleading. It might be thought to imply some sort of exception to an otherwise normal application of the principle, in virtue of the fact that certain foreigners, including diplomatic agents, consular agents and Heads of State, enjoy greater protection in the territory of the country than foreigners in general. In reality, however, there is no exception here. As we pointed out at the beginning of this section, the so-called principle of exhaustion of local remedies became established in general international law concurrently with the formation of international obligations laying down the treatment to be accorded by the State to foreign natural or legal persons. Having regard to the specific object of those obligations, to the fact that private persons were envisaged as the beneficiaries of their performance, it seemed normal that those same persons should have to set in motion the machinery that would enable the State to redress where necessary any adverse consequences of the original conduct of its organs and in that way still produce the result whose attainment might have been jeopardized by that original conduct. In other words, all this is meaningful precisely because it is concerned with the performance or breach of obligations concerning the treatment to be accorded to individuals. Foreign

²³⁷ See para. 93 above.

²³⁸ The resolution provided that the rule of exhaustion of local remedies would not apply "if the injurious act affect a person enjoying special international protection". (*Annuaire de l'Institut de droit international, 1956* (Basel), vol. 46, p. 358.)

Heads of State, diplomatic agents, consular agents and members of special missions of a foreign State are not foreign individuals; they are State organs, they are the foreign State itself. Their case is therefore outside the scope of the possible application of the principle under discussion.²³⁹ This, and not the protection specially provided for them, is the reason why, if they suffer an injury which affects them in their official capacity, there is no question of requiring them to use local remedies. Such use could be required of them in a specific case in which they complained of a State action contrary to an international obligation which allegedly affected them in their private capacity, in a case, that is to say, in which they appeared only as individuals.²⁴⁰ But then, of course, we are dealing with a normal case of application of the principle and not with an exceptional extension of the principle to other areas.

103. An extension of the traditional sphere of application of the principle requiring the exhaustion of local remedies may come about automatically as a result of the growing participation of public capital in private companies. It is useful to bear this development in mind in delimiting the scope of the specific situations in which the use of local remedies must be reckoned with. The fact that the requirement of such use has been affirmed in connexion with international obligations governing the treatment to be accorded by the State to foreign individuals must not lead us, in this context, to assign to the word "individual" the same meaning as it had a century ago. A foreign company financed partly or even mainly by public capital is bound, in the appropriate circumstances, to employ local remedies in exactly the same way as a purely private joint stock company. Indeed, the participation of public capital has never been put forward as grounds for non-applicability of the principle of exhaustion of local remedies to any legal person. For example, the United Kingdom Government made no such claim in the *Anglo-Iranian Oil Company* case. In the dispute over the *Aerial Incident of 27 July 1955*, counsel for the Bulgarian Government stated, in support

²³⁹ The same applies to other organs of a State which are called upon to perform functions in the territory of another State, and to organs of subjects of international law other than States, such as the Holy See or international organizations. In this context, it is interesting to note the individual opinion given by Judge Azevedo in connexion with the advisory opinion in the case of *Reparation for injuries suffered in the service of the United Nations*:

"In the case of officials or experts appointed directly by the Organization, ... the Organization ... may make a claim without having to put forward a denial of justice, or even to show that domestic remedies have been exhausted." (*I.C.J. Reports 1949*, p. 195.)

²⁴⁰ Let us imagine that a foreign diplomat owns private property in the receiving country, for example, a country estate which he has bought with a view to eventual retirement or private profit. Let us suppose that he is the victim of an act of confiscation committed by a local authority, contrary to the provisions of a treaty requiring that the real property of nationals of his country should be respected. He will obviously have to use the local remedies before it can be concluded that the international responsibility of the receiving State is engaged and that action may be taken in consequence. (It should be noted that there is no argument against this conclusion in the fact that the diplomatic agent enjoys complete exemption from local jurisdiction. Such exemption dispenses with the requirement that the diplomat should appear before the courts as a defendant, but in no way prevents him from resorting to them as a plaintiff.)

of the applicability of the principle in the case in question, that:

Even if it was proved that El Al was a company ... in which the State of Israel held a vast majority of the shares, I would say that altered nothing in the case.²⁴¹

Furthermore, without going into a question whose main features far transcend the bounds of our present concerns, we would simply observe that we do not believe that the applicability of the principle of exhaustion of local remedies should be ruled out in the case of foreign legal persons of a predominantly, if not exclusively, public character. It seems to us that, from this point of view, the main consideration should be, not the more or less public character attributed to the legal person in the legal order to which it belongs, but the fact that its activity in the territory of the foreign State is carried on in the same areas as those where the activities of private legal persons are usually carried on.²⁴²

104. We think, however, that a genuine extension of the sphere of application of the principle of exhaustion of local remedies can be spoken of only in connexion with the applicability of the requirement imposed by that principle to the beneficiaries of the obligations now being laid on States with regard to the treatment to be accorded, no longer to "foreign" individuals alone, but also to "national" individuals. The problem is relatively new, because States have only recently recognized—and so far have recognized only to a limited degree—that international law lays duties upon them in this connexion. It should also be noted that the international obligations of the State with regard to the treatment of its own citizens are almost exclusively of a conventional nature and that, in the instruments imposing them, the requirement of exhaustion of local remedies by the persons concerned is nearly always explicitly stated. It is, however, acknowledged that the existence of a few customary rules on the subject at the present time cannot be entirely ruled out and that such rules will probably increase in number. Moreover, an attempt to clarify the question in the present draft may be of some use in the interpretation of conventions in which the problem of the applicability of the principle of exhaustion of local remedies is not explicitly solved.

105. This having been said, it seems to us clear beyond doubt that the principle discussed in this section should also apply to international obligations of the State concerning the treatment to be accorded to its own nationals. We see no reason whatsoever why the State should avoid incurring international responsibility by rectifying, necessarily on the initiative of the persons concerned, situations that are incompatible with the

²⁴¹ *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 569 (translation by the Secretariat). See in this connexion Gaja, *op. cit.*, p. 82, note 6.

²⁴² Various writers incline—somewhat tentatively, it is true—to the view that the requirement of exhaustion of local remedies would gradually be extended to cases of injury caused to foreign public entities—including States—provided that, in the cases in question, they had acted *jure negotii* or *jure gestionis*. For references, see Gaja, *op. cit.*, p. 83, note 6. For the reasons indicated above (foot-note 240), we think that any exemption from local jurisdiction which these entities may enjoy is irrelevant to the solution of our problem.

result required by international obligations in cases where that result concerns foreigners and not in cases where it concerns nationals. Let us add that States are already disinclined to allow frequent intervention by other States where the stated purpose of such intervention is the protection of nationals of those other States; they will be even less inclined to allow interventions of this kind where the stated purpose is the protection of their own nationals. It is hence unthinkable that they should consent to forgo, precisely with regard to a possible breach of obligations concerning the treatment of their own nationals, the valuable "screening" afforded by the requirement of prior exhaustion of local remedies. The very fact that the principal international conventions relating to the protection of human rights expressly impose the requirement of prior exhaustion of local remedies²⁴³ rules out the possibility that States might lay aside this shield in the case of obligations of a customary nature. We therefore believe that we should take these considerations into account in the definition of the principle which we propose to formulate, and that, in particular, the reference to be made, in the text to be adopted, to the persons upon whom the requirement of exhaustion of local remedies is to be laid should not be restricted to foreign individuals.

106. It remains for us to give a brief explanation of precisely what is meant by the use and exhaustion of local remedies. It is obvious—and in a different context we have already pointed out²⁴⁴—that the principle we are considering is based on the assumption that there are remedies open to the individuals concerned under the internal legal system of the State in question.²⁴⁵ If the measure initially taken by a State organ, whether it be a legislative, executive, judicial or other measure, is not subject to any remedy, the possibility of using other means to redress the situation created by that measure is ruled out. The breach by the State of its international obligation is complete *ab initio*. The international responsibility of the State has thus come into being already, and nothing can delay the possibility of taking action on it. The only qualification to be made to this statement refers to the case in which the lack of remedies open to the individual is due to his own negligence: for

²⁴³ This is true of the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 26) (for reference, see foot-note 36 above); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11, para. 3, and art. 14, para. 7(a)) (*idem*, foot-note 8); the International Covenant on Civil and Political Rights (art. 41, para. 1(c)) (General Assembly resolution 2200 A (XXI), annex), and the Optional Protocol thereto (art. 5, para. 2(b)) (*ibid.*).

²⁴⁴ See what was said in paragraph 42 about cases where the State encounters in its own system of internal law an insurmountable obstacle precluding the possibility that it may still fulfil its obligation by remedying *ex post facto*, by the adoption of different conduct, a situation which is incompatible with the internationally required result and which was created by its initial conduct.

²⁴⁵ See the observation made by United States Secretary of State Fish on 29 May 1873 to the effect that: "A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust" (J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, p. 677). For an analysis of State practice, international judicial decisions and the opinions of writers on this point, see Gaja, *op. cit.*, pp. 123 *et seq.*, note 29, and p. 85, note 9.

example, failure to lodge his appeal within the prescribed time-limit.²⁴⁶

107. The real problems in interpreting the principle arise, therefore, when remedies against a given State measure exist in law and are available to individuals who consider themselves injured by that measure. It is universally recognized in principle, furthermore, that the mere existence of remedies does not automatically impose a mandatory requirement that the individuals concerned should make use of them. There is, however, less unanimity about identifying the cases in which it is permissible not to meet that requirement. The remedies vary considerably in form from one legal system to another; all international law can do, therefore, is to provide some guidance in principle for adaptation to each specific case. In any event, the real reason for the existence of the principle of exhaustion of local remedies must always be kept in mind: it is to enable the State to avoid the breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the result required by the obligation. From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken is concerned with all avenues which offer a real prospect of still achieving the result originally aimed at by the international obligation or, where appropriate, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be used. This idea is summed up in the general conclusion requiring that the remedies available should be "effective".

108. It seems worth while to make a brief analysis of this conclusion. It implies, from the positive standpoint:

(a) That all available remedies capable of redressing the situation complained of, whether they be judicial or administrative, ordinary or extraordinary, of the first, second or third degree, should be used;²⁴⁷

(b) That all fitting legal grounds should be advanced with a view to securing a favourable decision. The same

²⁴⁶ This aspect of the matter was considered in detail in connexion with the Finnish Vessels case. The validity of the qualification mentioned in the text is open to doubt, however, in a case where the time allowed for the exercise of a remedy is unduly short, for instance, if the injured foreigner is not resident in the territory of the State and it is thus materially impossible for him to take action in time. The tendency in such a case is to treat the situation as one in which there is no remedy at all.

²⁴⁷ Appeals to the highest judicial authority (court of cassation, supreme court) are of course included, along with such special remedies as application for review, appeal against the judges and appeal to the constitutional court where such a court exists and is open to individuals. For details of the practice of States in this matter, see Gaja, *op. cit.*, pp. 123 *et seq.*, Chappetz, *op. cit.*, pp. 181 *et seq.*, Haesler, *op. cit.*, pp. 28 *et seq.*, 48 *et seq.* Amerasinghe (*State Responsibility... (op. cit.)*, pp. 189 *et seq.*) would except administrative remedies. One doubtful point remains: that of "petitions for redress", not based on a precise legal claim. These were mentioned, as we have seen, in the Phosphates in Morocco case. Against the inclusion of this type of remedy among those to be used, see Chappetz, *op. cit.*, pp. 180 *et seq.*, Haesler, *op. cit.*, p. 29, and Amerasinghe, *State Responsibility... (op. cit.)*, pp. 191 *et seq.*

applies to procedural means and other formal remedies.²⁴⁸ In a word, the claimant must show that he wants to win the case, and not merely to lodge an appeal in order to meet the requirement for formal exhaustion of local remedies. He must prove his genuine intention to create the prerequisites for action by the State at the international level. It should be emphasized that, if the individual fails to advance in the course of the internal proceedings an argument which might have won him the case, and if that omission is later revealed by the use of that argument before an international court, the court may find that the requirement for exhaustion of local remedies has not been duly met.

109. From the negative standpoint, the conclusion reached above implies:

(a) That a remedy should not be used unless it holds out genuine—even if uncertain—prospects of success. In other words, the individual concerned is under no obligation to waste his time attacking before an internal court a State measure which is *de facto* final. He cannot be required to use a remedy which would be a mere formality, as for example where it is clear from the outset that the law which the court will have to apply can lead only to rejection of the appeal (the case of appeal against a measure taken under a law that cannot be overturned; of a court bound by a previous judgment rejecting a similar appeal, or by a well-established body of unfavourable case-law; of proven partiality on the part of the court, etc.);²⁴⁹

(b) That a remedy should not be used unless the success it may bring is not, in its turn, a mere success of form but can actually produce either the result originally required by the international obligation or, if that is no longer possible, an alternative result which is genuinely equivalent.²⁵⁰

²⁴⁸ The question of using all procedural means was discussed in particular in the Ambatielos case (United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), pp. 119-120). See Gaja, *op. cit.*, pp. 119 *et seq.*, Haesler, *op. cit.*, pp. 28 *et seq.*, 48 *et seq.*, and 71 *et seq.*, and Chappetz, *op. cit.*, pp. 205 *et seq.*

²⁴⁹ See Amerasinghe, *State Responsibility ... (op. cit.)*, pp. 192 *et seq.*, 194 *et seq.*, and Gaja, *op. cit.*, pp. 109 *et seq.*, notes 14 and 15.

²⁵⁰ If the result required by the international obligation is, in fact, still attainable, it would appear that the individuals concerned cannot be compelled to settle for an equivalent result—in other words, for reparation instead of restitution. This point was discussed in the Phosphates in Morocco case, although the Court was not called upon to rule on it. Where the internationally required result has become *de facto* unattainable, it is plain that the individual concerned cannot be required to use a remedy unless it offers him prospects of adequate reparation at the very least. Among possible cases under this heading are those in which the course of justice is unduly slow or unduly expensive in proportion to the prospective compensation. On these aspects of the matter, which were dealt with in the Finnish Vessels case and the Ambatielos case, see Amerasinghe, *State Responsibility ... (op. cit.)*, pp. 196 *et seq.*, and Gaja, *op. cit.*, pp. 106 *et seq.*, notes 10 and 12. We have already mentioned the specific case in which, for reasons such as the fact that the injured individual's residence is distant from the territory of the State that adopted the harmful measures, or that he has no voluntary link with that State, or for similar reasons, the obstacle to the use of local remedies is not necessarily due to a defect of the available system of remedies *per se* but to an objective situation which in practice makes it impossible for the individual concerned to use that system. As we said in paragraph 100 above, it is open to question whether

110. The exhaustive use of the available local remedies may prove fruitful where it is practised, and may thus lead to acceptance of the recourse lodged by the individual concerned. On the other hand, it may prove fruitless and result in rejection of the recourse. If the recourse is accepted, the effect of acceptance is the achievement of the result required by the international obligation or, where appropriate, the achievement of another result, economically equivalent to it. If the recourse is rejected, the breach of the obligation begun by the State conduct against which the recourse was lodged is consequently completed by the rejection, and an international responsibility comes into being for the State. A purely ostensible acceptance of the recourse—which, for example, did not lead to the internationally required result in a case where that result was still attainable, or which led to an alternative result that was not equivalent—would obviously be tantamount to rejection.

111. In conclusion, let us put forward some brief considerations *de jure condendo*. We are well aware that there are not solely advantages in the fact that general international law requires individuals injured by the action or omission of a State organ to seek redress of the situation injurious to them by having recourse to internal authorities and thus prompting a new course of State conduct that corrects the initial course of conduct. To put it more clearly, there are not solely advantages in the fact that a very large proportion of international obligations concerning the treatment of individuals ultimately allow the State to achieve, in stages, the result required of it. There are not solely advantages in the fact that such obligations accordingly allow conduct contrary to the internationally required result to be disregarded for the purposes of establishing international responsibility, provided that that result is eventually secured by subsequent conduct. All the practical disadvantages inevitably attendant on these facts explain why various conventions expressly preclude the application of the principle of exhaustion of local remedies in certain contexts. Again, the desire to avoid the hesitations and delays to which the principle may give rise, both in redressing situations incompatible with the result aimed at by an international obligation and in establishing that that obligation has definitely been breached, has led to the consideration and institution of alternative systems. As examples of such systems, we may cite the over-all compensation agreements reached in certain disputes over nationalization of foreign property, or the inclusion in contracts between States and foreign private companies of arbitration clauses in place of recourse to local courts. However this, in our view, offers no proof that States would be prepared today, having regard to the progressive development of international law, to abandon the principle of exhaustion of local remedies or severely to curtail its scope. It is true that the investing countries exhibit a growing awareness of the repercussions on the interests of the national community as a whole of encroachments upon the interests of their nationals operating on foreign soil.

the general requirement that the available remedies should be *effective* ought not to be understood to imply also that they should be *effectively usable*.

They would consequently like to be free to lodge international claims as they see fit, independently of whether the individuals directly injured have exhausted the available local remedies or shown themselves neglectful in that regard. The proponents of the idea of a more direct, quicker and more effective form of protection of human rights, in their turn, see in the principle of exhaustion of local remedies an obstacle to the development to which they aspire. At the same time, the requirement that the individuals directly affected by measures on the part of an organ of the State in which they reside and in which they carry on their activity should exhaust the local remedies has always been a safeguard applied by the investing countries against a tendency to exaggerate obligations concerning the treatment of foreign natural and legal persons. Those countries see in this requirement a protection against the unduly facile attempts traditionally made to place on the level of international relations disputes which have often belonged only to the internal level. The inclination of the developing countries would thus be, in the context of general international law, to favour strengthening rather than weakening the principle of exhaustion of local remedies. Let us add that the minds most heedful of today's problems and of the difficulties in solving them realize that compliance with this essential requirement may well be the best guarantee of further substantial progress in the acceptance of new obligations with regard to human rights. In the circumstances, the Special Rapporteur considers that it would be injudicious to tamper with

the existing general scope of the principle in the name of an alleged progressive development which others might regard as a step backwards in the matter of guarantees of equal sovereignty for all States.

112. The definition given to the principle in the rule we are about to formulate needs to be, in our opinion, flexible enough for adaptation to a variety of specific situations. In addition, a summary wording seems to us preferable to a detailed list of different aspects of the principle, which, in the multiform nature of international life, could never be exhaustive.

113. In view of these considerations and of the arguments advanced and evidence cited in the foregoing paragraphs, the Special Rapporteur proposes that the Commission should adopt the following text:

Article 22. Exhaustion of local remedies

There is a breach of an international obligation requiring the State to achieve a particular result, namely, to accord certain treatment to individuals, natural or legal persons, if, after the State's initial conduct has led to a situation incompatible with the required result, the said individuals have employed and exhausted without success the local remedies which were available to them and which possessed the necessary effectiveness to ensure either that the required treatment would continue to be accorded to them or, if that should prove impossible, that appropriate compensation be awarded to them. Consequently, the international responsibility of the State for the initial act or omission and the possibility of enforcing it against the State are not established until after local remedies have been exhausted without satisfaction.

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/301 AND ADD.1

**Ninth report on succession of States in respect of matters other than treaties,
by Mr. Mohammed Bedjaoui, Special Rapporteur**

Draft articles on succession in respect of State debts with commentaries

[Original: French]
[13 and 20 April 1977]

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ABBREVIATIONS

AOF	French West Africa
IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
UNITAR	United Nations Institute for Training and Research

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 Special Rapporteur.

CHAPTER I

Determination of the subject-matter of the present study

1. With a view to limiting as best he can the too extensive subject of succession to public debts and maintaining a certain parallelism with the Commission's draft articles on succession to State property, the Special Rapporteur proposes to confine himself entirely to a discussion of the treatment of *State debts*.

A number of problems then arise: (a) what is a "State debt" for the purposes of this study or, conversely, what is a "non-State debt", to be excluded from the scope of the present inquiry? (b) which State is meant? (c) what definition should be adopted for "State debt"? (d) what problems are raised by succession of States with respect to State debts?

However, before considering each of these questions in turn, it should be precisely ascertained what a "debt" is, what legal relationships it creates, between what subjects it creates such relationships, and in what circumstances such relationships may be susceptible to novation through the intervention of another subject.

A. The concept of debt and the relationships which it establishes

2. This is a concept that writers do not usually define because they consider the definition self-evident. Another reason, probably, is that the concept of "debt" involves a "two-way" or two-sided problem, that can be viewed from the standpoint either of the party benefiting from the obligation (in which case there is a "debt-claim") or of the party performing the obligation (in which case there is a "debt").

From the latter standpoint an element of definition suggests itself: a debt may be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something, to effect a certain performance, for the benefit of a certain party called the "creditor". The relationship created by such an obligation thus involves three elements: the party against whom the right lies (the debtor), the party to whom the right belongs (the creditor), and the subject-matter of the right (the performance to be effected).

3. It should further be noted that the concept of debt falls within the category of personal obligations. The scope of the obligation is restricted entirely to the relationship between the debtor and the creditor. It is thus a "relative" obligation, in that the beneficiary (the creditor) cannot assert his right in the matter *erga omnes*, as it were. In private law, only the estate of the debtor, as composed at the time when the creditor initiates action to obtain performance of the obligation due to him, is liable for the debt.

4. In short, the relationship between debtor and creditor is personal, at least in private law. Creditor-debtor relationships unquestionably involve personal considerations that play an essential role both in the formation

of the contractual link and in the performance of the obligation. There is a "personal equation" between the debtor and the creditor. "Consideration of the person of the debtor", says one writer, "is essential not only in viewing the obligation as a legal bond, but also in viewing it as an asset; the debt-claim is worth what the debtor is worth".¹ Discharge of the debt depends not only on the solvency of the debtor but also on various considerations connected with his good faith. It is therefore understandable that the creditor will be averse to any change in the person of his debtor. National laws do not normally allow the transfer of a debt without the consent of the creditor.

5. One of the problems that will arise in the course of this study is whether this also applies in international law. Especially where succession of States is concerned, the main question will be whether and in what circumstances a triangular relationship is created and dissolved between a third State as creditor, a predecessor State as first debtor and a successor State that agrees to assume the debt.

B. Exclusion of debts contracted, or guaranteed, by a non-State organ

6. Both State debts and non-State debts occur in a variety of forms, the exact features of which should be ascertained in the interest of a sounder approach to the concept of State debt. From a review of the different categories of debts there will gradually emerge *the elements of a definition of State debt*, on which the Special Rapporteur will in due course have to produce a draft article.

In State practice, in judicial decisions and in the legal literature a distinction is made among:

- (a) State debts and debts of local authorities;
- (b) general debts and special or localized debts;
- (c) State debts and debts of public establishments, public enterprises and other quasi-State bodies;
- (d) public debts and private debts;
- (e) financial debts and administrative debts;
- (f) political debts and commercial debts;
- (g) external debt and internal debt;
- (h) contractual debts and delictual or quasi-delictual debts;
- (i) secured debts and unsecured debts;
- (j) guaranteed debts and unguaranteed debts;
- (k) State debts and other State debts termed "odious" debts, war debts or subjugation debts and, by extension, régime debts.

¹ H., L. and J. Mazeaud, *Leçons de droit civil*, fourth ed. (Paris, Montchrestien, 1969), vol. II, p. 1093.

In comparing these various categories of debts, the Special Rapporteur will have an opportunity to provide, by way of guide-posts, some brief remarks concerning the legal régime applicable to each of them.

1. STATE DEBTS AND DEBTS OF LOCAL AUTHORITIES

7. A first distinction should be made between State debts and debts of local authorities. The latter are contracted not by an authority or department responsible to the central government, but by a public body that usually is not of the same political nature as the State, and that is in any event inferior to the State. Such an authority, here referred to as a local authority, has a territorial jurisdiction that is limited and is in any event less extensive than that of the State. It may be a province, a *Land*, a *département*, a region, a county, a district, an *arrondissement*, a *cercle*, a canton, a city or municipality, and so on.

8. This territorial authority may—and indeed must—have a degree of financial autonomy to be able to borrow in its own name. It nevertheless remains subordinate to the State, not being a part of the sovereign structure that is recognized as a subject of public international law. That is why the defining of a territorial authority inferior to the State, for which the Special Rapporteur proposes to use the simpler term “local authority”, is normally a matter of internal public law, and no definition of it exists in international law.

9. Nevertheless, internationalists have at times been concerned to define an authority such as the *commune*. Such an occasion arose in particular when article 56 of the Regulations annexed to the Convention respecting the law and customs of war on land, signed at The Hague on 18 October 1907,² and following up the Hague Convention of 1899, sought to provide for a system for the protection of public property, including property owned by municipalities (*communes*), in case of war. The term “commune” then attracted the attention of internationalists.³

In any event, a local authority is a public-law territorial body other than the State. Whatever debts it may contract by virtue of its financial autonomy are not legally debts of the State and do not bind the latter, precisely because of that financial autonomy.

10. Strictly speaking, a study of State succession should not be concerned with what becomes of “local” debts because prior to succession such debts were, and after succession will be, the responsibility of the detached territory. Never having been assumed by the predecessor State, they cannot be assumed by the successor State. The territorially diminished State cannot transfer to the enlarged State a burden that it did not itself bear and had never borne. In this case there is no subject-matter of State succession, which consists in the substitution of one State for another. This does not apply,

² J. B. Scott, *The Proceedings of the Hague Peace Conferences* (New York, Oxford University Press, 1920), vol. 1, p. 623.

³ See O. Debbasch, *L'occupation militaire—Pouvoirs reconnus aux forces armées hors de leur territoire national* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 29 and 30 and foot-notes 34 and 35.

however, in the case of “localized” debts, contracted by the predecessor State for the benefit of the territory now detached. Here there is subject-matter for the theory of State succession, the question being whether such a localized debt of the predecessor State is transmissible to the successor State.

11. Legal theory on all these points is not as clear as might be desired. A distinction should be made between *debts proper* to the transferred territory, which was responsible for them before State succession and for which it alone will be responsible afterwards, and debts of the State incurred either for the general good of the national community or solely for the benefit of the territory now detached. What becomes of these two categories of State debts is a question that must be settled in the theory and practice of State succession.

12. There is almost unanimous agreement among legal writers on the rule that “local” debts should pass to the successor State. This may not be incorrect in substance, but at the least it is badly expressed. If it is clearly established that the debts in question are local debts, as distinct from other debts, then they will be debts proper to the detached territory. They will not of course be the responsibility of the diminished predecessor State, and from that standpoint the writers concerned are justified in their view. But it does not follow that such debts will become the responsibility of the successor State, as these writers claim. They were and will continue to be debts to be borne solely by the territory now detached. Obviously, however, in the case of one type of State succession, namely, decolonization, debts proper to the territory, or “local” debts (in relation to the metropolitan territory of the colonial Power), are assumed by the successor State, since in this case the detached territory and the successor State are one and the same.

13. However, a careful distinction must now be drawn between *local debts*, meaning those contracted by a territorial authority inferior to the State, and *localized debts*, which may be the responsibility of the State itself and for which the State is liable. The comparison that follows between general debts and special or “localized” debts will make this distinction clear.

2. GENERAL DEBTS AND SPECIAL OR LOCALIZED DEBTS

14. In the past, a distinction was made between “general debt”, regarded as State debt, and regional or local debts contracted, as noted above, by an inferior territorial authority with sole responsibility for this category of debts.

It is now possible to envisage a further category, comprising what are called “special” or “relative” debts incurred by the *predecessor State* solely to serve the needs of the territory concerned. *A clear distinction should therefore be drawn between a local debt (which is not a State debt) and a localized debt (which may be a State debt).* The criterion for making this distinction is whether or not the State itself contracted the loan earmarked for local use. It has been accepted to some extent in international practice that local debts remain entirely the responsibility of the part of territory which is detached, the predecessor State not having to bear

any portion of them. As will be seen later, this is simply an application of the adage *res transit cum suo onere*.

15. Writers differentiate among several categories of "local" debts, but do not always draw a clear dividing line between these and "localized" debts. The point should be more clearly analysed. "Local" debt is a concept that may sometimes appear to be relative. Before a part of a State's territory detaches itself, debts are considered local because they have various links to that part of territory. At the same time, however, there may also be an obvious linkage to the territorially diminished State. The question is whether the local character of the debt outweighs its linkage to the predecessor State. It is mainly a problem of determination of degree.

16. The following criteria may be suggested for distinguishing between localized State debts and local debts:

(a) Who the debtor is: a local authority or a colony or, for and on behalf of either of these, a central government;

(b) Whether the part of territory that is detached has financial autonomy, and to what degree;

(c) To what purpose the debt is to be put: for use in the part of territory that is detached;

(d) Whether there is a particular security situated in that part of territory.

Although these criteria are not absolutely reliable, each can provide part of the answer to the question whether the debt should be considered primarily as a local or as a State debt.

17. That is why legal theory on the question fluctuates. It is not always easy to ascertain whether a territorial authority other than the State really has financial autonomy and what is the extent of its autonomy in relation to the State. Moreover, even when the State's liability (in other words, the fact that the debt contracted is a State debt) is clear, it is not always possible to establish with certainty the intended purpose of each individual loan at the time it is contracted, where the corresponding expenditure is to be effected and whether the expenditure actually serves the interests of the detached territory.

18. (A) The personality of the debtor remains the least uncertain of the criteria. If a local territorial authority has itself contracted a debt, there exists a strong presumption that it is a local debt. The State is not involved, nor will it be any more involved simply because it becomes a predecessor State. Hence neither will the successor State be involved. There will be no subject-matter for State succession here.

If the debt is contracted by a central government, but expressly on behalf of the detached local authority, it is legally a State debt. The Special Rapporteur proposes that it be called a *localized State debt*, because the State intends the funds borrowed to be used for a specific part of the territory. If the debt was contracted by a central government on behalf of a colony, the same situation should in theory prevail.

19. (B) The financial autonomy of the detached part of territory is another useful criterion, although in practice it may prove difficult to draw absolutely certain conclusions from it.

A debt cannot be considered local unless the part of territory to which it relates has some degree of financial autonomy. But does this mean that the province or colony must be financially independent? Or is it sufficient that its budget is separate from the general budget of the predecessor State?

20. Again, is it sufficient that the debt is distinguishable or, in other words, identifiable by the fact that it is included in the detached territory's own budget? What, for example, of certain "sovereignty expenditures" covered by a loan, which a central government requires to be included in the budget of a colony and whose purpose is to install settlers from the metropolitan country or to suppress an independence movement?⁴ Inclusion of the loan in the local budget of the territory because of its financial autonomy does not suffice to conceal the fact that debts contracted for the purpose of making such expenditures are State debts.

21. (C) This leads to the third criterion, namely, the intended purpose and actual use of the debt that has been contracted. In and of itself, this criterion cannot provide the key for distinguishing between local (non-State) and "localized" (State) debts. A central government, acting in its own name, may decide, just as a province would always do, to devote the loan it has contracted to a local use. It is a State debt earmarked for territorial use. The criterion of intended purpose must be combined with the others to determine whether the debt is or is not a State debt. In other words, implicit in the concepts of both "local" and "localized" debt is a presumption that the loan will actually be used in the territory concerned. This may or may not be a strong presumption. It is therefore necessary to determine the degree of linkage needed to justify a presumption that the loan will be used in the territory concerned. In the case of local debts, contracted by an inferior territorial authority, the presumption is naturally very strong; a *commune* or city generally borrows for itself, and not in order to allocate the proceeds of its loan to another city. In the case of localized debts contracted by the central government with the *intention* of using them specifically for a part of territory, the presumption is obviously less strong.

22. To refine the argument still further, three successive stages may be discerned in a localized State debt. First, the State must have intended the corresponding expenditures to be effected for the territory concerned (*the criterion of earmarking or intended use*). Next, the State must actually have used the proceeds of the loan in the territory concerned (*the criterion of actual use*). Lastly, the expenditure must have been effected for the benefit and in the actual interest of the territory in question (*the criterion of the interest or benefit of the territory*). On these terms, abuses by a central government could be avoided and such problems as those of régime debts or subjugation debts could be resolved in a just and satisfactory manner.

23. (D) An additional item of evidence is the possible existence of securities or pledges for the debt.

⁴ This raises the problem of "odious" debts, régime debts, war debts or subjugation debts. See chap. III below.

This is the last criterion. A debt may be secured, for instance, by real property or fiscal resources, and the property may be situated or the taxes levied either throughout the territory of the predecessor State or only in the part of territory detached from that State. This may provide additional indications as to whether the debt is or is not a State debt. But the criterion should be cautiously applied for this purpose, since both the central government and the province may offer securities of this nature for their respective debts.

24. When it has been ascertained with sufficient certainty that the debt is a State debt, it remains to be determined—and this is the subject-matter of the study on State succession—what finally becomes of the debt. The successor State is not necessarily liable for it. For example, in the case of a State debt secured by property belonging to the detached territory, it is by no means certain that the loan was contracted for the benefit of the territory in question. Perhaps the predecessor State had no other property that could be used as security; it would be unfair to place the burden of such a debt on the successor State simply because the territory that has become joined to it had the misfortune to be the only part capable of providing the security. In any case, such a debt is a State debt (not a local debt), for which the predecessor State was liable, and the purpose of the study on State succession is to determine what becomes of it.

25. In the case of debts secured by local fiscal resource, the presumption is stronger. As this form of security is possible in any part of the territory of the predecessor State (unless special revenue is involved), the linkage with the part of the territory that has been detached is specific in this case. However, as in the case of debts secured by real property, the debt may be either a State debt or a local debt, since both the State and the province can secure their respective debts with local fiscal resources.

26. The report of the International Law Association, for its part, subdivides public debts into three categories:

(a) *National debt*: “The national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any particular assets”;

(b) *Local debt*: “Local debts, that is, debts either raised by the central government for the purpose of expenditure in particular territories, or raised by the particular territories themselves”;

(c) *Localized debt*: “Localized debts, that is, debts raised by a central government or by particular territorial governments with respect to expenditure on particular projects in particular territories”.⁵

27. The above definition of general or “national” debt would appear acceptable to the Special Rapporteur, subject to a comment to be made in due course.⁶ However, the Special Rapporteur does not subscribe to the definitions of local debts and localized debts, since they are not suitable for distinguishing State debts from non-

State debts. In addition, the contrast between “local” and “localized” debts does not emerge clearly from these definitions, so that the difference between the two is not readily discernible.

28. In brief, the Special Rapporteur is of the opinion that a *local debt* may be said to be a debt: (a) that is contracted by a territorial authority inferior to the State; (b) to be used by that authority in its own territory; (c) such territory has a degree of financial autonomy; (d) with the result that the debt is identifiable.

29. In addition, the Special Rapporteur designates as a *localized debt* a *State debt* that is used specifically by the State in a clearly defined portion of territory. Because State debts are not generally “localized”, it is believed that they should be described as such if that is in fact what they are. This is superfluous in the case of local debts, all of which are “localized”, in that they are situated and used in the territory. The reason for specifying that a debt is “localized” is that it is a State debt that happens to be, by way of exception, geographically “situated”. *In short, while all local debts are by definition localized, State debts are usually not; when they are, this must be expressly indicated so that it will be known that such is the case.*

3. STATE DEBTS AND DEBTS OF PUBLIC ENTERPRISES

30. The Special Rapporteur wishes to limit this study solely to State debts, excluding any debts that might be contracted by public enterprises or public establishments. It is sometimes difficult, under the domestic law of certain countries, to distinguish the State from its public enterprises. And when it proves possible to do so, it is even more difficult not to consider debts contracted by a public establishment in which the State itself has a financial participation as State debts.

31. There arises, first of all, a problem in defining a public establishment or public enterprise.⁷ The Special Rapporteur dealt with this in his sixth report, when he took up the problem of the property of such public bodies.⁸ These are entities distinct from the State

⁷ The Special Rapporteur will use these two terms interchangeably, even though the legal régime for the bodies in question may be different under the domestic law of certain countries. In French and German administrative law, the “établissement public” or “öffentliche Anstalt” are distinguished from the “entreprise publique” or “öffentliche Unternehmung”. English law and related systems seem to make little distinction between a “public corporation”, an “enterprise”, an “undertaking” and a “public undertaking” or “public utility undertaking”. Spain has “institutos públicos”, Latin America has “autarquías”, Portugal has “estabelecimentos públicos” or “fiscalias” and Italy has “enti pubblici”, “imprese pubbliche”, “aziende autonome” and so on. See W. Friedmann, *The Public Corporation: A Comparative Symposium*, University of Toronto School of Law, *Comparative Law Series*, vol. 1 (London, Stevens, 1954).

⁸ See *Yearbook... 1973*, vol II, pp. 59-61 and 63, document A/CN.4/267, part four, articles 32-34.

International judicial bodies have had to consider the definition of public establishments, in particular:

(a) In an arbitral award by Beichmann (Case of German reparations: *Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles* (arbitrator F. V. N. Beichmann), publi-

(Continued on next page.)

⁵ International Law Association, *Report of the Fifty-fourth Conference, held at The Hague, 23rd-29th August 1970* (London, 1971), p. 108.

⁶ See para. 62 below.

which have their own personality and usually a degree of financial autonomy, are subject to a *sui generis* juridical régime under public law, engage in an economic activity or provide a public service and have a public or public-utility character. Professor Ago describes them as "public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions".⁹ In the case of certain Norwegian loans, considered by the International Court of Justice, the agent of the French Government, Professor Gros, stated:

... in domestic law ... a public establishment is brought into existence in response to a need for decentralization; it may be necessary to allow a degree of independence to certain establishments or bodies, either for budgetary reasons or because of the purpose they serve—for example, an assistance function or a cultural purpose. This independence is achieved through the granting of moral personality under domestic law.¹⁰

32. The Special Rapporteur does not have to discuss here the question, settled by the Commission, whether in respect of *international responsibility* the debt of a public establishment may be considered a State debt. His purpose is to determine *whether in respect of State succession* the debt of such a body is a State debt. The answer, obviously, can only be in the negative. The category of debts of public establishments will therefore be excluded from the scope of this inquiry, just as that of debts of inferior territorial authorities, although both are of a public character. This public character does not suffice to make the debt a State debt, as will be seen below in the case of another category of debts.

4. PUBLIC DEBTS AND PRIVATE DEBTS

33. The preceding comments show that it is absolutely necessary, although by no means sufficient, that a debt should have a public character if it is to be identified as a State debt.

A "public debt" is an obligation binding on a public authority, as opposed to a private body or an individual. But the fact that a debt is called "public" does not make it possible to identify more completely the public authority that contracted it, so that this may be the State,

(Foot-note 8 continued.)

cation of the Reparation Commission (Paris, 1924), annex 2145a, and United Nations, *Reports of Arbitral Awards*, vol. 1 (United Nations publication, Sales No. 1948.V.2), pp. 453 *et seq.*);

(b) In a decision of the United Nations Tribunal in Libya (Case of the institutions, companies and associations mentioned in article 5 of the agreement concluded on 28 June 1951 between the United Kingdom and Italian Governments concerning the disposal of certain Italian property in Libya: decision of 27 June 1955 (United Nations, *Reports of Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 390 *et seq.*)); and

(c) In a decision of the Permanent Court of International Justice in a case relating to a Hungarian public university establishment (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. 236 *et seq.*).

⁹ *Yearbook... 1971*, vol. II (Part One), p. 254, document A/CN.4/246 and Add.1-3, para. 163.

¹⁰ *I.C.J. Pleadings, Case of certain Norwegian loans* (France v. Norway), vol. II, p. 72. (Translation from French.)

a territorial authority inferior to it, or a public institution or establishment distinct from the State. The term "public debt" (as opposed to private debt) is therefore not very useful in identifying a State debt. This term is too broad and covers not only State debts, which are the subject of this study, but also the debts of other public entities, whether or not of a territorial character.

5. FINANCIAL DEBTS AND ADMINISTRATIVE DEBTS

34. Financial debts are associated with the concept of credit. Administrative debts, on the other hand, result automatically from the activities of the public services, without involving any financing or investment. The report of the International Law Association cites several examples:¹¹ (a) certain expenses of former State services; (b) debt-claims resulting from decisions of public authorities; (c) debt-claims against public establishments of the State or companies belonging to the State; (d) building subsidies payable by the State; (e) salaries and remuneration of civil servants.¹²

35. While financial debts may be either public or private, administrative debts can be only public. But the fact that the former may, and the latter must, be of a public character does not suffice to make them State debts. The Special Rapporteur will concern himself only with State debts, whether financial or administrative.

6. POLITICAL DEBTS AND COMMERCIAL DEBTS

36. Whereas commercial debts may be State debts, debts of local authorities or public establishments or private debts, political debts are always State debts. Political debts fall within the scope of this study. The term, according to Gaston Jèze, should be taken to refer to

those debts for which a State has been declared liable or has acknowledged its liability to another State as a result of *political events*. The most frequent case is that of a debt imposed on a defeated State by a peace treaty (war reparations etc.). Similarly a war loan made by one State to another State gives rise to a political debt.¹³

Jèze adds that "a *political debt* is one that exists only between governments, between one State and another. The creditor is a State; the debtor is a State. It is of little consequence whether the debt arises from a loan or from the imposition of war reparations."¹⁴

37. The same author contrasts political debts, which establish an inter-State relationship between the creditor and the debtor, with commercial debts, which are "those arising from a loan contracted by a State with private parties, whether bankers or individuals".¹⁵ The Special

¹¹ International Law Association, *op. cit.*, pp. 118-121.

¹² See *Materials on succession of States* (United Nations publication, Sales No. E.68.V.5), pp. 114 and 115 (Poldermans v. State of the Netherlands: judgement of 8 December 1955).

¹³ G. Jèze, "Les défaillances d'Etat", *Recueil des cours de l'Académie de droit international de la Haye, 1935-III* (Paris, Sirey, 1936).

¹⁴ *Ibid.*, pp. 383 and 384.

¹⁵ *Ibid.*, p. 383.

Rapporteur need not deal with private commercial debts, or even with public commercial debts if they are not contracted by the State itself.

38. The International Law Association distinguishes among debts according to their form, their purpose and the status of the creditors:

The loans may be made by:

(a) Private individual lenders by means of individual contracts with the government;

(b) Private investors who purchase "domestic" bonds, that is, bonds which are not initially intended for purchase by foreign investors ...;

(c) Private investors who purchase "international" bonds, that is, bonds issued in respect of loans floated on the international loan market and intended to attract funds from foreign countries;

(d) Foreign governments for general purposes and taking the form of a specific contract of credit;

(e) Foreign governments for fixed purposes and taking the form of a specific contract of loan;

(f) Loans made by international organisations.¹⁶

Under Gaston Jèze's system of classification, types (a), (b) and (c) might be commercial State debts, whereas (d) and (e) might be political State debts.

7. EXTERNAL DEBT AND INTERNAL DEBT

39. The distinction between external debt and internal debt is normally applied only to *State debts*, although it could conceivably be applied to other public debts or even to private debts.

Where this distinction is made in the present study, it will of course refer exclusively to State debts. Internal debt is one where the creditors are nationals of the debtor State,¹⁷ while external debt includes all debts contracted by the State with other States or with foreign bodies corporate or individuals.

8. CONTRACTUAL DEBTS AND DELICTUAL DEBTS

40. Delictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession. Resolution of such problems is governed primarily by the principles relating to international responsibility of States. However, delictual debts are far less important than contractual debts. Nevertheless, the Special Rapporteur will not confine himself to a consideration of the latter, since the former also constitute State debts. Whether the source of State debts is contractual or delictual, State succession will determine what becomes of them.¹⁸

¹⁶ International Law Association, *op. cit.*, p. 106.

¹⁷ See D. Bardonnet, *La succession d'Etats à Madagascar—Succession au droit conventionnel et aux droits patrimoniaux* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 271 and 276.

¹⁸ See Bardonnet, *op. cit.*, p. 305. Bardonnet refers (p. 270) to A. B. Keith, *The Theory of State Succession—with Special Reference to English and Colonial Law* (London, Waterlow, 1907), pp. 58 *et seq.*, on State succession in respect of delictual or quasi-delictual debts. See also International Law Commission, *op. cit.*, p. 122, appendix C, "Debts of the Belgian Congo", Brussels Court of Appeal, Bougnet and Hock v. Belgium, judgement of 4 December 1963.

9. SECURED DEBTS AND UNSECURED DEBTS

41. Although all debts, whether private, public or State debts, may or may not be secured in some manner, this report will deal exclusively with State debts. In that connexion, the notion of secured debt is an extremely important one. A distinction must be made between two categories of debt. First, there are State debts that are especially secured by certain tax funds, it having been decided or agreed that the revenue from certain taxes would be used to secure the servicing of the State debt. Secondly, there may be cases when State debts are especially secured by specific property, the borrowing State having in a sense mortgaged certain national assets.

10. GUARANTEED DEBTS AND NON-GUARANTEED DEBTS

42. A State's liability may arise not only from a loan contracted by the State itself but also from a guarantee that it gives in respect of the debt of another party, which may be a State, an inferior territorial authority, a public establishment or an individual.

43. When granting a loan to a dependent territory, IBRD often requires a guarantee from the administering Power. Thus, when the territory in question attains independence, two States are legally liable for payment of the debt.¹⁹ However, a study of the actual record of loans contracted with IBRD shows that State succession does not alter the previously existing situation. The dependent territory that attains independence remains the principal debtor, and the former administering Power remains the guarantor. The only difference, which has no real effect on the treatment of the debt, is that the dependent territory has changed its legal status and become a State.

44. The real question that arises is whether the present report should deal with cases of loans contracted by a dependent territory with IBRD. Strictly speaking, these are not "State debts" but rather debts proper to the transferred territory.²⁰ It should be added that the main issue in State succession is not, as will be seen,²¹ what becomes of the debts of the territory that has been detached, but what becomes of those of the predecessor State.

11. STATE DEBTS AND RÉGIME DEBTS

45. The distinction to be made here serves not only to contrast two complementary concepts but also to point out the differences among a set of terms that are used at various levels. For the sake of strict accuracy, State debts might be contrasted with *régime debts*, since the

¹⁹ G. R. Delaume, *Legal Aspects of International Lending and Economic Development Financing* (Dobbs Ferry, N.Y., Oceana Publications, 1967), p. 321; K. Zemanek, "State succession after decolonization", *Recueil des cours ... 1965-III* (Leiden, Sijthoff, 1965), vol. 116, pp. 259-260.

²⁰ Under IBRD's standard loan agreement, a dependent territory that has contracted a debt with the Bank becomes "a person of international law, directly responsible for the performance of the agreement" (Zemanek, *loc. cit.*, p. 259).

²¹ See paras. 57 *et seq.* below.

latter—as their name indicates—are debts contracted by a political régime or a government having a particular political form.

46. However, the question here is not whether the government concerned has been replaced *in the same territory* by another government with a different political orientation, since that involves merely a succession of governments in which régime debts may be repudiated, as for example when the the Soviet Union refused to honour Tsarist debts. On the contrary, what is at issue here is a succession of States, and the question is whether the régime debts of a predecessor State pass to the successor State. For the purposes of this study, régime debts must be regarded as State debts. The Special Rapporteur does not contend that such debts pass to the successor State; indeed, he contends the contrary.²² He wishes simply to make it clear that such debts are entirely within the scope of this report. International law does not concern itself with governments, or any other organs of the State, but with the State itself. Just as internationally wrongful acts committed by a government give rise to State responsibility, so also “régime debts”, i.e. debts contracted by a government, are State debts.

47. However, it is now necessary to specify what is meant by *régime debts*. According to Charles Rousseau, these are

debts contracted by the dismembered State in the temporary interest of a particular political form, and the term may include, in peacetime, *subjugation debts* specifically contracted for the purpose of colonizing or absorbing a particular territory and, in wartime, *war debts*.²³

This is one application of the broader theory of “odious debts”, which will be dealt with later.²⁴

C. Exclusion of debts contracted by a State other than the predecessor State

48. When reference is made to *State debts*, it is necessary to specify which State is meant. Only three States could *possibly* be concerned: a third State, the successor State and the predecessor State. In fact, only one of them is legally “implicated”, with regard to its debts, as a result of State succession: the predecessor State. This must be made quite clear.

1. EXCLUSION OF DEBTS OF A THIRD STATE FROM THE SUBJECT-MATTER OF THIS STUDY

49. A third State might assume financial obligations towards another third State, towards the successor State or towards the predecessor State.

50. In the first instance, the financial relationship—like any other relationship of whatever kind between two States that are both third parties as regards the State succession—obviously cannot be affected in any way by the territorial change that has occurred or by its consequences with respect to State succession.

²² See chap. III below.

²³ C. Rousseau, *Droit international public* (Paris, Sirey, 1977), vol. III, p. 458.

²⁴ See chap. III below.

51. In addition, this study should not cover any financial relationship that might exist between a third State and the successor State. There is no reason why, and no way in which, debts owed by the third State to the successor—or potential successor—State should be treated differently because of State succession. Such succession does not alter the international personality of the successor State if the latter existed as a State before the succession took place. The fact that the succession may have the effect of modifying, by enlarging, the territorial composition of the successor State does not affect, and should not in future affect, debts contracted with it by a third State. If it so happened that the successor State had no international personality at the time the third State contracted a debt with it (e.g. in the case of a commercial debt contracted by a third State with a territory that was subsequently to become independent or to separate from the territory of a State in order to form another State), it is perfectly clear that accession to statehood would not cause the successor State to forfeit its rights vis-à-vis the third State.

52. As to debts owed by a third State to the predecessor State, these are *debt-claims* of the predecessor State against the third State. Such debt-claims are State property and have been considered in the context of succession of States in respect of State property. They are therefore not covered in the present study.

Debts of third States need thus in no case be considered in the present context.

2. EXCLUSION OF DEBTS OF THE SUCCESSOR STATE FROM THE SUBJECT-MATTER OF THIS STUDY

53. The successor State may assume financial obligations either to a third State or to the predecessor State.

54. In the case of a debt of the successor State to a third State, no difficulty arises. In this instance, the debt came into existence at the time the succession of States occurred, in other words, precisely when the successor State acquired the status of successor. The only real debt of the successor State to a third State is a *debt contracted by the successor State on its own account*, and in this case it is clearly unconnected with the succession of States that has occurred. Any debt for which the successor State could be held liable vis-à-vis a third State *by the very fact of succession of States* would not, strictly speaking, be a debt *contracted directly* by the former to the latter but rather a debt *transmitted indirectly* to the successor State as a result of the State succession. A quite different type of debt by the successor State to a third State must be excluded from this study, namely, the type of debt that in the strict legal sense is a debt *of the successor State*, actually contracted by that State with the third State and coming into existence in a context completely unconnected with a succession of States. In cases where this kind of debt was incurred after State succession, it is *a fortiori* excluded from this study.

55. Debts of the successor State to the predecessor State may have two possible origins. First, they may be completely unconnected with the relationship between the predecessor State and the successor State created

and governed by State succession, in which case they should clearly remain outside the area of concern of the Special Rapporteur. This is the kind of debt that must be excluded from this study.

56. They may also be debts contracted by the successor State with the predecessor State *as a result of State succession*; this presupposes the existence of liabilities that would have to be assumed by the successor State during, and in consequence of, the process of State succession. For example, the successor State might be required to pay certain sums in compensation to the predecessor State as a financial settlement between the two States. The object of the study of State succession is to determine what ultimately becomes of debts contracted previously; however, the sums referred to do not fall under the heading of such debts. The problem has already been resolved by the State succession, and it can now be said not that these debts *do not* concern succession of States, but that they *no longer* concern it.

3. DEBTS OF THE PREDECESSOR STATE THE ONLY SUBJECT-MATTER OF THIS STUDY

57. The predecessor State may have contracted debts either to the future successor State or to a third State. In both cases, these are debts directly related to succession of States, the difference being that, in the case of a debt of the predecessor State to the successor State, the only possibility to be envisaged is non-transmission of the debt, since deciding to transmit it to the successor State—which is the creditor—would mean cancellation or extinction of the debt. In this case, transmitting the debt would in fact mean not transmitting it, that is, extinguishing it.

58. In any event, the basic purpose of the study of State succession is to determine what becomes of debts contracted by the predecessor State, and by it alone; for it is the territorial change affecting the predecessor State, and it alone, that triggers the phenomenon of State succession. The change that has occurred in the area of the territorial jurisdiction of the predecessor State raises the problem of the identity, continuity, diminution or disappearance of the predecessor State and thus causes a change in the territorial jurisdiction of the debtor State. The whole problem of succession of States in respect of public debts is whether this change has any effect and, if so, what effect, on debts contracted by the State in question.

D. Definition of State debts

59. Some writers simply confuse “public debts” with “State debts”. For example, Gaston Jèze writes:

A public debt is the individual legal situation of the State's administrative patrimony: it is the legal obligation of the administrative patrimony to pay a certain sum of money to a given creditor.²⁵

This definition is not very helpful for the purposes of the present study.

²⁵ G. Jèze, *Cours de science des finances et de législation financière française*, 6th ed. (Paris, Giard, 1922), p. 215.

60. Another writer, Alexandre Sack, gives a much simpler and more accurate definition when he states that “1. Public State debts are debts of the State, of a political community organized as a State”. Logically, this definition amounts to the almost tautological statement that “State debts are debts of the State”. However, the author supplements this first part of his definition with two others:

2. From the point of view of their material content, these debts are *contractual obligations* of the State. By lending to the State or purchasing State bonds, public creditors become the possessors of acquired rights, namely, debt-claims against the debtor State.

3. State debts are guaranteed by the entire patrimony of the State.²⁶

61. The Special Rapporteur indicated earlier²⁷ that he intended to confine himself to the question of contractual State debts and to leave aside debts of a delictual or quasi-delictual origin. However, contrary to the view of the author quoted above, contractual State debts do not arise solely from *loans*—although, for convenience, the Special Rapporteur will himself base his arguments throughout the present study on cases of State loans. It is none the less understood that a State debt may be a commercial, administrative or other debt. In addition, by including in his definition of State debt the additional point that such debts are “guaranteed by the entire patrimony of the State”, the author in question is referring to the concept of the patrimonial State, and accordingly draws conclusions, some of which are questionable, with regard to State succession. It is therefore preferable to remove this complicating factor from the definition.

62. It will also be recalled that the International Law Association defined *national debt* as follows: “the national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any assets”.²⁸ This cannot be faulted as a definition of the “national” debt, which is indeed a State debt. And it would be quite correct to say that a “State debt” is also a debt that is chargeable solely to the treasury of the central government. However, there is in addition a form of State debt that is contracted by the organs of the central government and charged to the general treasury of the State but that has been used, by decision of the State, to meet the exclusive needs of a particular territory. This is the kind of debt that the Special Rapporteur has called a “localized debt”, because it is a State debt contracted in the exclusive interests of a particular territory.²⁹ Thus it may be seen that a “national” debt may have a direct relationship with a particular territory. The debtor is the State and the user is a given province.

63. In short, a State debt should not be defined in terms of the needs that it was used to meet, which may be either general or specific. It should be defined by the fact that (a) it was contracted by the central government of the State and is therefore legally binding on the State itself, and that (b) it is chargeable to the central

²⁶ A. N. Sack, “La succession aux dettes publiques d'Etat”, *Recueil des cours ... 1928-III* (Paris, Hachette, 1929), vol. 23, p. 153.

²⁷ See para. 40 above.

²⁸ See para. 26 above.

²⁹ See paras. 14 *et seq.* above.

treasury of the State. There is a correlation here between the party that is legally bound and the party that is financially chargeable with the debt.

Accordingly, a very simple article could be drafted along the following lines:

Article O. Definition of State debt

For the purposes of the present articles, State debt means a financial obligation contracted by the central government of a State and chargeable to the treasury of that State.

64. It may be useful, in due course, to establish "sub-definitions" of the various categories of State debts.³⁰ The criterion adopted will be the use made of the funds. A definition will thus be obtained of the *general debt* of the State, contracted to meet the general needs of the State, as well as of *special* or *localized State debts*, incurred by the State to meet the needs of a particular territory.

E. Problems raised by succession of States in respect of State debts

65. Having limited the subject-matter of the present inquiry to State succession in respect of "State debts", the Special Rapporteur will now examine three fundamental questions.

(a) Why are—or are not—State debts or guarantees of State debts assumed by the successor State? The problem here is to justify, both in practice and in theory, the transferability—or non-transferability—of the debts or guarantees to the successor State. In this connexion, reference will be made both to legal theory and to the evidence of State practice.

(b) What State debts (or guarantees) may be transferred to the successor State? The problem here is the criterion based on the nature of the debt and on the circumstances in which it was contracted by the predecessor State.

(c) How can State debts be transferred to the successor State? This problem involves the procedures for the apportionment or sharing of debts when, in certain cases, they are assigned to the predecessor and successor States in specified proportions.

66. It should be pointed out, however, that, for purposes of convenience and in the interests of over-all consistency and parallelism with the draft articles adopted by the Commission on succession in respect of treaties and in respect of State property, the Special Rapporteur will refer in the present study to the following types of succession:

- (a) Transfer of part of the territory of a State;
- (b) Newly independent States;
- (c) Uniting of States;
- (d) Separation of one or more parts of the territory of a State;
- (e) Dissolution of a State.

67. This classification was adopted by the Commission at its twenty-eighth session in the case of State succession

³⁰ See paras. 175 *et seq.* below.

in respect of State property.³¹ It is used here provisionally. Nothing prevents the consolidation of the last three headings, should the need arise or should this prove advisable for convenience of presentation, under one or two types of succession (e.g. uniting and dissolution of States, separation of one or more parts of the territory of a State).

1. DIFFICULTIES OF THE SUBJECT-MATTER

68. The liquidation of the bank of issue of the former Austro-Hungarian monarchy illustrates the difficulties created between the two world wars by State succession in respect of a State's assets and, above all, of its liabilities. Lloyd George, speaking at a meeting of the Supreme Council, in Paris, in January 1921, described the disintegration of the Austro-Hungarian empire with his customary wit: an explosion, he said, had taken place in Central Europe and the Austro-Hungarian monarchy had been shattered to pieces, one piece landing in Italy, another in Serbia, another, crossing the Carpathians, had crashed in Romania, another had become a part of Poland, yet another had formed a State that was apparently called Czechoslovakia, while two others had remained bleeding on the banks of the Danube.³²

69. The difficulties involved in settling assets and liabilities in a case of State succession in general, and specifically in the case of the monarchy's bank of issue following the "fission" of the diverse ethnic fragments that had made up the Austro-Hungarian empire, gave rise to the story that a Viennese wit, dreaming of the apocalypse, was transported to the valley of Josaphat on judgement day, where he stood before St Peter. The latter, after calling the roll of the living and the dead, informed God that he could begin to pass judgement. The omniscient Lord replied: "Impossible! The three liquidators of the Bank of Austria-Hungary have not finished their work!"³³

70. In his very first report, the Special Rapporteur observed:

International practice with regard to succession to public debts is unusually complex, either because the very nature of the problems to be solved varies with the circumstances of each case or because there are several categories of debts, each raising different questions. This complexity is reflected in the diversity of views expressed in the literature and the divergencies of practice, where treaty obligations are rarely respected.³⁴

A. A. Fatouros, in turn, refers to the proverbial complexity, imprecision and difficulty of the problems of State succession in respect of public debts.³⁵

³¹ See *Yearbook... 1976*, vol. II (Part Two), pp. 127 and 128, document A/31/10, chap. IV, sect. B.

³² Monès del Pujol, "La solution d'un grand problème monétaire: la liquidation de la Banque d'émission de l'ancienne monarchie austro-hongroise", *Revue des sciences politiques*, vol. XLVI (Paris, April-June 1923), p. 161.

³³ *Ibid.*, p. 185.

³⁴ *Yearbook... 1968*, vol. II, p. 109, para. 95, document A/CN.4/204.

³⁵ A. A. Fatouros, "La succession d'Etats dans les matières autres que les traités" (report of the United Nations regional symposium on international law for Africa held in Accra, Ghana, from 14 to 28 January 1971, organized by UNITAR at the invitation of the Government of Ghana), p. 22.

Daniel Bardonnet notes:

It is a truism that the transfer of public debts raises extremely complex problems, both because of the wealth and diversity of treaty practice and because there are several categories of debt, each of which raises specific difficulties. As Judge Hackworth observed, no definitive conclusion can be reached on the subject "except that no universal rule of international law on the subject can be said to exist".²

² *Digest of International Law*, vol. I, p. 539.**

Another author notes:

The legal principles governing the effect on the public debt of a change of sovereignty are much less firmly settled than those respecting changes in the form of a debtor's government. In light of the abundant literature on this confused subject, which reflects all shades of legal, political and philosophical thinking, and the instances of State practice, which exhibit remarkable historical and geographical variations, it is impossible to formulate any universal rule.³⁷

71. In the law relating to obligations, the easiest solution is not to recognize the existence of a debt but to accept the *status quo*. In a number of cases, domestic law provides for outright non-recognition of the debt-claim; Fatouros notes that, under the laws of several European States, there is a general principle in favour of the debtor, which flows by deduction from the literature or by induction from a number of precise provisions of the legal code.³⁸ The case in point does not involve a principle but rather a logical constraint arising from the problems of drafting the law. If these problems appear insurmountable, consideration might be given to deriving a principle from this situation.

72. At first sight, therefore, there are only two solutions: either the law recognizes the existence of a debt or the debt does not exist from a legal point of view. If this facile solution is to be avoided in more complex circumstances, the law must be formulated in sufficient detail; it must take account of the largest number of cases capable of occurring in this area. Only law that is reasonably sophisticated, covering evidence, exceptions, presumptions, prescriptions etc., is able to provide graduated solutions (e.g. partial payment of a debt claimed by a creditor). Public international law has not yet reached this level of sophistication, and that is the underlying cause of the difficulties encountered in respect of public debts in cases of State succession.

2. DIVERSITY OF THEORETICAL OPINIONS

73. There are two basic and opposing schools of thought: on the one hand, the voluntarist concept, which stresses State sovereignty and establishes a negative principle of non-transferability of debts; on the other hand, the objectivist concept, which attempts to establish positive rules limiting State sovereignty. The question is to what extent a codification of public international law can abandon voluntarism and postulate principles of continuity in certain cases.

³⁶ D. Bardonnet, *op. cit.*, p. 645.

³⁷ G. R. Delaume, *op. cit.*, pp. 318 and 319.

³⁸ A. A. Fatouros, *loc. cit.*, p. 14.

(a) Theories favourable to the transfer of debts

74. These theories are based on various arguments.

(a) *The principle of respect for acquired rights*³⁹ plays an important role. Here, the interests of creditors are taken into consideration. But it would seem that the problem is not whether the creditors are to be paid but rather who should pay them, the predecessor State or the successor State.

(b) *The theory of benefit* refers to the profit derived by the transferred territory from investments which the predecessor State made there, contracting debts accordingly.⁴⁰ This theory is based on the principles of justice and equity, but it must be admitted that it is not easily applied in practice. It should be added that its relevance is obviously limited to "localized" State debts (special State debts) or to local debts in the strict sense.

(c) *Considerations of justice and equity* have often been invoked for the benefit of the diminished State, especially by writers on English law and related systems. In advancing these considerations, the advocates of this doctrine have not invoked the theory of benefit.

(d) Some writers, for example Fauchille, have also invoked *common sense*.⁴¹ In their view, it would be unjust for a State to be obliged to continue to assume a debt—from which the separated part of its territory may also have benefited—once it was cut off from the resources derived from that part. This clearly involves the idea of the "patrimonial State".

Another idea that follows from this one and that has been invoked in the same spirit allows its adherents to assert that the successor State is not obliged to assume debts of the predecessor State in excess of the assets it receives. Westlake took this view.⁴² Fauchille says that Westlake regarded it as an application of the "principle of the right of succession under *beneficium inventorii*".⁴³ This is an outright transposition of private law.

(e) The civil-law theory based on the adage *res transit cum suo onere* was often applied by nineteenth-century writers in connexion with succession to public debts.⁴⁴ Some of them believed that it was possible in this case to invoke the existence of a "customary law"⁴⁵ or of a "recognized principle of international law, invariably

³⁹ See second report of the Special Rapporteur, *Yearbook... 1969*, vol. II, pp. 69 *et seq.*, document A/CN.4/216/Rev.1; S. von Pufendorf, *De jure naturae et gentium*, 1672; C. de Visscher, *Théorie et réalité en droit international* (Paris, Pédone, 1970), pp. 214 *et seq.*; N. Sack, *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières* (Paris, Sirey, 1927), vol. I, pp. 274-280; International Law Association, *op. cit.*, pp. 106 and 107 and p. 113, foot-note relating to para. 9.

⁴⁰ See N. Politis, *Les emprunts d'Etat en droit international public* (thesis) (Paris, 1891), p. 111; Sánchez de Bustamante y Sirvén, *Droit international public* [French translation by P. Goulé] (Paris, Sirey, 1936), vol. III, pp. 277 *et seq.*

⁴¹ P. Fauchille, *Traité de droit international public*, 8th edition of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1922, vol. I), p. 378.

⁴² J. Westlake, *International Law*, 2nd ed. (Cambridge, University Press, 1910-1913).

⁴³ P. Fauchille, *op. cit.*, p. 352.

⁴⁴ A. Rivier, *Principes du droit des gens* (Paris, Rousseau, 1896), vol. 1, p. 213; see Bardonnet, *op. cit.*, p. 267, foot-note 2 and p. 269.

observed by the various political treaties concluded since the beginning of this [the nineteenth] century".⁴⁶

(f) *The theory of unjust enrichment* also received support from this school of thought and is clearly derived from civil law.⁴⁷

(b) *Theories opposed to the transfer of debts*

75. The contemporary era is much less in favour of the principle of succession to public debts. This is true, for instance, of the *positivist authors of continental Europe*,⁴⁸ but the main advocates of this view are *Anglo-American writers*.⁴⁹ Those opposed to the transfer of public debts generally advance two arguments, one derived from State sovereignty, the other from the nature of the debt.⁵⁰

The first played a major role in the colonization era but has never lost its force, if not its timeliness, in connexion with other types of State succession. According to this argument,

The State acquiring a territory does not gain possession of the sovereign rights of the former State, but exercises in the acquired territory only its own sovereign rights. It would follow that the acquiring State is not obliged to assume any of the obligations of the former State.⁵¹

The second argument, derived from the nature of the debt, stresses the *personal* nature of the debt of the predecessor State, which must continue to assume that debt unless it loses its international personality. Gaston Jèze writes:

The dismembered State ... contracted the debt *personally*; it solemnly undertook to pay the debt *whatever might happen*. It doubtless counted on the tax revenue from the *entire* territory. Dismemberment, in the case of *partial* annexation, reduces the resources with which it expected to be able to pay its debt. *Legally*, however, the obligation of the debtor State cannot be affected by changes in the extent of its resources.⁵²

⁴⁶ L. Le Fur, "Chronique des faits internationaux: B. Conséquences des annexions territoriales effectuées par les Etats-Unis", *Revue générale de droit international public*, vol. VI (Paris, 1899), p. 621, foot-note 2:

"The fourteen partial treaties that were signed by the various nations participating in the Congress of Vienna in application and development of the principles laid down by the Congress all refer to this provision, which thus acquires the status of a *customary clause of public international law* *."

⁴⁸ C. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Rousseau, 1896), vol. IV, p. 404.

⁴⁷ N. Politis, *op. cit.*, p. 111; A. Cavaglieri, *La dottrina della successione di stato a stato* (Pisa, Archivio giuridico, 1910), pp. 109 *et seq.* and 134 *et seq.*; G. Jèze, *Cours de science des finances...*, *op. cit.*, p. 328; International Law Association, *op. cit.*, p. 108; A. Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 321 *et seq.*

⁴⁹ W. Schönborn, "Staatensukzessionen", *Handbuch des Völkerrechts* (Stuttgart, Kohlhammer, 1913), vol. II, sect. 5. See also the works of Strupp, Zorn, Cavaglieri, Jèze, Feilchenfeld etc.

⁵⁰ See the works of Lawrence, Hall, Westlake, Moore and especially Keith, *op. cit.* (see foot-note 18 above), pp. 5-10, 58, 61, 72 and 99 *et seq.*

⁵¹ For a complete presentation of the arguments, see in particular A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 283-293.

⁵² *Ibid.*, p. 283.

⁵³ G. Jèze, "L'emprunt dans les rapports internationaux—La répartition des dettes publiques entre Etats au cas de démembrement du territoire", *Revue de science et de législation financières*, vol. XIX (Paris, Jan.-March 1921), No. 1, p. 65.

76. The doctrine of the non-transferability of debts received judicial confirmation in the arbitral award made on 18 April 1925 by Eugène Borel in the *Ottoman public debt* case:⁵³

In the opinion of the arbitrator, it is not possible, despite the existing precedents, to say that the Power to which a territory is ceded is automatically responsible for a corresponding part of the public debt of the State of which the territory previously formed part.

77. Professor Rousseau considers the voluntarist theories that reject the transfer of debts as open to serious objections. They lead to

deplorable results, in fact to the imposition of a crushing burden on the dismembered State, which is left with its debts but has been deprived of the means of paying them. Lastly, and above all, it must be remembered that the State is never anything more than the political organization of a society of human beings possessing economic means. That being so, it is unjust that political dissociation should allow these persons to evade their obligations.⁵⁴

This argument has only partial validity. The voluntarist theories imply a welcome rejection of the idea of the "patrimonial State". Moreover, although the interests of creditors certainly deserve to be protected, such protection cannot be absolute; whoever accepts a State commitment incurs the risk that the State will become insolvent, whether owing to territorial change or for some other reason.⁵⁵ These risks exist for all creditors, no matter who their debtors may be; they are inherent in the status of creditor.⁵⁶

78. It is true that these differences of opinion among legal writers may be explained largely by the special interests of the State of which a given writer is a national. These interests give rise to substantial differences in the solutions adopted in practice.

3. DIVERGENT HISTORICAL PRECEDENTS

79. Sánchez de Bustamante y Sirvén⁵⁷ differentiates among three main categories of treaties:

(a) Those that admit obligations only in the case of regional or local debts of the predecessor State;

(b) Those that consent to participation in the general or national debt of the predecessor State;

(c) Those that implicitly or explicitly reject all debts.

The divergencies in historical precedents may be explained by differences as regards: (1) the recognition—contained in the solution adopted—of a rule of law; (2) the era; (3) the political circumstances in which the

⁵³ United Nations, *Reports of International Arbitral Awards*, vol. I, p. 573.

⁵⁴ C. Rousseau, *op. cit.*, p. 430.

⁵⁵ Professor Cavaré takes the contrary view. He writes:

The interests of the creditors ... must be protected. The rights acquired by private persons must always be safeguarded. Such persons know that their debts "constitute an encumbrance on the territory of the debtor State" and that the "former and new" governments exercising authority over that territory have assumed a commitment to them.

See L. Cavaré, *Le droit international public positif*, 3rd ed. (Paris, Pédone, 1967), vol. I, p. 369, who cites in support of his theory A. N. Sack, *Les effets des transformations des Etats ...*, p. 58.

⁵⁶ Bardonnnet, *op. cit.*, p. 281; Jèze, "L'emprunt dans les rapports internationaux", *loc. cit.*, p. 66.

⁵⁷ Sánchez de Bustamante y Sirvén, *op. cit.*, p. 282, No. 694.

territorial change took place; (4) the ratio of forces; (5) the solvency of the parties; (6) the interests involved and the character and nature of the debts.

80. In principle, the absence of a treaty must be interpreted as a refusal by the successor State to assume part of the debt of the predecessor State. However, the contrary is not necessarily true; in so far as a treaty does not recognize the principle of the obligation to succeed to debts but accepts it "spontaneously and voluntarily" or "as a favour", that treaty cannot serve, without reservation, as a precedent confirming a rule of succession. Thus, while treaties themselves have binding force, they do not always imply recognition of a rule of law through the solution adopted, but often express considerations of expediency or moral obligations. The exact significance of treaty provisions is therefore quite difficult to determine. In any event, it would be somewhat unwise to interpret their solutions literally with a view to deducing an absolutely certain rule of law.

81. A similar problem arises in connexion with the date of historical precedents: does a change of practice always nullify the importance and significance of earlier practice? The answer seems to be in the negative in so far as the circumstances, too, have changed. Of course, however, if historical precedents resulted from circumstances—such as annexation or colonization—that are no longer tolerated by modern international law, or are based on considerations that run counter to the principles of contemporary international law, they may nevertheless provide arguments *a contrario*. Here again, however, uncertainty may prevail because—as a result of circumstances peculiar to a given situation—the historical precedent invoked may have involved solutions relating to public debts that would be deemed acceptable today.

82. Historical circumstances also come into play in another respect: when the territorial change results from peaceful development, it is normal that succession to debts should follow rules other than those applying when such a change results from the use of force. The "force" factor, however, is in no way limited to open hostilities. The ratio of forces between the various States or territorial areas is bound to influence the solution adopted. The Special Rapporteur will revert to this aspect of the problem later.

83. The ratio of forces may also be determined by a "weakness", namely, the insolvency of the State. There are many historical precedents for solutions based on the idea that it is preferable for the "second" debtor to pay, although in principle another party is legally responsible. Thus the practical solutions adopted with regard to succession are greatly influenced by considerations of expediency that may be explained only by the forces or interests involved.

4. NON-COMPLIANCE WITH TREATIES

84. The analysis is complicated by yet another factor: in many cases, treaties providing for succession to public debts have not been complied with by the successor State.

For example, under the Treaty of Berlin of 13 April 1878,⁵⁸ Bulgaria, Serbia and Montenegro were made responsible for part of the Turkish debt on the basis of an equitable apportionment. In fact, however, they never paid their part, since Turkey was not strong enough to demand implementation of the treaty and the European Powers were not sufficiently united to impose the apportionment of the debt.

85. The Netherlands-Indonesian Round Table Conference Agreement, signed at The Hague on 2 November 1949,⁵⁹ established the principles and procedures for the apportionment of the Netherlands debt between the Netherlands and Indonesia when the latter became independent. However, in February 1956 the Indonesian Government denounced the agreements, thereby repudiating most of its debts to the Netherlands.⁶⁰

86. Similarly, following Guinea's refusal in 1958 to join the Community, financial relations between France and the newly independent State were broken off and Guinea virtually stopped servicing the loans of the former colony to which it had succeeded.⁶¹

Many examples of non-compliance with treaties could be cited, such as the cases of the German and Austrian debts after the peace treaties of 1919 and the debts of Yemen, Albania and the Hejaz in the context of the Treaty of Lausanne of 1923.

87. That treaties providing for succession to public debts are not always complied with is not surprising given the circumstances in which they are concluded. Often the "free consent" of the successor State to assume part of the debt of the predecessor State is a mere fiction. In reality, many of these treaties are imposed upon the successor States, thereby making them involuntary debtors. It will be observed that the treaties in these cases often place exceptionally heavy burdens on States, thus going beyond the generally accepted principles of succession.⁶²

88. In other cases, the question of compliance with a treaty does not arise because the attitude of a given successor simply precludes any solution in treaty form. However, it cannot always be said, in such cases, that the State in question has failed to abide by the principles of international law in respect to succession to public debts.

5. THE INTERESTS INVOLVED⁶³

89. The interests relating to succession to public debts are especially complex. In the case of the transfer of

⁵⁸ Articles 9, 33 and 42 of the Treaty of Berlin. Case cited by Rousseau, *op. cit.*, p. 436, and A. Andréadès, "Les obligations financières, envers la dette publique ottomane, des provinces détachées de l'Empire turc depuis le traité de Berlin", *Revue générale de droit international public*, vol. XV (Paris, Nov.-Dec. 1908), No. 6, pp. 585-601.

⁵⁹ See below, paras. 304 *et seq.*, and foot-note 230. See also France, Présidence du Conseil et Ministère des affaires étrangères, *La documentation française—Notes et études documentaires* (Paris, 16 September 1950), No. 1.380, pp. 17 and 18.

⁶⁰ See foot-note 232 below.

⁶¹ See Bardonnat, *op. cit.*, p. 646 and references.

⁶² See para. 379 below.

⁶³ See Jèze, "Les défaillances d'Etat", *loc. cit.*, pp. 377-435; and International Law Association, *op. cit.*, pp. 107 and 108.

part of the territory of a State, the interests of the territorially diminished State incline at first towards a refusal to pay not only the debts relating to the part of the territory it has lost, but even a part of the general debts proportionate to the size of the territory lost. Its interest lies in having payment made by its successor in the exercise of sovereignty over the separated territory. It is especially important to it not to be crushed by the burden of debts for which it remains responsible after the territorial change. However, since it also has an interest in preserving its credit, it does not go so far as to repudiate debts for which it can unquestionably be held responsible in accordance with the principles of international law.

90. The taxpayers of the detached territory, on the other hand, have an interest in not being held responsible for debts from which they have not benefited. Willingness to succeed to public debts will therefore be limited by this consideration. Furthermore, the taxpayers of the successor State other than those living in the part of territory that has been joined to it will share the interests of the taxpayers of the ceded territory. In both cases, however, the successor State may take account of the importance of not losing its external credit and good name.

91. A change of debtor may also affect the interests of the creditor third State. A "personal equation" or *intuitus personae* existed between the debtor State and the creditor third State that ceases with the change of debtor. Again, State succession may further strengthen the interest of the creditor third State by shifting responsibility for the debt from an impecunious or unwilling predecessor State to a successor State that is richer or more favourably disposed. A complication arises, however, when the creditor State and the successor State are the same. The identity of the debtor State is more important for private creditors, who do not always have the means to institute proceedings against the debtor State. Their interest therefore inclines towards an attempt to lay down rules to facilitate such proceedings, if the debts involved are legitimate and merit such protection.

92. Finally, the interest of the international community must be taken into account. This interest assumes effective form when it becomes that of an international organization or of an international financial agency such as IBRD.⁶⁴ Furthermore, a sound international legal order requires that debts should be paid by the responsible party, and to the exact extent of its responsibility, in accordance with the principles of international law. As always, however, the demands of justice are counter-balanced by considerations of equity; the international community can have no interest in destroying a State simply because it should discharge its debts.⁶⁵ As in civil law, under which imprisonment for debt has been abolished, logical arguments reinforce moral ones: the ruin of a State is the surest means of making payment of its debts impossible. There is therefore a general interest in seeing that the debtor State remains "viable".

93. One of the purposes of law is to reconcile conflicting interests. This means that the debtor may not ignore a debt for which he is responsible and the creditor may not forget that any military intervention to secure the servicing of loans is illegal. For many reasons, that vary with the political perspective from which they are viewed, international law has created a legal order without means of enforcement. It is therefore rather difficult to recognize a principle of succession to State debts as a rule of law.

F. Recapitulation of the text of the draft article proposed in this chapter

Article O. Definition of State debt

For the purposes of the present articles, State debt means a financial obligation contracted by the central government of a State and chargeable to the treasury of that State.

⁶⁴ See International Law Association, *op. cit.*, p. 107.

⁶⁵ See J. Lescure, "Faut-il détruire la Turquie?", *Revue politique et parlementaire*, vol. 103 (Paris, April-June 1920), p. 42.

CHAPTER II

Problem of the third State

A. Definition of the third State

94. The Special Rapporteur earlier devoted a number of articles, including one containing a definition, to the question of the third State in the context of State succession in respect of State property. He noted, in that connexion, that:

a third State is thus neither the State which cedes nor the State which succeeds. It is neither the State which undergoes a [territorial] change nor the beneficiary of the change. It is the State which, by virtue of having previously established a patrimonial relationship with the predecessor State, is affected by the succession of States.⁶⁶

⁶⁶ *Yearbook... 1974*, vol. II (Part One), p. 100, document A/CN.4/282, chap. IV, art. X, para. 7 of commentary.

The International Law Commission, agreeing with the Special Rapporteur, defined the third State as follows:

Article 3. Use of terms

[For the purposes of the present articles:

...

(e) "Third State" means any State other than the predecessor State or successor State.]⁶⁷

95. As the Commission points out, this definition is the simplest and clearest for the whole question of succession of States in respect of matters other than treaties. It is valid for succession both to State property and to State debts, and the Special Rapporteur will accordingly use it here.

⁶⁷ *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

B. Creation of a legal relationship exclusively between the predecessor State and the successor State as a result of State succession

96. It has to be determined in what capacity the third State is of concern to this study. It certainly does not concern it as a debtor. If that State is a debtor of the successor State, State succession, being extraneous to that patrimonial relationship, clearly has no effect on it. If it is a debtor of the predecessor State, that means that the latter has a debt-claim against it that constitutes "State property". This question has already been considered in the context of State succession to State property; hence the present study relates to the third State only in its capacity as a *creditor State*.⁶⁸ But whose creditor? The third State may be a creditor of the successor State; in that case, the resulting relationship has no relevance to State succession. In the final analysis, the territorial change concerns the status of the third State *as a creditor of the predecessor State*.

97. In the part of the draft articles dealing with State succession as it relates to State property, the Commission has already adopted a text protecting the property—and therefore the debt-claims—of a third State from any "disturbance" resulting from the territorial change. The Commission decided:

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].⁶⁹

98. If article X above were to be narrowly interpreted, it could be said to relate only to tangible property, land, buildings, consulates and possibly bank deposits (these are referred to in paragraph 3 of the commentary on article X) which may be located, under article X, in the territory of the successor (or predecessor) State. No restriction was placed on the phrase "property, rights and interests" of the third State so that third State debt-claims, constituting intangible property whose location might be difficult to determine, could be excluded. If, then, article X were taken to refer also to the debt-claims of the third State, that would mean that the debts of

⁶⁸ The Special Rapporteur does not intend to go into this point in detail at this stage. The third State may itself have State debt-claims against the predecessor State. However, another case is that of individuals or bodies corporate, private or public, other than the State, having debt-claims in the third State against the predecessor State. Such creditors are nationals of the third State. The "State debt" of the predecessor State has of course been defined as such, with the attribute "State", by reference to the debtor. There is a "State debt" of the predecessor State even if the creditor is a foreign private person; it is enough for that debt to have been contracted by the government of the predecessor State.

Similarly, the Special Rapporteur is confining his discussion here to the case of a *third State*, although he is fully aware that the predecessor State may be the debtor of an international organization or international financial agency. A case that comes immediately to mind is that of IBRD.

⁶⁹ *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

the predecessor State, corresponding to those debt-claims, could in no way be affected by State succession. It would thus be wholly impossible and useless to study the general problem of State succession in respect of debts, since a strict *status quo* must apply to the debts of the predecessor State (which are no more than the debt-claims of the third State), a position that could not be modified by State succession.

99. What article X really means is that the debt-claims of the third State must not cease to exist or suffer from territorial change. Prior to State succession, the debtor State and the creditor State were linked by a specific, legal debtor-creditor relationship. The problem, then, is whether succession of States is, in this case, intended not only: (1) to create and establish a legal relationship between the debtor predecessor State and the successor State, enabling the former to shift to the latter all or part of its obligation to the creditor third State, but also (2) to create and establish a new "successor State/third State" legal relationship to replace the "predecessor State/third State" relationship in the proportion indicated by the "predecessor State/successor State" relationship with respect to assumption of the obligation.

100. The answer is that *succession of States in respect of State debts can create a relationship between the predecessor State and the successor State with regard to debts that bound the former to a third State, but that it cannot, of itself, establish any direct legal relationship between the creditor third State and the successor State should the latter "assume" the debt of its predecessor*.

From this point of view, the problem of State succession in respect of debts is much more akin to that of State succession *in respect of treaties* than to that of succession in respect of property.

101. Considering here only the question of the transfer of obligations and not that of the transfer of rights, there are certainly grounds for stating that "succession of States", in the strict sense, takes place only when, by reason of a territorial change, certain international obligations of the predecessor State to third parties are transferred to the successor State solely by virtue of a rule of international law providing for such transfer, independently of any manifestation of will on the part of the predecessor State or the successor State. But the effect, *in itself*, of State succession should stop there. A new legal relationship is established between the predecessor State and the successor State with regard to the obligation in question. However, the existence of this relationship does not have the effect either of automatically extinguishing the former "predecessor State/third State" relationship [except where the predecessor State entirely ceases to exist], or of replacing it by a new "successor State/third State" relationship in respect of the obligation in question.

102. If, then, it may be concluded that there is a "transfer" (*transmission*)⁷⁰ of the debt to the successor State (the manner of which it is the main purpose of succession of States to determine), it cannot be argued that it must

⁷⁰ The term is not really appropriate.

automatically have effects in relation to the creditor third State in addition to the normal effects it will have vis-à-vis the predecessor State. In other words, article 6 of the draft cannot be applied in respect of debts. It will be remembered that this article read as follows:

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.⁷¹

It would be rash to assert, on the dangerous ground of parallelism, that an article of the same kind would be correct in the case of debts. A clause would have to be added indicating that novation occurs only in the legal relationship between the successor State and the predecessor State. Such an article could read as follows:

Article R. Obligations of the successor State in respect of State debts passing to it

In the relations between the predecessor State and the successor State, a succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the present articles.

As in the case of succession of States in respect of treaties, a *personal equation* is involved in the matter of succession to State debts. The legal relationship that existed between the creditor third State and the predecessor State cannot undergo a twofold novation, in a triangular relationship, which would have the effect of establishing a direct relationship between the successor State and the third State.

103. The problem is not a theoretical one, and its implications are important. In the first place, if the successor State is to assume part of the debt of the predecessor State, in practice this often means that it will pay its share to the *predecessor State*, which will be responsible for discharging the debt to the creditor third State. The predecessor State thus retains its debtor status and full responsibility for the old debt. This has frequently occurred, if only for practical reasons, the debt of the predecessor State having led to the issue of bonds signed by that State. For the successor State to be able to honour those bonds directly, it would have to endorse them; until that operation—which constitutes novation in legal relations—has taken place, the predecessor State remains liable to the creditors for the whole of its debt. Nor is this true only in cases where the territorial loss is minimal and where the predecessor State is bound to continue servicing the whole of the old debt. Moreover, if the successor State defaults, the predecessor State remains responsible to the creditor third State for the entire debt until an express novation has taken place to link the successor State specifically and directly to the third State.

104. In the opinion of the Special Rapporteur, some of the most able writers seem to be in error on this point.

⁷¹ *Yearbook...* 1975, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

Alexandre Sack, for example, formulated such “rules” as the following:

No part of an indebted territory is bound to assume or pay a larger share than that for which it is responsible. If the government of one of the territories refuses to assume, or does not actually pay, the part of the old debt for which it is responsible, there is no obligation on other cessionary and successor States or on the diminished former State to pay the share for which that territory is responsible.

This rule leaves no doubt concerning cessionaries and successors that are sovereign and independent States; they cannot be required to guarantee jointly the payments for which each of them and the diminished former State (if it exists) are responsible, nor to assume any part of the debt which one of them refuses to assume.

However, the following question then arises: is the former State, if it still exists and if only part of its territory has been detached, also released from such an obligation?

...

The argument that the diminished “former” State remains the principal debtor vis-à-vis the creditors and, as such, has a right of recourse against the cessionary and successor States is based on [an erroneous] conception [according to which] the principle of succession to debts is based on the relations of States among themselves ...

...

Thus, in principle, the diminished former State has the right to consider itself responsible only for that part of the old debt for which it is responsible in proportion to its contributive capacity.

...

The creditors have no right of recourse (or right to take legal action) either against the diminished former State as regards those parts of the old debt for which the ... successors are responsible or against one of the ... successors as regards those parts of the old debt for which another ... successor or the diminished former State is responsible.

... The debtor States have the right to apportion among all the indebted territories what was formerly their common debt. This right belongs to them independently of the consent of the creditors. They are therefore bound to pay to the creditors only that part of the old debt for which each of them is responsible.⁷²

105. These various “rules” do not appear acceptable as long as the creditor third State has not consented to substitution of the debtor. The analysis made by Gaston Jèze is much more convincing:⁷³

If the annexation is *not total*, if there is *partial* dismemberment, the matter cannot be in doubt: after annexation, as before, bondholders have only one *creditor*, namely, the State that floated the loan ... *Apportionment of the debt between the successor State and the dismembered State** does not have the immediate effect of automatically making the successor State the *direct* debtor vis-à-vis the holders of bonds issued by the dismembered State. To use legal terms, the creditors' *right to institute proceedings* remains the same as it was before dismemberment; only the *contribution** of the successor State and of the dismembered State is affected: it is a legal relationship *between States*.

...

... Annexation or dismemberment does not *automatically* result in *novation through a change of debtor*.

In practice, it is desirable, *for the sake of all the interests involved*, that the creditors should have as the *direct* debtor the *real* and

⁷² A. N. Sack, “La succession aux dettes publiques d’Etats”, *loc. cit.*, pp. 304, 306 and 320.

⁷³ Jèze is discussing the case of the transfer of part of a territory, whereas Sack was referring to the case of the separation of several parts of territory and the establishment of as many States. However, the type of succession is of little relevance here.

principal debtor. Treaties concerning cession, annexation or dismemberment should therefore settle this question. In fact, that is what usually occurs.

...
In case of *partial* dismemberment, and when the portion of the debt assumed by the annexing State is small, the *principal* and *real* debtor is the dismembered State. It is therefore preferable not to alter the debt but to leave the dismembered State as the *sole debtor* to the holders of the bonds representing the debt. The annexing State will pay its contribution to the dismembered State and the latter *alone* will be responsible for servicing the debt (interest and amortization), *just as before the dismemberment*.

The contribution of the annexing State will be paid by the latter in the form either of a *periodic payment* ... or of a one-time capital payment.⁷⁴

C. Conditions for novation in the legal relationship with the third State

1. EFFECTS OF THE TRANSFER OF DEBTS WITH REGARD TO A CREDITOR THIRD STATE

106. The creditor third State and the debtor predecessor State set out their relationship in a treaty. What is to become of that treaty and thus of the debt to which it gave rise may have been decided in a "devolution agreement" concluded between the predecessor State and the successor State. But the creditor third State may prefer to remain linked to the predecessor State, even though the latter is diminished, if it considers that State more solvent than the successor State. In consequence of its debt-claim, the third State possesses a right that the predecessor State and the successor State cannot dispose of at their discretion in their agreement. The general rules of international law concerning treaties and third States—namely, articles 34 to 36 of the Vienna Convention on the Law of Treaties⁷⁵—quite naturally apply in this case. It must, of course, be recognized that the agreement between the predecessor State and the successor State concerning the "transfer" of a State debt from one to the other is not in principle designed to be detrimental to the creditor third State, but rather to ensure the maintenance of the debt contracted with that State.

107. However, as the Commission observed in connexion with devolution agreements, in the case of succession of States in respect of treaties,

the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.

A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported *assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory*. * It is, however, extremely doubtful whether such a purported assign-

⁷⁴ Jèze, "L'emprunt dans les rapports internationaux ...", *loc. cit.*, pp. 67-69. Jèze also quotes A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1905), vol. I, p. 287.

⁷⁵ 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. 288.

ment by itself changes the legal position of any of the interested States. The Vienna Convention contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, as a treaty, can be binding only as between the predecessor and successor States and the direct legal effects of which are necessarily confined to them.

...
... That devolution agreements, if valid, do constitute at any rate a general expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question is whether a devolution agreement constitutes something more, namely an *offer* to continue the predecessor State's treaties which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties ...⁷⁶

108. Accordingly, the Special Rapporteur is of the opinion that the draft articles on succession of States in respect of State debts should include a provision along the following lines:

Article S. Effects of the transfer of debts with regard to a creditor third State

State debts or fractions of State debts which, pursuant to the present articles or to agreements concluded between the predecessor and successor States, pass from the former to the latter do not, at the date of the succession of States and in consequence only of such transfer, become debts of the successor State vis-à-vis the creditor third State.

109. This means that:

(a) Although State succession has the effect of permitting the debt of the predecessor State to be apportioned between that State and the successor State, or to be assumed in its entirety by either of them, it does not, of itself, have the effect of binding the creditor third State;

(b) The creditor third State must in some way express its consent to the assignment of debts from the predecessor to the successor State; in other words, succession of States does not, *of itself*, have the effect of automatically releasing the predecessor State from the State debt (or the fraction of it) assumed by the successor State without the consent, express or tacit, of the creditor third State;

(c) Succession of States does not, of and by itself, have the effect of giving the creditor third State an established claim equal to the amount of the State debt transferred to the successor State; in other words, the creditor third State does not, in consequence only of State succession, have a right of recourse or a right to take legal action against the State that succeeds to the debt.

⁷⁶ *Yearbook... 1974*, vol. II (Part One), p. 184, document A/9610/Rev.1, chap. II, sect. D, art. 8, paras. 5, 6 and 11 of the commentary.

2. EFFECTS, WITH REGARD TO A CREDITOR THIRD STATE, OF A UNILATERAL DECLARATION BY THE SUCCESSOR STATE THAT IT ASSUMES THE DEBTS OF THE PREDECESSOR STATE

110. Does a unilateral declaration by the successor State that it assumes all or part of the debts of the predecessor State following a territorial change mean, *ipso facto*, novation in the legal relationship previously established by treaty between the creditor third State and the debtor predecessor State? Such a declaration is unquestionably to the advantage of the predecessor State, and it would be surprising and unexpected if that State were to find some objection to it, since it has the practical effect of easing its debt burden. It is also, at least in principle, to the advantage of the creditor third State, which might have feared that all or part of its debt-claim would be jeopardized by the territorial change.

111. The creditor third State might, however, have a political or material interest in refusing to agree to a substitution of the debtor or to assignment of the debt. In any case, under most national systems of law the assignment of debts is generally impossible. The creditor State has a subjective right, which involves a large measure of *intuitus personae*. It may, in addition, have a major reason for refusing to agree to assignment of the debts, for example, if it considers that the successor State, by its unilateral declaration, has taken over too large—or too small—a share of the debts of the predecessor State, with the result that the declaration may jeopardize its interests in view of either the degree of solvency of one of the two States—the predecessor or the successor—or the nature of the relations of the third State with each of them, or for any other reason. More simply still, the third State cannot feel itself automatically bound by the unilateral declaration of the successor State, since that declaration might be challenged by the predecessor State with regard to the amount of the debts that the successor State has unilaterally decided to assume.

112. Thus a provision comparable *mutatis mutandis* to article 9 of the draft articles on succession of States in respect of treaties⁷⁷ might be considered here. It might be worded as follows:

Article T. Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes the debts of the predecessor State

The debts of a predecessor State do not become, at the date of the succession of States, debts of the successor State in consequence only of the fact that the successor State has made a unilateral declaration by which it decides to assume responsibility for them.

3. CONSENT OF THE CREDITOR THIRD STATE AND ITS EFFECTS

113. It might also be useful to include a provision indicating the manner in which the creditor third State should express its consent to be bound by the agreement between the predecessor State and the successor State or by the unilateral declaration of the successor State concerning State debts assumed by the latter. The pro-

vision could also indicate the legal consequence of such consent, namely, the creation of a legal relationship—now a direct one—between the creditor third State and the successor State, which is the new debtor, regarding the debt that the latter has agreed or decided to assume.

114. Thus a draft article along the following lines could be included:

Article U. Expression and effects of the consent of the creditor third State

The consent of the creditor third State to be bound by an agreement concluded between the predecessor State and the successor State, or by a unilateral declaration by the successor State, concerning State debts in a succession of States can result from the intention expressed or conduct engaged in by the third State or from any formal or tacit act by that State.

Such consent entails, with regard to the creditor third State, the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State.

D. Recapitulation of the text of the draft articles proposed in this chapter

[*Definition of the third State*

Article 3 of the draft articles on succession of States in respect of matters other than treaties:

Article 3. Use of terms

For the purposes of the present articles:

...

(e) "Third State" means any State other than the predecessor State or successor State.]

Article R. Obligations of the successor State in respect of State debts passing to it

In the relations between the predecessor State and the successor State, a succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the present articles.

Article S. Effects of the transfer of debts with regard to a creditor third State

State debts or fractions of State debts which, pursuant to the present articles or to agreements concluded between the predecessor and successor States, pass from the former to the latter do not, at the date of the succession of States and in consequence only of such transfer, become debts of the successor State vis-à-vis the creditor third State.

Article T. Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State

The debts of a predecessor State do not become, at the date of the succession of States, debts of the successor State in consequence only of the fact that the successor State has made a unilateral declaration by which it decides to assume responsibility for them.

Article U. Expression and effects of the consent of the creditor third State

The consent of the creditor third State to be bound by an agreement concluded between the predecessor State and the successor State, or

⁷⁷ *Ibid.*, p. 187, document A/9610/Rev.1, chap. II, sect. D.

by a unilateral declaration by the successor State, concerning State debts in a succession of States, can result from the intention expressed or conduct engaged in by the third State or from any formal or tacit act by that State.

Such consent entails, with regard to the creditor third State, the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State.

CHAPTER III

Non-transferability of "odious debts"

115. The draft articles on succession of States in respect of State debts should include one or two provisions relating to what are generally called "odious debts" or "régime debts", in connexion with which the literature refers to the case of "war debts" and "subjugation debts".

116. It is generally recognized that historically the theory relating to these categories of debts has been developed in the writings of Anglo-American jurists, who have excluded them from all possible succession on the basis of moral principles. As will be seen, however, State practice in continental Europe, if not the writings of European jurists, has often stressed the primacy of this "clean slate" principle as regards these categories of debts, at least in the case of debts contracted between European States in order to make war on other European States. A definition of "odious debts" must be sought before the legal régime of these debts in the context of State succession can be determined.

A. Definition of "odious debts"

1. WAR DEBTS AND SUBJUGATION DEBTS

117. The definitions of odious, war or subjugation debts encountered by the Special Rapporteur are not very precise and it is not always clear whether they concern one category of such debts or all of them, so that even the classification of these debts in relation to each other seems uncertain. The Special Rapporteur has made a choice which he proposes to the Commission and which is apparent from the heading of this chapter. In his view, the term "odious debts" designates the genus, whereas "war debts" and "subjugation debts" constitute different species within that genus. In other words, odious debts represent a general category that includes distinct varieties such as war debts or subjugation debts, or conceivably still other types of debts.

118. Of course, all these cases involve State debts. By and large it may be said, provisionally, that "war debts" are those contracted by a State to sustain its war effort against another State, and "subjugation debts" are those contracted by a State with a view to subjugating a people and colonizing its territory.

119. Bustamante refers to debts contracted during a war of independence by the previous sovereign to cover the costs of that war ... It would be said in private law that the costs of a lawsuit cannot be imposed on the winning party, and in public law it cannot be claimed that one of the parties should assume the obligations engendered or created to prevent, directly or indirectly, its birth and its existence.⁷⁸

Bustamante refers here to war debts. He also refers to public debts created by the former State before the war of independence and charged to its general treasury of the region that subsequently became independent, with the direct or indirect intention of maintaining or ensuring its domination and preventing the birth of a new State.⁷⁹

In this case he refers to subjugation debts.

120. Fauchille, for his part, writes:

Some writers—Oppenheim, for example—claim that, in the case of annexation following conquest, the transfer [of debts] must include even the obligations incurred for the purpose of the war that led to the conquest. But most writers exclude such debts from the transfer. Indeed, it would seem difficult to compel the acquiring State to assume responsibility for the debts which the ceding State contracted with a view to combating and defeating it; *war debts* are thus subject to a special régime. This view is upheld notably by Jèze, Lawrence and Westlake. We may place in the same category as war debts debts contracted in peacetime, but specially for the purpose of subjugating the liberated territory; such debts cannot be binding on the liberating State.⁸⁰

121. The aforementioned writers are quoted not in order to indicate what becomes of such debts—a point that is not yet at issue—but only to explain what is generally meant by "war debts" and "subjugation debts". These two types of debt come under the general heading of "odious debts", which may provisionally be described simply as debts that run counter to the major interests of the transferred territory or of the successor State. There remains the case of debts that are often referred to as "régime debts".

2. RÉGIME DEBTS

122. Gaston Jèze drew a distinction between "régime debts" and State debts. In his view, State debts concerned the State as an abstract entity or as a legally organized nation. That organization received concrete expression in a complex of public services of general interest, irrespective of the political régime or ideological tendencies of the existing government. Jèze gradually came to consider even subjugation debts (in the case of the "Germanization" of Poland, for example) and war debts as régime debts.⁸¹ "We should place on the same footing as war debts", he wrote, "... debts contracted in peacetime, but specially for the purpose of subjugating the liberated territory ... These are régime debts."⁸² Hence State debts would be those contracted in normal times for the purpose of ensuring the regular operation

⁷⁸ *Ibid.*, p. 294.

⁸⁰ Fauchille, *op. cit.*, p. 352.

⁸¹ Jèze, *Cours de science des finances ...*, *op. cit.*, pp. 302-205 and 327.

⁸² *Ibid.*, p. 327.

⁷⁸ Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 293 and 294.

of public services, whereas régime debts would be linked to the installation of a political régime and, more generally, to the idea of exceptional circumstances.

123. The distinction thus drawn by Gaston Jèze is irreproachable in the context of the internal order of the State, but is a source of confusion and difficulty in the international order. In the latter context, international law does not concern itself with the organs of government and still less with their political orientation, but only with the State of which they are the instrument. *From this standpoint, régime debts are also State debts if they were contracted by an organ of government of the State in question.*⁸³

124. It should be noted that the case of "régime debts", in the strict sense of the term, is invoked much more frequently in succession of governments than in succession of States. The problem then arises following a change of political régime within a State, without any territorial change. In such cases, there is in fact no *change of identity or interruption of continuity for the debtor State*. It is the same State that consents—or does not consent—under a new government to assume the public debt previously contracted by it. The burden of that debt is borne by the same population in the same State. A famous case is that of the Tsarist public debt, for which the new régime resulting from the October Revolution of 1917 originally refused to assume responsibility.⁸⁴

125. It is true, however, that the question of régime debts may arise even in cases of territorial change, that is, of succession of States; it is all a matter of terminology or definition. Moreover, these régime debts, if accepted by a new government (succession of governments), may subsequently be at the heart of a State succession if the extent of the territory of that government changes before the debts have been paid.

126. In short, what is decisive in the context of State succession is (a) to affirm that régime debts are unquestionably State debts, since international law recognizes only States, and (b) to observe that, in the final analysis, the notions of "odious debt" and "régime debt" overlap to a great extent. Each constitutes a general category, a "genus", in which are found "species" called war debts, subjugation debts and so on. The difference between régime debts and odious debts is that *the former are considered from the standpoint of the predecessor State* (whose political "régime" is involved), whereas *the latter are considered from the standpoint of the successor State* (for which this category of debts is "odious"). Régime debts and odious debts could thus be regarded as practically identical. However, the customary non-transferability of the latter, which denotes repudiation on the part of the successor State, requires that they be viewed from the standpoint of that State and justifies a preference for the use of the term "odious debt".

127. If a more substantial distinction really has to be made between odious debts and régime debts, it may be said that *all odious debts are régime debts, whereas not all régime debts are odious debts*. The hypothetical case may be posited of a régime debt such as a war debt contracted by State A in a conflict with State B. If State A subsequently undergoes a territorial change—for example, by uniting with State C—successor State D, created by the uniting of States A and C, will probably not be reluctant to assume the war debt contracted by State A when the latter was at war with State B. It will be all the less reluctant because a uniting of States is involved; in other words, this is an instance of peaceful succession of States desired by the two States wishing to unite. In this case, it may be seen that the successor State assumes the debt because the war was not directed against it but took place between the predecessor State and a third State. It is a debt that was not odious to the successor State.

128. In this sense, the category of odious (strictly non-transferable) debts is clearly somewhat narrower than that of régime debts (a part of which may be assumed by the successor State if they were not contracted against its major interests). This is an element that should be taken into account in defining an odious debt.

3. DEFINITION OF AN ODIUS DEBT

129. Two important points may be singled out to clarify the definition of the term "odious debt":

(a) From the standpoint of the successor State, an odious debt could be taken to mean a State debt contracted by the predecessor State to serve purposes contrary to the major interests of either the successor State or the territory that has been transferred to it;

(b) From the standpoint of the international community, an odious debt could be taken to mean any debt contracted for purposes that are not in conformity with contemporary international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

(a) *Borrowed funds used against the major interests of the successor State or of the transferred territory*

130. The Special Rapporteur is referring here to the problem of major interests injured by the predecessor State. A thorough examination will, of course, reveal that almost any political, economic or social action by a State may be disadvantageous to another State. A debt contracted by a State for the purpose of carrying out the political, economic or social action in question does not, however, become an "odious debt" for another State unless the latter's interests are gravely or substantially injured. This is a matter that borders on the problem of State responsibility. If the debt was contracted by a State for the purpose of committing a wrongful act against another State, the position is clear:

⁸³ See para. 46 above.

⁸⁴ The French Third Republic acknowledged a war debt incurred by revolutionary France. A debt contracted in 1797 by Bonaparte (who was not in fact at the time an official organ of the French Government) was later acknowledged at the request of a family of French origin named Thierry, then living in Venice. The family had agreed to transfer 60 million gold francs to Bonaparte in 1797 to equip his army in Italy. In 1938 the Daladier government acknowledged that debt, through the French Embassy in Berlin, as being due to the family, which had become Tirrier and was living in Essen. Today, the debt would amount to the equivalent of 12 billion Deutsche marks.

the other State, if it becomes a successor State, will not acknowledge the debt. However, there may be cases in which, even if no wrongful act is committed, a State's action can be injurious to another State.

131. The hypothetical case may be taken of two neighbouring States, each fearing the other because of a territorial dispute, that embark on a particularly ruinous arms race and incur heavy debts for the purpose. However, the territorial dispute is finally settled by peaceful means and part of the territory of one State is transferred to the other. Substantial defence works have been constructed in that part of territory with borrowed funds. The successor State would certainly regard as an "odious debt" the debt contracted by the predecessor State during the arms race.

132. It is also necessary to identify the cases where debts are contracted that might be called "suspect debts". For instance, it may happen that a State, believing that annexation is imminent, contracts debts without adequate compensation for the sole purpose of embarrassing the successor State or the population of the territory concerned.⁸⁵

(b) *Debts contracted for purposes recognized as wrongful in international law*

133. A straightforward case is that of a debt contracted with the intention of using the funds to violate treaty obligations. However, this problem derives its complexity from another source. The question of "odious debts" in a case of State succession arises today in terms of contemporary legal ethics, in connexion on the one hand with human rights and the right of peoples to self-determination and, on the other hand, with the unlawfulness of recourse to war.

134. If, for example, the predecessor State contracted a debt in order to purchase arms that were used to flout human rights through genocide, racial discrimination or *apartheid*, the successor State must consider this debt as odious even if its own population or that of the territory ceded to it did not directly suffer from those policies. The successor State should not assume any part of the general debt of the predecessor State corresponding to such arms purchases.

135. Similarly, if the predecessor State contracted debts intended to finance a policy of subjugating a people and colonizing its territory or, in general, any policy contrary to the right of peoples to self-determination, such debts will be odious in the eyes of the international community. If there is subsequently a succession of States—for example a transfer of a part of a territory from one State to another—the successor State, even if it was not a victim of that policy, will not have to accept any part of these specific debts in the general debt of the predecessor State. The same holds true, for even greater reason, if the successor State or the territory transferred to it have themselves suffered from such a policy on the part of the predecessor State.

136. The question of odious debts also arises in terms of the unlawfulness of recourse to war in contemporary international law. Debts contracted by a State in order to wage a war of aggression are clearly odious debts. A distinction, however, should be made between two different cases. The first concerns irregularity in State succession as a whole, when brought about by force. The second concerns only irregularity of the debt, the problem of the assumption of which arising later in the context of another—regular—State succession.

137. The first point has been covered, since the codification work undertaken by the Commission concerns only situations "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".⁸⁶ Thus, not only should be debts of a war of aggression not be assumed by the successor State, but the succession of States itself has no legal existence. (The problem of what becomes of the debts of a war of aggression could in fact arise in this case only if the aggressor State were vanquished, which is possible, and lost some of its territory, which is irregular, since the State that is the victim of aggression and that emerges victorious does not have the right to expand its territory. Annexation remains prohibited even after the exercise of the right of self-defence. In the past, States that successfully resisted a war of aggression took a part of territory from the vanquished aggressor, thus giving rise to a succession of States. This still occurs, and writers take such cases as the basis for determining what becomes of debts incurred in connexion with a war of aggression that proved unsuccessful but nevertheless gave rise to State succession.) The problem should therefore not arise and there should be no subject-matter for succession of States, since there should not even be a succession.

138. If States wish to respect international law only the second hypothesis should be considered. In this case, State A would have contracted debts to wage its war of aggression against State B. According to the letter of the law, their war should not give rise to a regular territorial change and succession of States. There is thus no need to be concerned about what becomes of the war debts, any more than about any other subject-matter of succession. Subsequently, however, and before the war debts of State A have been paid, a regular succession of States occurs between State A and State C. It is then necessary to determine what happens to the war debts of State A vis-à-vis State C. Since aggression was committed, the debts that made that wrongful act possible cannot be transferred to State C, not so much because these war debts of State A served to advance designs contrary to the interests of State C as because they enabled State A to violate an imperative legal obligation of non-recourse to war, which is harmful to the international community.

⁸⁵ E. H. Feilchenfeld, *Public Debts and State Succession* (New York, Macmillan, 1931), p. 718.

⁸⁶ See *Yearbook... 1974*, vol. II (Part One), p. 181, document A/9610/Rev.1, chap. II, sect. D, draft articles on succession of States in respect of treaties, art. 6; and *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B, draft articles on succession of States in respect of matters other than treaties, art. 2.

139. The reality, however, is different. It is between State A and State B that State succession occurs as a result of a territorial change to the benefit of State B, which has vanquished its aggressor. The successor State (B) will be unwilling to honour the war debts of the predecessor State (A). The examples drawn from State practice refer mainly to such a case.

140. To sum up, the Special Rapporteur proposes a definition of odious debts that could take the following form:

Article C. Definition of odious debts

For the purposes of the present articles, "odious debts" means:

(a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

(b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

B. Determination of the treatment of odious debts

1. WAR DEBTS

141. A perusal of nineteenth century legal literature shows that it was fully agreed that the successor State should be relieved of responsibility for any debt contracted by the predecessor State to sustain its war effort against the former, since it was inconceivable that a people who had freed themselves from the political sovereignty of a State by victorious resistance should be required, after their victory, to pay the debts contracted by the State that had waged war upon them to keep them under its sovereignty. The practice of States was very soon orientated towards this just and sensible solution. However, there have also been contrary examples.

(a) *Rejection of war debts according to State practice*

142. Eighteenth and nineteenth century treaties provided for the rejection by the successor State of the war debts of the predecessor State. The Treaty of Campo Formio of 17 October 1797 between France and the Emperor of Austria,⁸⁷ the Treaty of Tilsit of 9 July 1807 between France and Prussia⁸⁸ and the Treaty of Vienna of 30 October 1864 between Denmark on the one hand and Prussia and Austria on the other hand⁸⁹ are examples.

Article 24 of the Treaty of Tilsit stipulated that:

*Any debts, obligations and promises * which His Majesty the King of Prussia might have previously assumed or contracted, prior * to the present war, on territories, properties or revenues which His said Majesty cedes or renounces under the present Treaty, shall revert to the new possessors, who shall undertake these obligations without reserves, exceptions or restrictions.*

Feilchenfeld considers "debts contracted *during* * the war between France and Prussia"⁹⁰ as thus excluded. The same was true of the other treaties cited.

⁸⁷ Art. 4.

⁸⁸ Art. 24 (G. F. de Martens, ed., *Recueil de traités* (Göttingen, Dieterich, 1835), vol. VIII, p. 666). See also the treaty of 11 April 1811 between Prussia and Westphalia, art. 13.

⁸⁹ Art. XII. In 1875, however, Prussia, of its own accord, paid a compensation of 4.5 million marks.

⁹⁰ Feilchenfeld, *op. cit.*, p. 91.

143. A quite well known case in State practice is that of the treatment of South Africa's war debts at the time of the annexation of the *Transvaal* by Great Britain in 1900. The Commander-in-Chief of the British armed forces, Field Marshal Roberts, had stated on 6 June and 17 July 1900 that Great Britain refused to assume the war debts contracted under Law No. 1 of 1900 by the South African Republic.⁹¹ The Crown Counsel, R. B. Finlay and E. Carson, came to the same conclusion on 30 November 1900 in the opinion they presented to the Colonial Office:

We think that obligations incurred during the war, or in contemplation of the war, stand upon a different footing, and we do not know of any principle of international law which would oblige Her Majesty's Government to recognize such obligations.⁹²

144. It will be noted that, in the case of the Netherlands South African Railway Company, the report of the Transvaal Concession Commission⁹³ reached the same conclusion in reaffirming that, in any event and in general, an annexing State was not legally bound by the obligations of the predecessor State. That position reflected a fairly consistent British position at the time and was also stated, for instance, by Lord Robert Cecil in his argument in the well known case of the *West Rand Central Gold Mining Company Limited v. the King*.⁹⁴

145. The problem of non-succession to war debts came to the fore again after the First World War, and attempts were made to resolve it. The major treaties ending the war confirmed the principle of the rejection of war debts by the successor State.

146. It follows *a contrario* from article 254 of the Treaty of Versailles of 28 June 1919⁹⁵ that the war debts of the German Empire did not have to be assumed by the successor States. Indeed, only German public debts contracted prior to 1 August 1914, the date of the outbreak of war, were assumed by the successor States in the manner specified in article 254 of the Treaty. Professor Charles Rousseau writes in this connexion that "the Treaty of Versailles in fact carried this principle very far, since it exempted Denmark, to which Schleswig was ceded, from any contribution to the war debts, although it had been legally neutral from 1914 to 1918".⁹⁶

147. The other peace treaties excluded from the apportionment of debts all debts contracted by the predecessor State to sustain its war effort.⁹⁷ Thus the Treaty of Lausanne excluded debts subsequent to 17 October 1912,⁹⁸ the treaties of Saint-Germain and Trianon those con-

⁹¹ *Ibid.*, p. 394, foot-note 102.

⁹² Bardonnet, *op. cit.*, p. 280, foot-note 58.

⁹³ Also referred to as the report of the Lyttleton Commission of 19 April 1901, and as the British Blue Book of 12 June 1901.

⁹⁴ *British International Law Cases* (London, Stevens, 1965), vol. 2, p. 283.

⁹⁵ *British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 124 and 125.

⁹⁶ Rousseau, *op. cit.*, p. 462.

⁹⁷ See Feilchenfeld, *op. cit.*, p. 450, para. 213.

⁹⁸ Treaty of Lausanne, of 24 July 1923, art. 50 (League of Nations, *Treaty Series*, vol. XXVIII, pp. 41 and 33).

tracted after 28 July 1914,⁹⁹ and the Treaty of Neuilly those subsequent to 11 October 1915.¹⁰⁰ The latter treaty (article 141, second para.) stated that the debt to be apportioned would be determined by fixing "the amount of the Bulgarian public debt on the 11th October 1915, taking into account *only such portion of the debt contracted after the 1st August, 1914, as was not employed by Bulgaria in preparing the war of aggression* *".

148. These solutions in the peace treaties were not achieved without difficulty. The Central Powers protested against them. Hungary argued that the differentiation of debts according to their origin was devoid of any basis in international law. Germany asserted that it was unjust to leave it to the vanquished population remaining under its sovereignty after the various cessions of territory to bear the burden of the war debts alone, since during the period of hostilities the entire population including that of the ceded territories, had been responsible for the war and had played an equal part in it. Austria and Turkey pointed out that the ex-enemy successor States were not the same as the Powers that had gone to war in 1914 at the side of the Allies.

149. Taking account, therefore, of the crushing financial burden weighing on Austria, for example, after the First World War, political solutions departed from recognized legal principles; it was thus that the Czechoslovak Government agreed, for political reasons, to pay 33 per cent of the Austrian war loans subscribed in its territory.

150. It should be noted that the peace treaties that wound up the First World War gave a very broad *extension* to the notion of "war debt" by treating as such any debt contracted *during* the war. Recognition was thereby given to the irrebuttable presumption based on the date of the loans. For instance, a loan contracted by Germany in 1917 for the construction of a bridge at Teschen in Upper Silesia was regarded by the German Reparations Commission as a war loan simply because of the date on which it was contracted.

151. The treaties ending the Second World War followed the same lines as the 1919 treaties with respect to the rejection of "war debts" by the successor States. This solution is implicit, for example, in the Treaty of Peace with Italy of 10 February 1947.¹⁰¹

152. Moreover, the Franco-Italian Conciliation Commission established under that treaty ruled that:

debts contracted by the ceding State *for war purposes* *, or for the purpose of expanding a territory which was first annexed and subsequently liberated, cannot bind the successor or restored State.

⁹⁹ Treaty of Saint-Germain-en-Laye of 10 September 1919, art. 203 (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 405-407); Treaty of Trianon of 4 June 1920, art. 186 (*British and Foreign State Papers* (London, H.M. Stationery Office, 1923), vol. 113, pp. 556-558).

¹⁰⁰ Treaty of Neuilly of 27 November 1919, art. 141 (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, p. 821).

¹⁰¹ Treaty of Peace with Italy, annex X (Economic and financial provisions relating to the Free Territory of Trieste), para. 5, and annex XIV (Economic and financial provisions relating to the ceded territories), para. 6 (United Nations, *Treaty Series*, vol. 49, pp. 210 and 226).

It is inconceivable that Ethiopia should have to assume the burden of expenses incurred by Italy in order to ensure its domination over Ethiopian territory.¹⁰²

(b) *Assumption of war debts according to State practice*

153. It was noted above¹⁰³ that, after the First World War, Czechoslovakia decided, for political reasons, to assume up to 33 per cent of the Austrian war debts. Going further back in time it may be found, for example, that the Treaty of Ryswick, which established the "peace of Westphalia", did not exclude war debts from succession, or that Prussia expressly undertook to pay certain war debts in its 1720 treaty with Sweden.¹⁰⁴

154. It need hardly be pointed out that such solutions are generally based on considerations of political expediency.¹⁰⁵ Some writers, although their number is indeed small, base themselves on these somewhat rare precedents and on other considerations in recommending that the successor State should take over war debts. De Louter writes:

There is no question but that Great Britain was ... duty bound, in 1901, to discharge the debts and other pecuniary obligations of the South African Republics it was conquering ... That is true of all debts, *regardless of the purpose for which they were incurred, including those resulting from efforts to defend the homeland and prevent it from being destroyed.*¹⁰⁶

155. Pufendorf, on the other hand, took his stand on the acquired right of creditors to enforce respect for all debts, even odious ones, by the successor State.¹⁰⁷

Feilchenfeld, for his part, states that:

Most discussions, however, concern cases which are considerably weaker. They do not argue that a debt should not be maintained because the use of its proceeds had the incidental effect of injuring another State, as would be the case, for instance, if the use of the proceeds has the effect of diminishing the export of another country; nor that all debts should be exempt from maintenance which have been contracted with the purpose of using the proceeds in a way which is positively harmful to other countries. The customary arguments are essentially restricted to war debts, and even so frequently apply only to war debts contracted during a war which immediately precedes the annexation. Further, the customary argument is restricted to the fact that the exemption concerns debts which have been contracted in the last war fought against the annexing State. As has been shown in the historical parts,

¹⁰² Franco-Italian Conciliation Commission, decision No. 201 of 16 March 1956, concerning the interpretation and application to Ethiopian territory of the provisions of article 78, para. 7, of the Treaty of Peace: *Commission de conciliation franco-italienne, Recueil des décisions*, fifth fascicle, p. 296; and *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 639.

¹⁰³ Para. 149.

¹⁰⁴ See Feilchenfeld, *op. cit.*, p. 75. The author also refers to the case of Greece in 1864 and to that of the unification of Italy (p. 269).

¹⁰⁵ The Special Rapporteur does not wish to imply that the opposite solution of rejecting war debts is not also based on political considerations. Law cannot be divorced from political realities. However, in the case of rejection, political considerations are more easily reconcilable with moral principles.

¹⁰⁶ J. de Louter, *Le droit international public positif* (Oxford, Publications of the Carnegie Endowment for International Peace, University Press, 1920), vol. I, p. 229 [French translation from Dutch; no English version was published].

¹⁰⁷ Referred to by Feilchenfeld, *op. cit.*, p. 32.

*no specific custom has grown up which exempts war debts from maintenance in case of annexation or dismemberment.**

156. He goes on to say:

Apart from vague sentimental considerations, there is no serious ground why annexing States should not pay debts which are validly owed even if the proceeds have been used against their interests.

He supports this argument by stating, in particular:

If the feelings of the people of a State are not disturbed by the incorporation into its organization of men who have fought against it, and by the acquisition of assets which have been used for war purposes, there is no reason why they should be disturbed by the maintenance of war liabilities.¹⁰⁸

He adds that it is not true that all creditors who lend money to a belligerent for purposes of war are gambling on the debtor's winning, and that they do not in fact expect to be paid in the event of defeat. In his view, war debts are not comparable to gambling debts.¹⁰⁹

It should not be forgotten, however, that all these authors were writing at a time when war was not—or at least not completely—prohibited by contemporary international law.

2. SUBJUGATION DEBTS

157. Subjugation debts are debts contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory.

As Chicherin, People's Commissar for Foreign Affairs of Soviet Russia, stated on 28 October 1921, "no people is obliged to pay debts that are like the chains it has been forced to bear for centuries".¹¹⁰ He was speaking in the specific context of the repudiation of "régime debts" following a succession of governments, namely, the substitution of the government of Soviet Russia for that of Tsarist Russia. The observation is far more pertinent, however, in the case of a people of one country held in subjugation by the government of another country.

158. In order to relieve the successor State of responsibility for these subjugation debts, theorists recall various similar historical precedents, in particular (a) the affair of the Cuban debts (1898); (b) the case of the debt for the installation of German settlers in Posen (1919); and (c) the problem of the Indonesian debt (1949).

(a) *Affair of the Cuban debts (1898)*

159. This affair,¹¹¹ which occurred immediately after the Spanish-American war that ended with the Treaty of Paris of 10 December 1898, originated with the United States, which was concerned to repudiate the debts contracted by Spain with a view to keeping Cuba under Spanish domination and opposing Cuba's war of liberation (insurrectionary movements of 1868 and 1895).

To set aside the "subjugation debts", the United States merely invoked the two principles which, singly or

together, constitute the basis of many treaties both old and new, as well as of a large part of past and present theory on the freeing of the successor State from a public debt. To cite only one example out of a multitude, the Peace Treaty of Pressburg of 26 December 1805 between France and Austria¹¹² placed responsibility on the successor State for public debts that (a) had been "formally agreed to by the ceded States [provinces]" or (b) corresponded to "expenses for administering those States".

160. In the Cuban affair (1898), the United States put forward parallel arguments for rejecting Cuba's subjugation debts. First, it maintained that financial charges resulting from Spanish war loans had been imposed upon Cuba against its will and without its consent. It was true, of course, that the Spanish colony had not been consulted by the metropolitan country regarding those loans. The United States memorandum pointed out that the corresponding debts had been created by the Spanish Government for its own purposes, through its own agents, and that Cuba had had no part in their creation.¹¹³ The United States also maintained that Spain had not contracted the loans in question for Cuba's benefit, and that indeed they had served *to finance operations that were manifestly contrary to the island's interests*. Cuba could not be held responsible for a debt contracted in order to maintain it as a Spanish dependency.

161. Spain, having undertaken a war of colonial reconquest in Santo Domingo, had in fact engaged in costly colonial expeditions that had considerably burdened the Cuban budget and debt between 1861 and 1880. This burden had been further increased when Spain started to repress the Cuban insurrectionary movements between 1868 and 1878. Thus Cuba's military expenditure under Spanish domination accounted for three quarters of its total expenditure in the financial year 1886/87. Loans contracted by Spain in 1890 were diverted in part from their original purpose and used directly to finance the repression of an insurrectionary movement in the island.

162. Spain countered all these United States arguments by contending that the major part of the loans had been contracted on behalf and for the benefit of Cuba and had, indeed, promoted the island's economic development. Moreover, at the Paris Peace Conference, Spain did not ask the United States to take over a loan of roughly two billion gold francs contracted after the start of the Cuban insurrection in February 1895.¹¹⁴

¹¹² Baron Descamps and L. Renault, *Recueil international des traités du XIX^e siècle* (Paris, Rousseau), vol. I (1801-1825), pp. 152 et seq.

¹¹³ This view is opposed by C. Rousseau (*op. cit.*, p. 459), who uses the legalistic argument that, since the colony was represented in the Cortès, Cuba had consented to the loans in question, which had been approved by the Spanish parliament. The colonies had always had a factitious and derisory representation in the metropolitan assemblies and could express no consent. *It would in any case have been more than a little surprising for the Cubans to have validly agreed to a Spanish war effort directed against their own freedom*. Parliamentary representation was one of the fictions maintained by the system of colonial domination.

¹¹⁴ See Le Fur, *loc. cit.*, p. 618 and foot-note; *Le Temps*, 23 October 1898.

¹⁰⁸ Feilchenfeld, *op. cit.*, pp. 718-720.

¹⁰⁹ *Ibid.*, p. 721.

¹¹⁰ *L'Europe nouvelle* (Paris, 5 November 1921), p. 1439.

¹¹¹ See Le Fur, *loc. cit.*, pp. 614-625; Feilchenfeld, *op. cit.*, pp. 337-342.

163. The Treaty of Peace of 10 December 1898¹¹⁵ indirectly upheld the United States position of rejecting subjugation debts. Article I stated that "Spain relinquishes all claim of sovereignty over and title to Cuba", without specifying in favour of whom, thus enabling the United States to extend its "protectorate" to the island without taking responsibility for Spanish public debts in Cuba. Neither the United States nor Cuba assumed the subjugation debts, for which Spain took the responsibility.

164. Following that precedent, theorists drew a distinction between debts according to their purpose, ruling out the transfer of debts in connexion with subjugation and accepting the transferability only of those that had contributed to a territory's development.¹¹⁶

165. The solution was opposed by a few authors, including Frantz Despagnet, who wrote:

Thus, it was said, Spain's debts stemmed from its expenditure on efforts to subdue the Cubans and the latter, once freed, did not have to suffer the result of liabilities contracted against them rather than for them. This attitude opens the way to all manner of disputes as to the utility of expenditure incurred by the dismembered country for the portion that is separated from it; it encourages the most arbitrary and most iniquitous solutions. It must be considered that, as long as they are united under a single authority, the various parts of a State form a cohesive whole and assume a collective and indivisible responsibility; once they are separated, this responsibility must be shared by them in equitable proportions. The fact that the expenditure was incurred by the State and that one or other of its provinces or colonies did not benefit from it is of little account, for the State incurred other expenses from which the province or colony in question did benefit, and the balance was thus restored. The solution should be the same, *even in the case of sums expended by the metropolitan country to combat a colony's revolt**, as was argued in the case of Cuba. Spain, the legitimate sovereign of the island, was entitled to regard expenses incurred to maintain Cuba under its political protection and to enable Cuba to participate in Spain's political and economic life as useful for Cuba [*sic*].¹¹⁷

The least that can be said is that this point of view is outmoded . . .

166. Turning to earlier instances of decolonization,¹¹⁸ it will be seen that the new republics of Spanish America *spontaneously and unilaterally* assumed Spain's debts in return for "recognition, peace and friendship". However, like Cuba later, they appear to have refused to assume war debts. The Special Rapporteur has nevertheless found a case where one of the republics assumed debts of this kind. Under article 5 of the "treaty of recognition, peace and friendship" concluded between Spain and Bolivia in Madrid on 21 July 1947:

The Republic of Bolivia ... has already spontaneously recognized, by Act of 11 November 1844, the debt contracted and charged to

its Treasury on the direct orders of the Spanish Government or by order of the authorities established by it in the territory of Upper Peru, now the Republic of Bolivia; ... it undertakes ... to acknowledge as the consolidated debt of the Republic, to be treated as fully privileged, all debt-claims of *whatever kind**, for *pensions, pay**, supplies, advances, loans, *forced lending*, deposits, contracts and any other debt, whether *relating to the war* or antedating it, charged to its Treasury, provided that they are the result of direct orders of the Spanish Government or of its authorities in the provinces which today comprise the Republic of Bolivia ...".¹¹⁹

167. The Special Rapporteur will discuss later the special circumstances peculiar to this kind of decolonization.¹²⁰ The only conclusion that can be drawn is that reached in connexion with the Cuban affair of 1898: subjugation debts cannot be assumed by the successor State.

(b) *Case of the German debt relating to the Germanization of part of Poland (affair of the Posen settlers) [1919]*

168. Since Germany had contracted loans in order to establish its nationals as settlers on Polish territory, the Treaty of Versailles (28 June 1919)¹²¹ absolved a restored Poland from having to assume the debt contracted by Germany for the economic subjugation of Poles by Germans. Article 255, paragraph 2, provided that:

That portion of the debt which, in the opinion of the Reparations Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland, shall be excluded from the apportionment to be made under article 254.

The Allied Powers declared on 16 June 1919:

It cannot be contemplated that Poland should bear either directly or indirectly the burden of a debt contracted to extend Prussian influence at the expense of Polish rights and traditions.¹²²

(c) *Problem of the Indonesian debt (1949)*

169. At the Round Table Conference held in The Hague from 23 August to 2 November 1949, the problem of the Netherlands public debt arose and Indonesia declared readiness to assume certain debts prior to the Netherlands capitulation to the Japanese in Indonesia on 8 March (Java) and 7 April 1942 (Sumatra). Indonesia refused, however, to assume various debts subsequent to those dates, particularly those resulting from Netherlands military operations against the Indonesian national liberation movement. It was especially unwilling to assume debts for the financing of guerrilla operations between 21 July 1947 and 17 January 1948 and again between 20 December 1948 and 1 August 1949.

170. At the Round Table Conference, and under the agreements of 2 November 1949, the debts were apportioned so that 4.5 billion guilders would be payable by Indonesia and 2 billion guilders by the Netherlands.

¹¹⁵ See text in Le Fur, *loc. cit.*, pp. 598 *et seq.*

¹¹⁶ C. L. von Var, "Die kubanische Staatsschuld", *Die Nation* vol. XVI (Berlin, 22 April 1899), No. 30, p. 425. The author distinguishes between debts incurred for "Kulturobjekte" ("works of civilization", socio-economic development) and those incurred to deal with insurrections, maintaining that the latter should remain Spain's responsibility.

¹¹⁷ F. Despagnet, *Cours de droit international public*, 3rd ed. (Paris, Larose and Tenin, 1905), p. 111.

¹¹⁸ See paras. 281-294 below, especially paras. 291-294.

¹¹⁹ *British and Foreign State Papers, 1868-1869* (London, Ridgway, 1874), vol. 59, p. 423.

¹²⁰ See paras. 291-294.

¹²¹ For reference, see above, foot-note 95.

¹²² "Reply of the Allied and Associated Powers", *British and Foreign State Papers* (London, H.M. Stationery Office, 1922), p. 290.

That arrangement reflected a desire for compromise involving, it seems, some departure from the principle of rejection of subjugation debts by the successor State, inasmuch as the political debt was not fully cancelled. However, as the agreements of 2 November 1949 were denounced by Indonesia in 1956, the Indonesian precedent does not conflict with previous practice.¹²³

3. DRAFT ARTICLE ON ODIIOUS DEBTS

171. This review of State practice has amply demonstrated the reluctance of successor States to assume payment of "odious debts". Two problems arise in this connexion. The first concerns irregularity in State succession as such, and is thus antecedent to the question of succession to odious debts. The Special Rapporteur has already expressed his views on this point.¹²⁴ It should be understood that the contracting of odious debts does not preclude the occurrence of a perfectly regular State succession; it should not be concluded that, because a colonial Power has contracted debts with a view to suppressing a war of national liberation in a dependent territory, a State succession that leads to the creation of the newly independent State is irregular. All it means is that the new State will not assume the subjugation debts.

172. The second problem arises in connexion with a particular type of State succession, namely, the uniting of States. In contrast with what occurs in other types of

¹²³ The case of Algeria may also be mentioned. Algeria refused to assume the debts contracted by the predecessor State in connexion with the war of national liberation; debts contracted to finance French military operations in Algeria; recruitment of a force of *harkis* (Algerians who collaborated with the administering Power); compensation for the victims of "Algerian terrorism". See para. 334 below.

¹²⁴ See paras. 137-139 above.

succession, the successor State will probably assume all the debts, of whatever kind, of the States that unite. However, this characteristic, which would appear to be peculiar to the uniting of States, will be present only if the States that form a union retain no international personality, that is, if they form a unitary State. Where States that unite decide to establish their union on a federal basis, the odious debts contracted by one of them will probably remain its responsibility, a fact that strengthens the argument that odious debts are rejected by the successor State. The Special Rapporteur therefore proposes that the exception, in the case of uniting of States, to the apparently general principle of rejection of odious debts by the successor State should be placed in square brackets.

173. The article might read:

Article D. Non-transferability of odious debts

[Except in the case of uniting⁷ of States,] odious debts contracted by the predecessor State are not transferable to the successor State.

C. Recapitulation of the text of the draft articles proposed in this chapter

*Article C. Definition of odious debts*⁸

For the purposes of the present articles, "odious debts" means:

(a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

(b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article D. Non-transferability of odious debts

[Except in the case of the uniting of States,] odious debts contracted by the predecessor State are not transferable to the successor State.

CHAPTER IV

Succession to debts in cases of transfer of part of a territory

174. The Special Rapporteur will not dwell on the definition of the type of succession of States referred to by the expression "transfer of part of a territory". The definition is the same as that adopted, in respect of State property, by the Commission at its twenty-eighth session; it therefore relates to "a part of the territory of a State transferred by that State to another State".¹²⁵

A. Categories of debts envisaged in cases of transfer of part of a territory

In this type of succession of States, four categories of debt may be identified.

1. GENERAL DEBT OF THE PREDECESSOR STATE

175. The first category is the *national public debt*, also called *general debt*, of the predecessor State, contracted for that State's general needs. It is a true "State debt"

in the sense that the Special Rapporteur has assigned to that category in his classification of debts. The purpose of the present study is to determine whether or not the successor State assumes a part of this general debt proportionate to the size of the territory transferred to it. It must be borne in mind that there is "succession of States" in the strict sense when, as a result of a territorial change, certain international rights and duties of the predecessor State vis-à-vis third parties are transferred to the successor State solely by virtue of a rule of international law providing for such transfer, independently of any expression of wishes on the part of the predecessor or successor States.

The question here, therefore, is whether part of the general debt of the predecessor State passes to the successor State by virtue of a rule of international law. This general debt may or may not be secured by special resources or property belonging to the part of territory that is transferred.

¹²⁵ *Yearbook... 1976*, vol. II (Part Two), p. 127.

2. "LOCALIZED" STATE DEBTS

176. Debts contracted by the government on behalf of the State as a whole but allocated to some specific need—construction of a port, a canal, a railway of local importance, and so on—fall into the second category, which the Special Rapporteur has termed a *localized State debt*.¹²⁶ This is of course a loan contracted by the State, but for the special needs of a specific territory. Sack calls debts of this type "special State debts".¹²⁷

Debts of the predecessor State, where the contract expressly indicates that the debt was contracted for and on behalf of the transferred territory, should be treated in the same manner and included in this second category. These too are State debts "localized" in the ceded territory.

3. "LOCAL" DEBTS GUARANTEED BY THE STATE

177. The third category comprises debts contracted by the transferred territory by virtue of its financial autonomy, but guaranteed by the State to which the territory belonged. This category concerns not a State debt but a *State guarantee of a local debt proper to the transferred territory*. The subject-matter of State succession is not, even within the narrow confines of the present study, to determine merely what becomes of a debt of the predecessor State; it is also to determine what becomes of that State's obligation to back a debt of the territory it has transferred.

4. "LOCAL" DEBTS PROPER TO THE TRANSFERRED TERRITORY

178. Finally, if a debt is contracted by the financially autonomous territory without any intervention or guarantee by the State, there is a fourth category, comprising "local" debts proper to the territory in question, that is, *debts contracted by local authorities for local needs*. These are debts of "administrative districts", as they are termed in some of the major peace treaties ending the First World War.¹²⁸ They are not State debts; accordingly, they do not concern the present study. It should, however, be pointed out that writers often wrongly refer to such purely local debts (which remain the responsibility of the transferred territory) as evidence that there is a principle of transferability of debts to the successor State in case of the transfer of a part of the territory of one State to another.

179. The Special Rapporteur will confine himself to considering State debts falling into the first two categories as well as State guarantees of local debts, since these entail an obligation of the predecessor State, and it is part of the subject matter of State succession to determine what ultimately becomes of such an obligation.

¹²⁶ See paras. 14-29 above.

¹²⁷ A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, p. 272; *Les effets des transformations des Etats...*, *op. cit.*, pp. 71-74, 76-78 and 192 and 193.

¹²⁸ See article 204 of the Treaty of Saint-Germain-en-Laye or article 187 of the Treaty of Trianon [for references to the text of these treaties, see foot-note 99 above].

B. Treatment of the general debt of the predecessor State in cases of transfer of part of a territory

180. The reference here is to the "national public debt", which is unquestionably a State debt. It is one that the predecessor State will have contracted for its *general needs* in respect of national defence, education, health, economic development or defence of the currency. The funds thus borrowed by the predecessor State will not have been allocated specifically for the *particular needs* of the territory subsequently transferred. They will have served the nation as such and will have been spent for the territory of the State as a whole before the latter's size was reduced. It is irrelevant, in this context, that the proceeds of the loan should have been allocated unequally among regions, in accordance with the needs of each region and of general State policy.

1. UNCERTAINTIES IN THE LITERATURE

181. The positions held on each category of debt have not been defined with the desired clarity and it is difficult to disentangle them. If, by good fortune, the effort is successful, it becomes apparent that opinions are very divided. In the case under consideration, relating to the general debt of the predecessor State a part of whose territory has been amputated and joined to another State, some writers have concluded that a proportion of the general debt may be transferred to the successor State, others that it may not, depending perhaps on whether or not they endorse the old theory of the patrimonial State, but more probably because of a degree of general confusion.

182. Since no solution is conclusive, it is not surprising that opinion should be divided. Fauchille sums up the situation very well as follows:

... What conclusion is to be drawn with regard to the general public debt of the dismembered State? Opinions on this differ widely. There are several schools of thought. According to the first, the cession by a State of a fraction of its territory should have no effect on its public debt; the debt remains wholly its responsibility, for the dismembered State continues to exist and retains its individuality; it must therefore continue to be held responsible vis-à-vis its creditors. Moreover, the annexing State, being only an assignee in its private capacity, should not be held responsible for personal obligations contracted by its principal. [Here Fauchille cites the proponents of this view.] The second holds that the public debt of the dismembered State must be divided between that State and the territory that is annexed; the annexing State should not bear any portion of it. [Fauchille cites a writer holding this view.] According to the third school of thought, the annexing State must take over part of the public debt of the dismembered State. There are two main grounds for this view, which is the most widely held. First, since the public debt was contracted in the interest of the entire territory of the State and the portion that is now detached benefited just as did the rest, it is only fair that it should continue to bear some of the burden. Secondly, since the annexing State receives the profits from the ceded part, it is only fair that it should bear its costs. The State, whose entire resources are assigned to payment of its debt, must be relieved of a corresponding portion of that debt when it loses a portion of its territory and thus a part of its resources [Fauchille cites those who support this theory, who seem to be in the majority].¹²⁹

¹²⁹ Fauchille, *op. cit.*, p. 351.

(a) *Theories favourable to the transfer of part of the general debt*(i) *Theory of the patrimonial State and of the territory encumbered in its entirety with debts*

183. Alexandre N. Sack who, with E. H. Feilchenfeld, was undoubtedly the best authority on problems of succession to public debts during the period between the two world wars, was in favour of the transferability to the successor State of a part of the general debt of the predecessor State proportionate to the contributory capacity of the transferred territory. His reasons may be summarized as follows:

Whatever territorial changes a State may undergo, State debts continue to be guaranteed by the entire public patrimony of the territory encumbered with the debt*.¹³⁰ The legal basis for public credit lies precisely in the fact that public debts encumber the territory of the debtor State ...

...
From that standpoint, the principle of "indivisibility"¹³¹ proclaimed in the French constitutions of the Great Revolution is very enlightening; it has also been proclaimed in a good number of other constitutions ...

...
... These government actions and their consequences, as well as other events, may adversely affect the debtor State's finances and its capacity to pay.

All these are risks that must be borne by creditors, who cannot and could not restrict ... the government's right freely to dispose of its property and of the State's finances ...

...
Nevertheless, creditors have a legal guarantee in that their claims encumber the territory of the debtor State.

...
The debt that encumbers the territory of a State is binding on any government, old or new, that has jurisdiction over that territory. In case of a territorial change in the State, the debt is binding on all governments of all parts of that territory* ...

The justification for such a principle is self-evident; when taking possession of assets, one cannot repudiate liabilities: *ubi emolumentum, ibi onus esse debet, res transit cum suo onere*.

Therefore, with regard to State debts, the *emolumentum* consists of the public patrimony within the limits of the encumbered territory.¹³²

184. Here two arguments overlap. The principle of the first is debatable. According to this argument, since all parts of the territory of the State "guarantee", as it were, the debt that is contracted, the part that is detached will continue to do so even if it is placed under another sovereignty; hence the successor State is responsible for a corresponding part of the general debt of the predecessor State. Such an argument has as much validity as have the theories of the patrimonial State in general. The second argument casts an awkward shadow over the first by referring to the benefit that the transferred territory may have derived from the loan, or to the justification for taking over liabilities because of the acquisition of

¹³⁰ It is clear from the context that the author is referring to the entirety of the territory of the predecessor State prior to its amputation.

¹³¹ The author is referring here to the indivisibility of the Republic and of its territory.

¹³² A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 274-277.

assets. This argument may fully apply in the case of "local" or "localized" debts, where the benefit derived from such debts by the transferred territory must be taken into account, or the assets compared with the liabilities. It has no relevance when, as in the case in point, the reference is to a general State debt contracted for a nation's general needs, which may be such that the said territory will not have benefited from it, or not as much as the other territories.

(ii) *Theory of the benefit derived from the loan by the transferred territory*

185. This theory of the benefit derived by the ceded territory is still further developed by other authors. There is a clear tendency to prefer the second theory to the first. For example, to quote Henry Bonfils: The State that profits from the annexation must be responsible for the contributory share of the annexed territory in the public debt of the ceding State. It is only fair that the cessionary State should share in the debts that benefited the territory* it is acquiring in various ways, directly or indirectly.¹³³ For Nicolas Politis: The State that contracts a debt, either through a loan or in any other way, does so for the general good of the nation; all parts of the territory benefit from it,¹³⁴ and he draws the same conclusion. Again, according to René Selsosse: These debts were contracted in the general interest and were used to effect improvements from which the annexed areas benefited in the past and will perhaps benefit again in the future ... It is therefore fair ... that [the State] should be reimbursed for the part of the debt relating to the transferred province.^{135,136}

186. In practice, this theory leads to an impasse; since the debt is a general debt of the State contracted for the general needs of the entire territory, with no precise prior assignment to or location in any particular territory, the statement that such a loan benefited a particular transferred territory gives rise to vagueness and uncertainty. It does not provide an automatic and reliable key to the assumption by the successor State of a fair and easily calculated share of the general debt of the predecessor State. In reality, this theory is an extension of the principle of succession to local debts and localized State debts, which will be considered below,¹³⁷ and which benefit only the transferred territory. Such an extension is questionable in the case of a general State debt. In addition, it may prove unfair in certain cases of territorial transfer, and this would destroy its own basis in equity and justice.

(iii) *Reference to the contributory strength of the transferred territory*

187. Other theories purport to explain why part of the general debt is transferable, but in fact they explain only

¹³³ H. Bonfils, *Manuel de droit international public (droit des gens)*, 5th ed. (Paris, Rousseau, 1908), p. 117.

¹³⁴ N. Politis, *op. cit.*, p. 111.

¹³⁵ R. Selsosse, *Traité de l'annexion au territoire français et de son démembrement* (Paris, Larose, 1880), p. 168.

¹³⁶ For these and other authors, see details given by Sack in "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 295 *et seq.*

¹³⁷ See paras. 221 *et seq.* below.

how this operation should be effected. For example, certain theories make the successor State responsible for part of the general debt of the predecessor State by referring flatly to the "contributory capacity" of the transferred territory. Since such theories are diametrically opposed to the theory of benefit, the two positions cancel each other out.

188. The *contributory strength* of a transferred territory, calculated for example by reference to the fiscal resources and economic potential it previously provided for the predecessor State, is a criterion that is at variance with the theory of the benefit derived from the loan by the transferred territory. Thus a territory that is richly endowed by nature, and that has been attached to another State, may not have benefited much from the loan; on the other hand, it may have contributed greatly by its fiscal resources to the servicing of the general State debt by virtue of its membership of the former national community. Once the territory has been attached to another State, to request the successor State to assume a share of the predecessor State's national public debt, computed on the basis of the resources previously provided by the said territory, would not be justified by the theory of benefit. The criterion of the territory's financial capacity takes no account of the extent to which that territory may have benefited from the loan.

(iv) *Theory based on justice and equity*

189. However, this theory of the "contributory strength" of the territory leads to another theory, based on considerations of justice and equity towards the predecessor State and of security for creditors. It has been argued that the transfer of a territory, particularly of a rich territory, results in a loss of resources for the diminished State. Since the predecessor State—and indeed the creditors—relied on those resources, it is claimed that it is only fair and equitable that the successor State should have to assume part of the general debt of the predecessor State. The problem is how this share should be computed: some authors refer to "contributory capacity", which is logical given their premises (referring to the resources previously provided by the territory), while others consider the benefit the territory had derived from the loan. Thus the same overlapping considerations, always entangled and interlocked, are to be found in the works of the various authors.

190. It is particularly suprising to find the argument of justice and equity in the works of these authors of the nineteenth or early twentieth century, who were living at a time when provinces were annexed by conquest and by war. It is thus difficult to imagine how the annexing State, which did not shrink from the territorial amputation of its adversary or even the forced imposition on the adversary of reparations or a war tribute, could in any way be moved by considerations of justice and equity to assume part of the general debt of the State that it had geographically diminished. There is a certain lack of realism in this theoretical construction.

(v) *Inadequacy of these theories*

191. To sum up, it may be said that the ideas of "benefit derived from the loan by the ceded territory", of "justice

and equity" towards the predecessor State and of "security" for creditors may undoubtedly play a role in the case of certain categories of debts or in certain types of State succession. However in cases of transfer of part of a territory, these ideas or theories remain generally insufficient to justify the transfer to the successor State of part of the general debt of the predecessor State. On the other hand, these theories—for example, the theory of the benefit derived from the loan by the ceded territory—may be quite appropriate for the categories of local or localized debts, both in this type of State succession and in others.

(b) *Theories opposed to a transfer of part of the general debt*

192. Other authors deny that there is any legal basis for the principle of transferability to the successor State of part of the national public debt of the predecessor State (still referring to the case of transfer of part of a territory). Some of them consider that, when succession to part of this State debt in fact occurs, it is for political or moral reasons rather than in compliance with a legal obligation. Two arguments are advanced in support of this theory.

(i) *Non-transferability based on State sovereignty*

193. The first argument is based on the sovereign nature of the State. The sovereignty exercised by the successor State over the detached territory is not a sovereignty transferred by the predecessor State: it is its own sovereignty. Where State succession occurs, there is no transfer of sovereignty but a *substitution* of one sovereignty for another. In other words, the successor State that is enlarged by a portion of territory exercises its own sovereign rights there and does not come into possession of those of the predecessor State; it therefore does not assume the obligations or part of the debts of the predecessor State.

(ii) *Non-transferability based on the nature of the debt*

194. The second argument derives from the nature of the State debt. The authors who deny that a portion of the national public debt (i.e. of a general State debt) is transferable to the successor State consider that this is a *personal* debt of the State that contracted it; hence, when a territorial change occurs, this personal debt remains the responsibility of the territorially diminished State, since that State retains its political personality despite the territorial loss suffered. For example, Professor Jèze writes:

... The dismembered or annexed State *personally* contracted the debt; ⁽¹⁾ it solemnly undertook to service the debt, whatever happened. It is probable that it was counting on the tax revenue to be derived from the *whole* of the territory. In case of *partial* annexation, the dismemberment reduces the resources with which it expected to be able to pay its debt. *Legally*, however, the obligation of the debtor State cannot be affected by variations in the size of its resources.

(1) The reference here is to *national*, not to *local* debts ... ¹²⁸

¹²⁸ Jèze, "L'emprunt dans les rapports internationaux ...", *loc. cit.*, p. 65. However, the author writes in the same article that:

(Continued on next page.)

He adds in a foot-note that:

in a case of partial annexation, most English and American authors regard this principle as absolute, to the point of declaring that the annexing State is not *legally* bound to assume *any* part of the debt of the dismembered State.¹³⁹

according to W. E. Hall, for example:

... the general debt of a State is a personal obligation ... With rights which have been contracted by the old State as personal rights and obligations, the new State has nothing to do. The old State is not extinct.¹⁴⁰

2. AVERSION REFLECTED IN JUDICIAL PRECEDENTS TO TRANSFER OF PART OF THE GENERAL DEBT

195. The most frequently cited precedent in this matter is the arbitral award made by Eugène Borel on 18 April 1925 in the *Ottoman public debt* case. Although this case involved a type of succession of States other than the transfer of part of the territory of one State to another—since it related to the apportionment of the Ottoman public debt among States and territories detached from the Ottoman Empire (separation of one or more parts of the territory of a State with or without the constitution of new States)—it is relevant here because of the general nature of the terms advisedly used by the arbitrator from Geneva. He took the view that there was no legal obligation for the transfer of part of the general debt of the predecessor State unless a treaty provision existed to that effect. In his ruling he said:

In the view of the arbitrator, despite the existing precedents, one cannot say that the Power to which a territory is ceded is

(Foot-note 138 continued.)

"The annexing State did not *personally* contract the debt of the annexed or dismembered State. It is logical and equitable that, as a result of the annexation, it should *at most* be obliged only *propter rem*, because of the annexation ... What exactly is involved in the obligation *propter rem*? It is the burden corresponding to the contributory strength of the inhabitants of the annexed territory." (*Ibid.*, p. 62.)

In this passage, then, Jèze favours a contribution by the successor State to the general debt of the predecessor State. But see also *ibid.*, p. 70:

"Present and future taxpayers in each portion of the territory of the dismembered State must continue to bear the total burden of the debt *regardless of the political events that occur*, even if the annexing State does not agree to assume part of the debt ... A change in the size of the territory cannot cause the disappearance of the legal obligation regularly contracted by the competent public authorities. The taxpayers of the dismembered State, despite the reduction in its territorial size and resources, remain bound by the original obligation."

Jèze must ultimately be classified among the authors who favour *conditional* transferability of part of the national public debt of the predecessor State, for he concludes with the following words:

"To sum up, *in principle*, (1) the annexing State must assume part of the debt of the annexed State; (2) this share must be calculated on the basis of the contributory strength of the annexed territory; (3) by way of exception, if it is demonstrated in a *certain and bona fide manner* that the annexed territory's resources for the present and for the near future are not sufficient to service the portion of the debt thus computed and chargeable to the annexing State, the latter may suspend or reduce the debt to the extent strictly necessary to obtain the desirable financial stability." (*Ibid.*, p. 72.)

¹³⁹ *Ibid.*, p. 65, foot-note 2.

¹⁴⁰ W. E. Hall, *A Treatise on International Law*, 7th ed. (Oxford, Clarendon, 1917), pp. 93 and 95, quoted by Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, p. 287.

automatically responsible for a corresponding part of the public debt of the State to which the territory formerly belonged.¹⁴¹

He went on to state even more clearly:

One cannot consider that the principle that a State acquiring part of the territory of another State must at the same time take responsibility for a corresponding portion of the latter's public debts as established in positive international law. Such an obligation can stem only from a treaty in which it is assumed by the State in question, and it exists only on the terms and to the extent stipulated therein.¹⁴²

3. VARIATIONS IN STATE PRACTICE

(a) Assumption by the successor State of part of the national public debt of the predecessor State

196. In this context, writers cite the case of Sardinia which, when Lombardy was annexed in 1859, is said to have taken over a large part of the *Austrian* debt. This is an erroneous reading of the Treaty of Zurich (10 November 1859), which imposed on Sardinia three fifths of the debt of *Lombardy*, not of *Austria*. The question of succession to the general debt of the predecessor State did not arise.

However, under article 1 of the Franco-Sardinian Convention of 23 August 1860, France, which had gained Nice and Savoy from the Kingdom of Sardinia, assumed responsibility for a small part of the Sardinian debt.

In 1866, Italy accepted a part of Pontifical debt proportionate to the population of the Papal States (Romagna, the Marches, Umbria and Benevento), which the Kingdom of Italy had annexed in 1860.

Greece, which had incorporated in its territory the former Ottoman territory of Thessalia, in 1881 accepted a part of the Ottoman public debt corresponding to the contributory capacity of the population of the annexed province (article 10 of the treaty of 24 May 1881).

197. The many territorial upheavals in Europe following the First World War raised the problem of succession of States to public debts on a large scale, and attempts to settle it were made in the treaties of Versailles, Saint-Germain-en-Laye and Trianon. In those treaties, writes Professor Rousseau,

political and economic considerations ... came into play. The Allied Powers, which had drafted the peace treaties virtually alone, had no intention of completely destroying the economic structure of the vanquished countries and reducing them to complete insolvency. That explains why the vanquished States were not left to shoulder their debts alone, for they would have been incapable of discharging them without the help of the successor States. But other factors were also taken into consideration, including the need to ensure preferential treatment for the Allied creditors and the difficulty of arranging regular debt servicing owing to the heavy burden of reparations.

... Finally, it should be pointed out that the traditional differences in legal theory as to whether or not the transfer of public debts was obligatory caused a cleavage between the States concerned, entailing *radical opposition between the domestic judicial precedents of the dismembered States and those of the annexing States*.¹⁴³

¹⁴¹ United Nations, *Reports of International Arbitral Awards* vol. I, p. 573.

¹⁴² *Ibid.*, p. 571.

¹⁴³ C. Rousseau, *op. cit.*, p. 442.

198. A general principle of succession to German public debts was consequently affirmed in article 254 of the Treaty of Versailles (28 June 1919). According to this provision, the Powers to which German territory was ceded were to undertake to pay a portion—to be determined—of the debt of the German *Empire*, and of that of the German *State* to which the ceded territory belonged, as existing on 1 August 1914.¹⁴⁴

199. However, article 255 of the Treaty provided a number of exceptions to this principle. For example, because Germany had refused, in consideration of the annexation of Alsace-Lorraine in 1871, to assume part of France's general public debt, the Allied Powers decided, at the request of France, to exempt France from any participation in the German public debt in consideration of the retrocession of Alsace-Lorraine.

200. Isaac Paenson cites a case of participation of the successor State in part of the general debt of its predecessor. It is a case, however, that is not consistent with contemporary international law, since the transfer of part of the territory was effected by force. The third Reich, in its agreement of 4 October 1941 with Czechoslovakia, assumed an obligation of 10 billion Czechoslovak korunas as a participation in that country's general debt (and also in the localized debt for the conquered *Länder* of Bohemia-Moravia and Silesia). Part of the 10 billion covered the consolidated internal debt of the State, the State's short-term debt, its floating debt and the debts of government funds such as the central social security fund, the electricity, water and pension funds, and so on (as well as all the debts of the former Czechoslovak armed forces, as at 15 March 1939, which were State debts and which the author incorrectly includes among the debts of the territories conquered by the Reich).¹⁴⁵

201. The author also cites, in the context of the Second World War, Bulgaria's participation in the national debt of Romania as "one of the obligations, seemingly the most important, by virtue of which Bulgaria was to pay Romania 1 billion lei"¹⁴⁶ under the Craiova agreement (7 September 1940), whereby Romania ceded to Bulgaria southern Dobruja, whose Bulgarian population outnumbered its Romanian population.

¹⁴⁴ War debts were thus excluded; see chap. III above. Article 254 of the Treaty of Versailles [for reference, see above, foot-note 95] read as follows:

"The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay:

(1) A portion of the debt of the German Empire as it stood on August 1, 1914 ...

(2) A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged ..."

¹⁴⁵ I. Paenson, *Les conséquences financières de la succession des Etats* (Paris, Domat-Montchrestien, 1954), pp. 112 and 113.

The author refers to an irregular annexation and, moreover, considers the Czechoslovak case as falling within the category of "cession of part of a territory"; in fact, the case was more complex, involving disintegration of the State not only through the joining of territories to Hungary and to the Reich, but also through the creation of States: the so-called "Protectorate of Bohemia-Moravia" and Slovakia.

¹⁴⁶ *Ibid.*, pp. 115 and 116 and *passim*, particularly p. 102.

(b) *Exoneration of the successor State from any portion of the national public debt of the predecessor State*

202. Article 3 of the "Peace preliminaries between Austria and Prussia on the one hand and Denmark on the other hand, signed at Vienna on 1 May 1864, provided that:

Debts contracted specifically on behalf [either] of the Kingdom of Denmark [or of one of the Duchies of Schleswig, Holstein and Lauenburg] shall remain the responsibility of each of those countries.¹⁴⁷

203. At a time when annexation by conquest was the general practice, Russia rejected any succession to part of the Turkish public debt for territories it had conquered from the Ottoman Empire. Its plenipotentiaries drew a distinction between transfer of part of a territory by agreement, donation or exchange (which could perhaps give rise to the assumption of part of the general debt, and territorial transfer effected by conquest (as was acceptable at the time), which in no way created any right to relief from the debt burden of the predecessor State. Thus, at the meeting of the Congress of Berlin of 10 July 1878, the Turkish plenipotentiary, Karatheodori Pasha, proposed the following resolution: "Russia shall assume the part of the Ottoman public debt pertaining to the territories annexed to Russian territory in Asia." According to the record of the meeting:

Count Shuvalov replied that he believed he was justified in considering it generally recognized that, whereas debts in respect of territories that were derached by agreement, donation or exchange would be apportioned, that was not so in the case of conquest. Russia was the victor in Europe and in Asia. It did not have to pay anything for the territories and could in no way be held jointly responsible for the Turkish debt. Prince Gorchakov categorically rejected Karatheodori Pasha's request and could not conceal his astonishment at it.

The President said that, in view of the opposition of the Russian plenipotentiaries, he could see no possibility of acceding to the Ottoman proposal.¹⁴⁸

204. Some writers have cited the annexation of part of the territory of Mexico by the United States as an example of participation in the general debts of the predecessor State. Le Fur writes:

The United States ... recognized this principle at various times, upon the admission to the Union of the various states that compose it; it did so relatively recently, at the time of the annexation of Texas. It was on the occasion of that annexation that President Tyler, in 1844, in a message to Congress, said that the United States could not honourably take over the land without taking over responsibility for the payment in full of all the debts with which it was encumbered.¹⁴⁹

There seems to be some confusion in the author's mind. The Union in fact assumed the debts of the various states composing it, but that was a case of a uniting of states or federation. The incorporation of Texas was a very different case, since it genuinely involved the transfer of part of the territory of one State to another.

¹⁴⁷ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), vol. XVII, pp. 470 *et seq.*

¹⁴⁸ Protocol No. 17 of the Congress of Berlin for the Settlement of Affairs of the East, in *British and Foreign State Papers* (London, Ridgway, 1855), vol. LXIX, p. 1055 [text of protocol cited in French]. This was exactly the policy followed by the other European Powers in cases of conquest.

¹⁴⁹ Le Fur, *loc. cit.*, p. 622.

In that case, the reality seems to the Special Rapporteur to have been somewhat different, in view of the solutions adopted. Article XII, paragraph 1, of the Treaty concluded in Guadalupe Hidalgo on 2 February 1848 between the United States and Mexico¹⁵⁰ provided:

In consideration of the extension acquired by the boundaries of the United States, as defined in the Vth article of the present Treaty, the Government of the United States engages to pay to that of the Mexican Republic the sum of 15 million dollars.

It is thus clear that the sum paid by the United States was entirely unconnected with any participation by the latter in a portion of Mexico's national public debt; according to the treaty, the justification for the payment was the expansion of the territorial boundaries of the United States at the expense of Mexico.

It is true that the treaty included two other articles, XIII and XIV,¹⁵¹ on which Le Fur based his conclusion that the United States had assumed part of Mexico's national public debt. In the opinion of the Special Rapporteur, however, this was not the case.

205. Article VI of the Treaty of Peace concluded at Vienna on 3 October 1866, whereby Austria ceded the region of Lombardy-Venezia to Italy, provided:

The Italian Government will assume: 1. the portion of the debt of the Lombardo Veneto fund that devolved upon Austria by virtue of the convention concluded in Milan in 1860 in execution of the Treaty of Zurich; 2. the debts added to the Lombardo Veneto fund since 4 June 1859; 3. a sum of 35 million florins, in Austrian currency, for the portion of the loan of 1854 allotted to Venezia, and for the cost of the non-transferable war matériel.¹⁵²

It may be seen that in this case a treaty placed responsibility for certain State debts previously assumed by the Austrian Government and relating to the transferred territory of Lombardy-Venezia, together with other debts, upon the successor State, Italy.

206. The Treaty of Frankfurt (10 May 1871) between France and Prussia, whereby Alsace-Lorraine passed to Germany, was deliberately silent on the assumption by the successor State of part of the French general debt. Prince von Bismarck, who in addition had imposed on France after its defeat at Sedan the payment of war indemnities amounting to 5 billion francs, had categorically refused to assume a share of the national public debt

¹⁵⁰ See *British and Foreign State Papers* (London, Harrison, 1862), p. 567.

¹⁵¹ The two articles read as follows:

Article XIII: The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican Republic, under the Conventions between the two Republics, severally concluded on the eleventh day of April eighteen hundred and thirty-nine, and on the thirtieth day of January eighteen hundred and forty-three: so that the Mexican Republic shall be absolutely exempt for the future, from all expense whatever on account of the said claims.

Article XIV: The United States do furthermore discharge the Mexican Republic from all claims of citizens of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this Treaty: which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the Board of Commissioners provided for in the following Article, and whatever shall be the total amount of those allowed.

¹⁵² See G. F. de Martens, ed., *op. cit.* (1873), vol. XVIII, p. 406.

of France proportionate to the size of the territories detached from France.¹⁵³ As has been seen,¹⁵⁴ the cession of Alsace-Lorraine to Germany in 1871, free and clear of any contributory share in France's public debt, had a mirror effect in the subsequent retrocession to France of the same provinces, also free and clear of all public debts, under articles 55 and 255 of the Treaty of Versailles.

207. When Chile, under the Treaty of Ancón (20 October 1883), annexed the province of Tarapacá from Peru, it refused to assume responsibility for any part whatever of Peru's national public debt. However, after disputes had arisen between the two countries concerning the implementation of the Treaty, another treaty was signed by them at Lima on 3 June 1929 confirming Chile's exemption from any part of Peru's general debt.¹⁵⁵

In 1905, no part of Russia's public debt was transferred to Japan with the southern part of the island of Sakhalin.

208. Following the Second World War, the trend of State practice broke with the solutions adopted at the end of the First World War. Unlike the treaties of 1919, those concluded after 1945 generally excluded the successor States from any responsibility for a portion of the national public debt of the predecessor State. Thus the Treaty of Peace with Italy (10 February 1947) ruled out any succession to the debts of the predecessor State, for instance in the case of Trieste,¹⁵⁶ except in respect of holders of bonds for those debts issued in the ceded territory. Similarly, the cession to France of Tenda and Briga, which were formerly Italian, entailed no participation by France in Italy's national public debt.¹⁵⁷ In these circumstances, it was no longer a question of the general debt of the predecessor State, but rather of the special State debt earmarked for the ceded territory. The Special Rapporteur will devote a few paragraphs to this question later.¹⁵⁸

¹⁵³ The fact that Prince von Bismarck affected to reduce the cost of war indemnities by first fixing them at 6 billion could be misleading; however, it did not imply an assumption of part of the general debt of France. This apparent concession by Prince von Bismarck was later used by d'Arnim at the Brussels Conferences, on 26 April 1871, as a pretext for ruling out any participation by Germany in France's general public debt.

¹⁵⁴ See para. 199 above.

¹⁵⁵ However, deposits of guano situated in the province transferred to Chile had apparently served to guarantee Peru's public debt to foreign States such as France, Italy, the United Kingdom or the United States. Claims having been lodged against the successor State for continuance of the security and assumption of part of the general debt of Peru secured by that resource of the transferred territory, a Franco-Chilean arbitral tribunal found that the creditor States had acquired no guarantee, security or mortgage, since their rights resulted from *private* contracts concluded between Peru and certain nationals of those creditor States (arbitral award of Rapperschwyl of 5 July 1901). See Feilchenfeld, *op. cit.*, pp. 321-329, and D. L. O'Connell, *The Law of State Succession* (Cambridge, University Press, 1956), pp. 167-170. In any event, the Treaty of Lima referred to above confirmed the exoneration of Chile as the successor State.

¹⁵⁶ For reference, see foot-note 101 above.

¹⁵⁷ However, France assumed the State debt that had been incurred prior to entry into the war for non-military purposes and that had been used for the benefit of Tenda and Briga on public works or civil administrative services (see para. 234 below).

¹⁵⁸ See paras. 221-238 below.

4. GENERAL CONCLUSIONS

(a) *Non-existence of a general rule concerning transfer of part of the debt*

209. Refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice. Political considerations or considerations of expediency have admittedly played some part in such refusals, but their influence appears to have been even greater in cases where the successor State ultimately assumed a portion of the general debt of the predecessor State, as occurred in the peace treaties ending the First World War. In any event, it must also be recognized that the bulk of the multitude of treaty precedents available consist of treaties terminating a state of war; and there is a strong presumption that that is not a context in which States express their free consent, or are inclined to yield to the demands of justice, of equity or even of law, if it exists.

210. In any case, the refusal of the successor State to assume part of the national public debt of the predecessor State appears to have logic on its side, as Cavaré remarks, although he agrees that it is "hard . . . for the ceding State, which is deprived of part of its property without being relieved of its debt, whereas the cessionary State is enriched or enlarged without a corresponding increase in its debt burden".¹⁵⁹ It would be vain, however, to try to find an incontestable rule of international law to prevent such a situation. There remains, perhaps, equity, which resolves the problem but creates others.

(b) *Problems resulting from the demands of equity*

211. In the absence of a rule of international law, and assuming the desirability, for reasons of equity, morality and justice, that the successor State should have to bear part of the general debt of the predecessor State, how can its contribution be determined? If war debts, naturally, are excluded (and it would be unseemly, if not odious, to oblige the successor State to assume these, especially if it had suffered from the war), it is hard to see by what criterion of "purpose" one loan rather than another could be assigned to the successor State, since by definition it is a question of the *general* debt of the State.

212. Writings on the subject and State practice have at one time or another used criteria for apportionment based on the total population of the transferred territory, on the size of that territory or on the share of taxes paid by that territory. The Special Rapporteur has observed a more marked preference for the third formula, which appears less arbitrary because there is a necessary correlation between the national public debt and the taxes borne by the inhabitants. Taxes constitute, in a sense, the "guarantee" of the general debt of the State. As Jèze writes, loans are only "advances on revenue from taxes to be paid by future generations".¹⁶⁰

213. It might therefore be possible to determine the portion of the general debt to be assigned to the successor State on the basis of the *fiscal criterion*, that is, of the proportion of taxes borne by the transferred territory.

This criterion may be further refined by referring rather to the *contributory capacity* of the transferred territory, of which the tax base is only one aspect. This formula would link the economic potential of the transferred territory to its fiscal status, all in relation to the productive and contributory capacity of the entire territory of the predecessor State.

(c) *Proposals of the Special Rapporteur*

214. (A) At the end of this review of the treatment of the general debt of the predecessor State in the case of transfer of part of its territory, the Special Rapporteur is left with a sense of frustration. Since no solution is obviously conclusive, he is strongly inclined, in all honesty, to propose two different texts to the Commission, each providing for one of the two conceivable but contrary solutions. He leaves the final choice to the superior knowledge and wisdom of the Commission.

The two articles, which contradict each other, might be worded as follows:

Article Y. Exoneration of the successor State from any participation in the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall assume no part of the general debt of the predecessor State unless otherwise stipulated by treaty.¹⁶¹

Article Z. Contribution of the successor State to part of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall assume a part of the general debt of the predecessor State proportionate to the contributory capacity of the transferred territory.

215. These two articles would be preceded by an article X defining a *general State debt*. Article X would later be included with other defining articles to form a chapter on "use of terms". For the time being, it might be worded as follows:

Article X. Definition of general State debt

For the purposes of the present articles, general State debt means a State debt contracted by a central State body to meet the general needs of the State.

216. (B) The Special Rapporteur has on several occasions shown the importance of political considerations in the solution of these problems. Such considerations constitute a factor of uncertainty. Yet another factor, inherent in the very nature of this particular type of State succession, should also be mentioned at this point. The difficulty in a case of transfer of part of a territory is that the transfer may involve either a very small area or a very large one. This type of succession, then, may affect minor boundary adjustments as well as very large territories and vast provinces. It is this fact—the vastness of the territorial change that has occurred or, conversely, the insignificance of the piece of territory involved—that gives the specific case of transfer of part of a territory from one State to another its duality or "ambivalence",

¹⁵⁹ L. Cavaré, *op. cit.*, p. 380.

¹⁶⁰ Jèze, "L'emprunt dans les rapports internationaux . . .", *loc. cit.*, p. 70.

¹⁶¹ The following might be added: or unless all or part of that general debt is covered by guarantees, securities and mortgages situated in the transferred territory.

and thus makes it so difficult. It should be added, however, that the size of a territory often bears no relation to its wealth, so that a few square kilometres transferred by a State may represent a severe economic and financial loss to it by reason of the surface and underground resources, population density and other advantages of the area concerned.

217. If, then, the losses sustained by the predecessor State prove to be minimal or relatively insignificant, not so much because of the size of the transferred territory as because of its limited contributory capacity, a rule of the kind contained in article Y will meet the requirements of both logic and simplicity. In the contrary case the provisions of article Z would better meet the desire for justice and equity. That, however, has been the issue throughout diplomatic history in every case where this solution has been adopted. In pointing this out, the Special Rapporteur wishes to emphasize that at no time, whether in the past or in the present, has the existence of a rule of international law regarding succession to a portion of the general debt of the predecessor State been demonstrated.

218. Can a bridge be established between article Y, which is better suited in the case of an economically insignificant territorial transfer, and article Z, which is in greater conformity with the requirements of a more significant territorial acquisition? The common denominator, which would make it possible to combine articles Y and Z, would be the extent of the transferred territory's "contributory capacity" or, more precisely, by correlation, the part of the burden of the general debt of the predecessor State previously borne by that territory. According to whether that part was minimal or very large, the solution should be based on article Y or on article Z.

219. (C) A partial synthesis of articles Y and Z could then be attempted, as follows:

Article YZ. Conditions for contribution of the successor State to a portion of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall be obligated for a part of the general debt of the predecessor State only if the contributory capacity of the transferred territory was of significant importance to the predecessor State.

In that case, the part of the general debt of the predecessor State to be borne by the successor State shall be determined on the basis of the previous contribution of the transferred territory to the financial resources of the predecessor State.

220. However, to evaluate the practicality of article YZ, an important point must be kept in mind. Although it is probably just and equitable not to wish to deprive the predecessor State of an important contribution on which it depended as long as it held sovereignty over the part of territory that it has had to transfer, it is no less just and equitable to remember that the transferred territory must also retain its contributory capacity for the benefit of the State in which it is now incorporated, by virtue of a new national solidarity.

C. Special State debts of benefit only to the ceded territory (localized State debts)

1. THE LITERATURE

221. It should be recalled that the debts referred to in this section are State debts contracted by the central government on behalf of the entire State, but intended especially to meet specific needs, so that the proceeds of the loan may have been used for a project *in the transferred territory*: digging a canal, constructing a railway, building a port, establishing a body that is national in character (e.g., a research institute), and so on. These are national debts, the State being the debtor. Appleton designates and defines them as follows: "What is meant by *debts relating to the ceded province* * is not provincial debts, but debts that the State itself contracted for the exclusive benefit of the province".¹⁶²

222. Identifying such debts may prove difficult in practice. Sack writes:

... it is not always possible to establish precisely (a) the intended purpose of each particular loan at the time it is concluded; (b) how it is actually used; (c) the place to which the related expenditure should be attributed ...; (d) whether a particular expenditure in fact benefited the territory in question.¹⁶³

223. The most commonly—and perhaps most lightly—accepted theory is that a special State debt of benefit only to the ceded territory should be attributed to the transferred territory, for whose benefit it was contracted. It would then pass, it is said, with the transferred territory, "by virtue of a kind of right of continuance (*droit de suite*)".¹⁶⁴ However, a sufficiently clear distinction is not drawn between State debts contracted for the particular benefit of a portion of territory and local debts proper, which are not contracted by the State. Moreover, the assertion that the debts follow the territory by virtue of a kind of right of continuance, and that they remain the responsibility of the transferred territory, implies that that territory was responsible for them *before* its transfer, which is not true of localized State debts, these being normally chargeable to the State's central budget. Finally, there is too much incorrect terminology and imprecision as regards what becomes of a *special* State debt, a problem that is in fact less difficult to resolve than that of the future of a *general* State debt.

224. Writers on the subject appear generally to agree that the successor State should assume special debts of the predecessor State, as particularized and identified by some project carried out in the transferred territory. The debt will, of course, be attributable to the successor State and not to the transferred territory, which had never assumed it directly under the former legal order and to which there is no reason to attribute it under the new legal order. Moreover, it may be argued that, if the transferred territory was previously responsible for the debt, it could not be regarded with certainty as a

¹⁶² H. Appleton, *Des effets des annexions de territoires sur les dettes de l'Etat démembré ou annexé et sur celles des provinces, départements etc., annexés* (Paris, Larose, 1895), p. 156.

¹⁶³ Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, p. 292.

¹⁶⁴ An expression used by Despagnet, *op. cit.*, p. 109.

State debt especially contracted by the central government for the benefit or the needs of the territory concerned, but rather as a local debt contracted and assumed by the territorial district itself. That is a completely different case.

2. STATE PRACTICE

225. State practice shows that the attribution of State debts to the successor State has in fact nearly always been accepted.

(a) *Assumption by the successor State of special State debts contracted exclusively in the interests of the transferred territory (or secured on the resources of that territory)*

226. In 1735, Emperor Charles VI borrowed 1 million crowns from London financiers and merchants, securing the loan on the revenue of the Duchy of Silesia. Upon his death in 1740, Frederick II of Prussia obtained the Duchy from Maria Theresa under the treaties of Breslau and Berlin. Under the latter treaty, signed on 28 July 1742, Frederick II undertook to assume the sovereign debt (or State debt, as it would now be called) with which the province was encumbered as a result of the security arrangement.

227. Two articles of the Treaty of Peace between the Emperor of Austria and France, signed at Campo Formio on 17 October 1797, presumably settled the question of the State debts contracted in the interests of the Belgian provinces or secured on them at the time Austria ceded those territories to France:

Article IV. All debts that were secured, prior to the war, on the territory of the countries specified in the preceding articles and that were contracted in accordance with the customary formalities shall be assumed by the French Republic.

Article X. Debts secured on the territory of countries ceded, acquired or exchanged under this Treaty shall pass to the parties into whose possession the said countries come.¹⁶⁵

228. These two articles, like similar articles in other treaties, referred without further specification to "debts secured on the territory" of a province. This security arrangement may have been made either by the central authority in respect of State debts or by the provincial authority in respect of local debts. The context, however, suggests that the reference was in fact to State debts, since the debts were challenged for the very reason that the provinces in question had not consented to them. France refused on that ground to assume the so-called "Austro-Belgian" State debt dating from the period of Austrian rule.¹⁶⁶

229. As a result, France, Germany and Austria included in the Treaty of Lunéville of 9 February 1801 an article VIII reading as follows:

As in articles IV and X of the Treaty of Campo Formio, it is agreed that, in all countries ceded, acquired or exchanged under

¹⁶⁵ A. J. H. de Clercq, *Recueil des traités de la France* (Paris, Durand, 1880), vol. I (1713-1802), pp. 336 and 337; G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1829), vol. VI, pp. 422 and 423.

¹⁶⁶ Cf. A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 268 and 269.

this Treaty, those into whose possession they come shall assume any debts secured on the territory of the said countries; in view, however, of the difficulties which have arisen in this connexion with regard to the interpretation of the said articles of the Treaty of Campo Formio, it is expressly agreed that the French Republic shall assume only debts resulting from loans formally authorized by the States of the ceded countries or from expenditure undertaken for the actual administration of the said countries.¹⁶⁷

[The term "States" refers here not to State entities but to provincial bodies.]

230. Under the Treaty of Peace between France and Prussia signed at Tilsit on 9 July 1807, the successor State was made liable for debts contracted by the former sovereign for or in the ceded territories. Article 24 reads as follows:

Such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Prussia may have entered into or contracted ... *as owner* * of countries, territories, domains, property and revenue ceded or renounced by His Majesty under this Treaty shall be assumed by the new owners ...".¹⁶⁸

Article 9 of the Treaty of 26 December 1805 between Austria and France provided that His Majesty the Emperor of Germany and Austria "shall remain free of any obligation in relation to *any debts whatsoever which the House of Austria has contracted by reason of possession*, * and has secured on the territory, of the countries renounced by it under this Treaty".¹⁶⁹

Similarly, article 8 of the Treaty of 11 November 1807 between France and Holland provided that "such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Holland may have entered into or contracted as owner of the ceded cities and territories shall be assumed by France . . .".¹⁷⁰ Article 14 of the Treaty of 28 April 1811 between Westphalia and Prussia is identical with the article just cited.¹⁷¹

231. Article VIII of the Treaty of Lunéville of 9 February 1801 served as a model for article V of the Treaty of Paris between France and Württemberg of 20 May 1802, which stated:

Article VIII of the Treaty of Lunéville concerning debts secured on the territory of the countries on the left bank of the Rhine shall serve as a basis and rule in respect of the debts with which the possessions and countries included in the cession under article II of the present Treaty are encumbered.¹⁷²

The Treaty of 14 November 1802 between the Batavian Republic and Prussia contains a similarly worded

¹⁶⁷ De Clercq, *op. cit.*, vol. I (1713-1802), pp. 426 and 427; de Martens, ed., *op. cit.* (1831), vol. VII, p. 299; Baron Descamps and L. Renault, *Recueil international des traités du XIX^e siècle* (Paris, Rousseau), vol. I (1801-1825), p. 3.

¹⁶⁸ De Clercq, *op. cit.*, vol. II (1803-1815), p. 221; de Martens, ed., *op. cit.* (1835), vol. VIII, p. 666; Descamps and Renault, *op. cit.*, p. 184.

¹⁶⁹ De Clercq, *op. cit.*, vol. II (1803-1815), pp. 147 and 148; de Martens, ed., *op. cit.*, vol. VIII, p. 391; Descamps and Renault, *op. cit.*, p. 153.

¹⁷⁰ De Clercq, *op. cit.*, vol. II (1803-1815), p. 241; de Martens, ed., *op. cit.*, vol. VIII, p. 720.

¹⁷¹ De Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1817), vol. I, p. 367.

¹⁷² De Clercq, *op. cit.*, vol. I (1713-1802), p. 582; de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1831), vol. VII, p. 430.

article IV.¹⁷³ Again, article XI of the Treaty of 22 September 1815 between the King of Prussia and the Grand Duke of Saxe-Weimar-Eisenach provided that "His Royal Highness shall assume [any debts] ... especially secured on the ceded districts".¹⁷⁴

232. Article IV of the Treaty of 4 June 1815 between Denmark and Prussia provided as follows:

*H.M. the King of Denmark undertakes to assume the obligations which H.M. the King of Prussia has contracted in respect of the Duchy of Lauenburg under articles 4, 5 and 9 of the Treaty of 29 May 1815 between Prussia and His Britannic Majesty, King of Hanover. ...*¹⁷⁵

The Franco-Austrian agreement of 20 November 1815, whose 26 articles dealt exclusively with debt questions, required the successor State to assume debts which "formed part of the French public debt" (State debts), but "originated as debts specially secured on countries which have ceased to belong to France or were contracted for purposes of the internal administration of the said countries" (article VI).¹⁷⁶

233. Although it entailed an irregular and forced annexation of territory, mention may be made of the assumption by the Third Reich, under an agreement of 4 October 1941, of debts contracted by Czechoslovakia for the purchase of private railways in the *Länder* seized from it by the Reich.¹⁷⁷ Debts of this kind seem to be governmental in origin and local in purpose.

234. After the Second World War, France, which had regained Tenda and Briga from Italy, agreed to assume part of the Italian debt only under the following four conditions: (a) that the debt was attributable to public works or civilian administrative services in the transferred territories; (b) that the debt had been contracted before Italy's entry into the war and had not been intended for military purposes; (c) that the transferred territories had benefited from the debt; (d) that the creditors resided in the transferred territories.

235. Succession to special State debts that were used to meet the needs of a particular territory is more likely if the debts in question are backed by special security arrangements. The predecessor State may have secured its special debt on tax revenue derived from the territory that it is losing or on property situated in the territory

¹⁷³ De Martens, ed., *op. cit.*, vol. VII, pp. 427 and 428.

¹⁷⁴ De Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1831), vol. III, p. 330; Descamps and Renault, *op. cit.*, p. 513.

¹⁷⁵ De Martens, ed., *op. cit.* (1887), vol. II, p. 350; Descamps and Renault, *op. cit.*, p. 426.

¹⁷⁶ De Martens, ed., *op. cit.*, vol. II, p. 723; Descamps and Renault, *op. cit.*, p. 531. See also article 5 of the Treaty of 14 October 1809 between France and Austria concerning debts secured on the territories (Upper Austria, Carniola, Carinthia, Istria) ceded to France by Austria (de Clercq, *op. cit.*, vol. II, p. 295; de Martens, ed., *op. cit.*, vol. I, p. 213); article VII of the Treaty of 3 June 1814 between Austria and Bavaria (de Martens, ed., *op. cit.*, vol. II, p. 21); article IX of the Treaty of 18 May 1815 between Prussia and Saxony (de Clercq, *op. cit.*, vol. II, pp. 520 and 521; de Martens, ed., *op. cit.*, vol. II, pp. 277 and 278); article XIX of the Treaty of Cession of 16 March 1816 under which the Kingdom of Sardinia ceded to Switzerland various territories in Savoy that were incorporated in the Canton of Geneva (de Martens, ed., *op. cit.*, vol. IV (1880), p. 223; Descamps and Renault, *op. cit.*, p. 555).

¹⁷⁷ Paenson, *op. cit.*, p. 113.

in question, such as forests, mines or railways. In both cases, succession to such debts is usually accepted.

Only in rare cases is a special State debt that was used to meet the particular needs of a transferred territory regarded as non-transferable.

(b) *Refusal of the successor State to assume special State debts contracted for the particular needs of the transferred territory (or secured on the resources of that territory)*

236. Although article 254 of the Treaty of Versailles laid down the general principle of succession to the public debts of the predecessor State, article 255 of the Treaty provided for a number of exceptions to that principle.¹⁷⁸ Thus, in the case of all ceded territories other than Alsace-Lorraine, the portion of the debt of the German Empire or the German States that represented expenditure by them upon property and possessions belonging to them and situated in the ceded territories was not assumed by the successor States. Political considerations played a role in this instance.

3. PROPOSALS OF THE SPECIAL RAPPORTEUR

237. The problem of succession to special State debts is relatively easier to deal with than that of succession to general State debts, for there appears to exist a rule of international law requiring the successor State to assume a special debt contracted by the predecessor State to meet the particular needs of the transferred territory. This rule may be stated very simply, but first it is necessary to define what is meant by a "special State debt". This definition will be given subsequently, together with others, in a chapter on use of terms.

238. At this stage, the following wording may be presented:

Article A. Definition of a special State debt (or localized State debt)

For the purposes of the present articles, special State debt (or localized State debt) means a State debt contracted by a central State organ to meet the special needs of a particular territory.

Article B. Assumption of special State debts by the successor State

When part of the territory of a State is transferred by one State to another State, the successor State shall, unless otherwise agreed, assume the special debts of the predecessor State relating to the transferred territory.

D. Local public debts guaranteed by the predecessor State

239. The problem referred to here should not concern this study, since it involves a local public debt, that is, a debt contracted by a local authority of an administrative district to meet purely local needs. It is not a State debt, but a local public debt proper to the transferred territory. Before the State succession, however, the State may have agreed to guarantee this purely local debt. It is the treatment of this *State guarantee*, backing a debt that is not itself a State debt, that should be dealt with in the present study. This guarantee provided by the

¹⁷⁸ See paras. 197-199 above.

State for a loan contracted by a local body or a secondary territorial authority imposes on that State a special obligation that may even, in the event of default by the principal debtor, lead to assumption of the debt by the guarantor State. The question is what becomes of this *State obligation* in respect of a local public debt contracted for the particular needs of a territory that has been transferred from one State to another.

240. While he cannot be sure that his research has been exhaustive, the Special Rapporteur has not found any precedents for this situation in State practice. However, once it is agreed that specialized State debts relating to the transferred territory pass to the successor State, it seems even more logical to favour the transfer to that successor State of a guarantee for a local debt, which necessarily follows the transferred territory. The local debt concerns only the ceded territory, whose debt it formerly was, and continues to be after the territorial change. As for the guarantee, it was given by the predecessor State, and it would seem natural that it should become an obligation transferred to the successor State.

241. A draft article might consequently be proposed specifying that this guarantee is transferred to the successor State. A definition of the "local debt", backed by the State guarantee, is probably necessary. It will subsequently be combined with the other definitions to form a chapter on use of terms.

It will be recalled that the Special Rapporteur provided the various elements for a definition of local debts when he discussed the various categories of debts in order to single out State debts. A local debt was accordingly described as a debt "(a) that is contracted by a territorial authority inferior to the State; (b) to be used by that authority in its own territory; (c) such territory has a degree of financial autonomy; (d) with the result that the debt is identifiable".¹⁷⁹ However, the Special Rapporteur offered these criteria as constituent elements of a definition of local debts in order to set off the definition of State debts, and the Commission may find this definition unnecessarily detailed for the limited purposes involved here. If so, only one or two simple elements of the definition could be used, together with a reference to the fact that the local debt may also have been contracted by a local public body or enterprise.¹⁸⁰

242. For the present, then, there would be the following two articles:

Article L. Definition of a local debt

For the purposes of the present articles, local debt means a public debt contracted by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.

[Variant:

Article L'. Definition of a local debt guaranteed by the State

For the purpose of the present articles, local debt guaranteed by the State means a public debt contracted, with the guarantee of the State, by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.]

¹⁷⁹ See para. 28 above.

¹⁸⁰ The Special Rapporteur so indicated when he contrasted State debts with debts of public enterprises (see paras. 30-32 above).

Article M. Transfer to the successor State of the obligation arising from the guarantee provided by the predecessor State for a local debt relating to the transferred territory.

When part of the territory of a State is transferred by one State to another State, the guarantee provided by the predecessor State for a local debt relating to the transferred territory shall, unless otherwise stipulated by treaty, be assumed by the successor State.

E. Exclusion of local debts contracted for local needs

243. These are debts proper to the transferred territory. Before State succession took place, they had never been included among the liabilities of the State to which the territory belonged. The occurrence of State succession does not have the effect of transforming these local debts into State debts suddenly devolving on the predecessor State and thus transferable to the successor State. The personal debts of a transferred territory relate to local interests and should quite naturally remain the responsibility of that territory. They are excluded from the present study.

F. Recapitulation of the draft articles proposed in this chapter

(1) GENERAL DEBT OF THE PREDECESSOR STATE

Article X. Definition of general State debt

For the purposes of the present articles, general State debt means a State debt contracted by a central State body to meet the general needs of the State.

Article Y. Exoneration of the successor State from any participation in the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall assume no part of the general debt of the predecessor State unless otherwise stipulated by treaty.

OR

Article Z. Contribution of the successor State to part of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall assume a part of the general debt of the predecessor State proportionate to the contributory capacity of transferred territory.

OR

Article YZ. Conditions for contribution of the successor State to a portion of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall be obligated for a part of the general debt of the predecessor State only if the contributory capacity of the transferred territory was of significant importance to the predecessor State.

In that case, the part of the general debt of the predecessor State to be borne by the successor State shall be determined on the basis of the previous contribution of the transferred territory to the financial resources of the predecessor State.

(2) SPECIAL DEBTS OF THE PREDECESSOR STATE

Article A. Definition of a special State debt (or localized State debt)

For the purposes of the present articles, special State debt (or localized State debt) means a State debt contracted by a central State organ to meet the special needs of a particular territory.

Article B. Assumption of special State debts by the successor State

When part of the territory of a State is transferred by one State to another State the successor State shall, unless otherwise agreed, assume the special debts of the predecessor State relating to the transferred territory.

(3) LOCAL DEBTS GUARANTEED BY THE PREDECESSOR STATE

Article L. Definition of a local debt

For the purposes of the present articles, local debt means a public debt contracted by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.

[Variant:

Article L'. Definition of a local debt guaranteed by the State

For the purpose of the present articles, local debt guaranteed by the State means a public debt contracted, with the guarantee of the State,

by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.]

Article M. Transfer to the successor State of the obligation arising from the guarantee provided by the predecessor State for a local debt relating to the transferred territory

When part of the territory of a State is transferred by one State to another State, the guarantee provided by the predecessor State for a local debt relating to the transferred territory shall, unless otherwise established by treaty, be assumed by the successor State.

244. Articles X, Y, Z, A, B, L, L' and M above might, of course, be quite easily rearranged in due course in two articles, one bringing together the defining provisions contained in articles X, A, L and L' and the other setting out, in separate paragraphs, the provisions of articles Y, Z, B and M.

CHAPTER V

Succession to debts in the case of newly independent States

A. Introduction

245. In the case of newly independent States, the problems relating to succession of States with respect to public debts have special aspects which, for the most part, make it more difficult to find acceptable and practical solutions. These special problems involve:

(a) In the case of decolonization, determining the categories of debt covered by this study on succession to "State debts";

(b) Determining the degree of financial autonomy of dependent territories at the time when the debts affecting them were contracted;

(c) Related to the question of budgetary autonomy, the problem of the allocation of the proceeds of the loan to the dependent territory, the actual utilization of the proceeds in that territory and, ultimately, the benefits it derived therefrom for its development;

(d) The political circumstances surrounding the change of sovereignty over the territory concerned, and the manner, whether peaceful or violent, in which decolonization took place;

(e) The significance of the precedents set by previous cases of decolonization with respect to debts (and, parallel to this, evaluation of contrary precedents related to colonization);

(f) The size of the financial burden to be borne by newly independent States, which inevitably imposes practical limitations on succession to debts.

Some of the points will be discussed below.

246. First, however, an objection has to be disposed of. It has been argued that decolonization is a closed chapter, belonging virtually only to the history of international relations. According to this argument, there is no need to include such cases in the typology of States succession. The Commission discussed this matter at its twenty-eighth

session.¹⁸¹ In point of fact, the chapter is not yet completely closed. Important parts of the world are still dependent, some, indeed, covering only small areas, but others larger, for example Rhodesia and Namibia in southern Africa, or Western Sahara in West Africa. Again, from another point of view, decolonization is still far from complete. If decolonization is taken to mean the end of a political relationship based on domination, it has reached a very advanced stage. Economic relations, however, which are vital, are much less easily cured of the effects of domination than political relations. Political independence is not real independence, and newly independent States long remain subject to domination in fact because their economy is dependent on the former metropolitan country, to which it remains firmly bound for many years.

247. It cannot be denied that the draft articles on succession to debts could prove useful not only to territories that are still dependent, for example Rhodesia, Namibia, Western Sahara, French Somaliland and Djibouti, Bermuda, Puerto Rico or those parts of northern Morocco that are under Spanish domination, but also to countries that have recently achieved political independence, for example Angola, Mozambique or Guinea-Bissau, and even to those that achieved political independence 15 or 20 years ago. In fact, the debt problem, including the servicing of the debt, the progressive amortization of the principal and the payment of interest, all extending over several years if not decades, is *the most typical example of matters covered by succession that long survive political independence*. The effects of problems of State succession in respect of State debts consequently continue to make themselves felt for many decades, and certainly longer than those relating to succession to treaties or succession to State property, in connexion

¹⁸¹ See in particular the explanation given by the Special Rapporteur at the 1393rd meeting (*Yearbook... 1976*, vol. I, pp. 182 *et seq.*).

with which the Commission has nevertheless devoted a chapter to decolonization.

248. Moreover, like the Commission, learned jurists continue to devote their attention to succession of States in the case of newly independent States. Recent studies, particularly those of the International Law Association,¹⁸² show that there is still need to devote attention to the problem of decolonization.

B. Succession to public debts in the context of colonization¹⁸³

249. Precisely because it entails a change of sovereignty benefiting the colonizing State, colonization gives rise to various problems in respect of succession of States, and in particular the problem of determining the extent to which the colonial successor State is willing or unwilling to assume responsibility for the debts of the conquered community. International practice is somewhat contradictory in this matter. Although some cases point to the acceptance of the succession as regards both liabilities and assets,¹⁸⁴ a much larger number of cases demonstrate the refusal of the colonial successor State to assume the financial responsibilities of the predecessor State. In so doing, the conqueror invokes various arguments, based on its sovereignty, or on the uncivilized nature of the predecessor State, or on the retention of a measure of legal personality by the subject community.

I. REFUSAL OF SUCCESSION TO PUBLIC DEBTS BASED ON THE SOVEREIGNTY OF THE SUCCESSOR STATE¹⁸⁵

250. According to this argument, the colonizer exercises sovereignty over the conquered territory only by its own volition. This is an obviously voluntarist point of view. The State will incur obligations only if it so wishes and only to the extent that it so consents. From this point of view, since the successor State did not itself contract the debt concerned, it cannot be bound by the obligations of the predecessor State. This is illustrated in a particularly striking manner by the succession of States in Madagascar.

(a) *Refusal of the French Republic to succeed to the Malagasy public debts*¹⁸⁶

251. The Malagasy public debt, and particularly the internal public debt, resulted of course from the financial effort made by the population of the island in its struggle against French conquest. Two loans had been granted to the Queen, in 1884-1885 and in 1893-1895. Once the

conquest had been completed, the problem of the debts of the Merina monarchy arose, and on at least two occasions the successor State repudiated those debts: first in the context of the protectorate established in Madagascar and, later, following the annexation.

252. Under the second protectorate treaty, of 1 October 1895, the French Republic ruled out any possibility of succeeding to the financial commitments of the Merina State. Article 6 of the treaty provided:

All expenditure on public services in Madagascar, as well as debt servicing, shall be covered by the Island's income.

The Government of Her Majesty the Queen of Madagascar undertakes not to contract any loan without the authorization of the Government of the French Republic.

The Government of the French Republic assumes no responsibility with respect to undertakings, debts or concessions contracted by the Government of Her Majesty the Queen of Madagascar before the signing of the present Treaty ...¹⁸⁷

This repudiation bears witness not only to the financial autonomy of Madagascar, but also quite simply to the free will of the French Government. The refusal was to be confirmed by the silence of the Annexation Act on this subject.

Annexation of Madagascar: silence of the Act of 6 August 1896 on the problem of the Malagasy public debts

253. This Act was preceded by a declaration by the French Government of 27 November 1895 concerning external debts, in which the following appeared:

As regards the obligations that the Hovas themselves may have contracted abroad, we shall, without having to guarantee them for our own account, follow strictly the rules of international law governing cases in which sovereignty over a territory is transferred as a result of military action.¹⁸⁸

Owing precisely to the ambiguity of this formula, it was not interpreted by anyone as implying acceptance by France of the Malagasy debt. On the contrary; according to one writer, "it made clear that, according to official French opinion, there is no rule of international law which compels an annexing State to guarantee or to assume the debts of annexed States".¹⁸⁹ This opinion was largely confirmed by the Annexation Act of 6 August 1896, which is significantly silent on the question of succession to the Malagasy debts.

If, by invoking its sovereignty, a State can refuse to assume the debts of the predecessor State, it can also, on the same voluntary ground, accept that succession. This is shown by the example of the Fiji Islands.

(b) *Acceptance of succession to debts "as an act of grace"*¹⁹⁰

254. The act of grace depends eminently on the will and sovereignty of the State; and if a State chooses to accept the debt of the predecessor State, it should not be forgotten in such cases that this acceptance is an exceptional concession. The principle remains the same as in

¹⁸² See International Law Association, *op. cit.*, p. 102.

¹⁸³ See in particular Bardonnet, *op. cit.*; D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I; Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 145-326; Feilchenfeld, *op. cit.*

¹⁸⁴ The annexation of Tahiti was such a case: Act of 30 December 1880 (see Feilchenfeld, *op. cit.*, p. 369).

¹⁸⁵ Bardonnet, *op. cit.*, particularly pp. 267-281.

¹⁸⁶ Sack, *Les effets des transformations des Etats ...*, p. 283; Bardonnet, *op. cit.*, pp. 267 *et seq.*

¹⁸⁷ See Feilchenfeld, *op. cit.*, p. 372, foot-note 20.

¹⁸⁸ *Ibid.*, p. 373, foot-note 22; Bardonnet, *op. cit.*, p. 275.

¹⁸⁹ Feilchenfeld, *op. cit.*, p. 373, including foot-note 23.

¹⁹⁰ O'Connell, *op. cit.*, p. 376.

the Malagasy example. It consists in the refusal to accept succession to the liabilities of the conquered territory. It was only at a later date and for *reasons relating to the situation prevailing at that time* that Great Britain agreed to settle the debts of the Fiji Islands. True, the islands "were not generally recognized as a member of the family of nations", a point, observes Feilchenfeld, "not officially stressed in the correspondence of the Colonial Office".¹⁹¹ This circumstance provides grounds both for denying the principle of succession in respect of the obligations of the predecessor State and for admitting that "as an act of grace" responsibility for some share of its debt might be accepted in some cases. The latter situation is rare, however, as is shown by the rejection of the Burmese debt.

2. REFUSAL OF SUCCESSION TO DEBTS ON THE GROUND THAT THE PREDECESSOR STATE IS NOT CIVILIZED: ANNEXATION OF BURMA (1886)¹⁹²

255. A colonized State was not part of the "family of nations".¹⁹³ Consequently it was denied the application of international law, especially where this would have worked to its advantage and entailed the liability of the colonizing State for the debts of the territory it had conquered. It was simpler to decide that, given "the rudimentary condition" of the indigenous inhabitants, they had "no rights under international law".¹⁹⁴ A justification was thus provided, as in the case of the annexation of Burma, for refusing to succeed to a public debt on the pretext that there was no regular public debt. This was tantamount to defining an "exception of underdevelopment based on the 'non-civilized' character of the society in question".¹⁹⁵ Such refusal to accept succession to the debts of colonized territories had the force a principle, even though in the relations between "civilized States" it was a rule that assumption of the debt of the predecessor State was obligatory. This seems to be borne out *a contrario* by a number of cases referred to by Lord Robert Cecil, acting as lawyer for the West Rand Central Company, which establish that:

by international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State: *Calvin's case* (1609), 4 Coke, 1; *Blankard v. Galdy* (1693), 2 Salk. 411; *Campbell v. Hall* (1774), 1. Comp. 204.¹⁹⁶

256. Not content with invoking its sovereignty or the "absence of civilization" of the conquered country as grounds for refusing to succeed to the debts of colonized territories, the colonizing State invoked yet a third argument, namely, the continuation in some cases of the financial autonomy of the conquered State.

3. REFUSAL OF SUCCESSION TO PUBLIC DEBTS ON THE GROUND THAT THE PREDECESSOR STATE RETAINS A MEASURE OF LEGAL PERSONALITY

257. This is the argument usually put forward when the colonization assumes for a time the form of a protectorate. The colonizing State claims that the protected State retains a degree of financial autonomy and hence must settle its debt with its own funds. There is thus refusal on the part of the colonizer to accept succession in respect of the debts of the protected State. This was demonstrated convincingly by article 6 of the second treaty relating to the protectorate over Madagascar, dated 1 October 1895, referred to above.¹⁹⁷ The annexation of the island was certainly not to lead to the payment by France of the Malagasy debt. The same refusal to succeed to the debts of the protected State on the pretext of the latter's financial autonomy is to be observed in the case of all the protectorates established at the end of the nineteenth century, for example, in Tunisia, Annam, Tonkin and Cambodia.¹⁹⁸

258. Similar behaviour on the part of the colonizer may be observed in the annexation of the "independent State" of the Congo by Belgium in 1908.¹⁹⁹ The treaty of cession of 28 November 1907, which in article 3 dealt with the succession of Belgium in respect of "all the liabilities and all the financial obligations of the independent State, as set forth in annex C",²⁰⁰ was soon contradicted by the "colonial charter" of 18 October 1908, which provided in article 1 that:

The Belgian Congo shall be an entity distinct from the metropolitan country.

It shall be governed by its own laws.

The assets and liabilities of Belgium and of the colony shall remain separate.

Consequently, the service of the Congolese debt shall remain the exclusive responsibility of the colony, unless otherwise provided by law.²⁰¹

259. Other examples could no doubt be cited. They would only confirm the indisputable fact that the colonizing States that call for succession to their debts in connexion with the contemporary decolonization process are the selfsame States that refused, on a variety of grounds, to succeed to the debts of the States which they colonized. Equity requires that these precedents, among others, should be taken into account.

C. State debts and decolonization: categories of debts covered

260. Before analysing State practice and various legal theories, it should be made very clear what is meant by State debts in the case of decolonization. Such clarifi-

¹⁹¹ Feilchenfeld, *op. cit.*, p. 293.

¹⁹² O'Connell, *op. cit.*, p. 378.

¹⁹³ Feilchenfeld, *op. cit.*, p. 287.

¹⁹⁴ J. Westlake, *Chapters on the principles of international law* (Cambridge, University Press, 1894), p. 144.

¹⁹⁵ Bardonnnet, *op. cit.*, p. 268, foot-note 7.

¹⁹⁶ Quoted by Sack, *op. cit.*, p. 282.

¹⁹⁷ Para. 252.

¹⁹⁸ See in particular Feilchenfeld, *op. cit.*, pp. 369-371; Bardonnnet, *op. cit.*, p. 269; O'Connell, *op. cit.*, p. 377.

¹⁹⁹ Feilchenfeld, *op. cit.*, p. 375.

²⁰⁰ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1910), third series, vol. II, p. 102.

²⁰¹ *Ibid.*, p. 109.

cation is absolutely essential if the tangle of different positions is to be sorted out. Jèze writes:

The precedents in this matter are interesting to study but are very varied; it is impossible to discern in them the application of a single legal theory. Moreover, they should not be assigned crucial importance: ideas have evolved considerably in the nineteenth and twentieth centuries.²⁰²

He then cites two contrary examples of the treatment of debts "when in fact the situations were similar" (the case of the independence of the American colonies, which refused to assume responsibility for the debt, and the case of the liberation of the colonies in Spanish America, which accepted part of the Spanish debt). This is true, but it would certainly be even more difficult to understand the welter of precedents or legal theories if the same types of debt were not referred to in each case.

It is necessary to specify the types of public debt that can exist when a dependent territory accedes to sovereignty.

1. EXCLUSION OF DEBTS PROPER TO THE DEPENDENT TERRITORY AND CONTRACTED BY ONE OF ITS AUTHORITIES

261. A *first category of debts* includes those that the dependent territory itself might have contracted in the exercise of its financial autonomy and through the intermediary of its central authority (Governor-General of a colony, Resident-General of a protectorate, as in certain former French dependencies. High Commissioner or Viceroy, as in other, formerly British, possessions). The non-indigenous colonial central authority is considered, through a legal fiction of colonization, an organ proper to the dependent territory. Such debts are therefore *proper to the territory*. They are the responsibility of the territory and of it alone. It should be stressed that what is at issue here is debts contracted *prior to the achievement of independence* by the territory in question and hence prior to State succession.

262. This category of debts does not concern the present study. The first reason that might be given to justify this assertion is that such debts were not the debts of a "State" but rather of a "dependent territory" that had not yet attained the status of a State. The nature of a debt is determined, from the standpoint of the status and personality of the debtor, at the time when the debt is contracted. In the present case, the debt was incurred prior to the independence of the territory, which did not yet exist as a State.

263. A second and still more compelling reason demands the exclusion of this category of debts from the scope of the present study. Succession of States is not concerned with what becomes of debts proper to a transferred territory; basically, it should answer the key question of what becomes of *the debts of the predecessor State*, and of those debts alone. The theory and practice of State succession will have fulfilled their objective when

they have shown whether, under what conditions, to what extent and in what proportion a particular debt may be transferred to the successor State.

264. Two circumstances are apt to create misconceptions or confusion in a situation that should remain clear in respect of this first category of debts proper to the dependent territory.

First, it may be observed that the newly independent State, which clearly has the status of successor State, has assumed these debts that are proper to the territory. However, the transfer of these debts to the successor State should not lead to the erroneous conclusion that they were transferred to it by the predecessor State as if they were latter's own debts. The successor State has in fact succeeded to them, but for a reason that is simpler and in any case unrelated to a claim that they are debts of the predecessor State. The fact is that the transferred territory and the territory of the successor State coincide geographically in the case of decolonization, unlike other cases of State succession, such as that of the transfer of part of a territory. In the case of decolonization, the debts of the dependent territory are identical with those of the successor State.

265. Secondly, it may be observed that the newly independent State, or successor State, ensures the servicing of the public debt following State succession, a circumstance that could create the false impression that it had inherited the debt by the mere fact of succession of States. Such, however, is not the case. For the dependent territory, and as regards the debts proper to it, State succession will have constituted a change of circumstances that will not have detracted from its obligation to assume—before, during and after succession—the servicing of the debt concerned. As regards this prior debt, proper to the dependent territory, that territory will have assumed the relevant obligations before accession to independence and during the phase in which State succession occurs. The fact that it continues to service the debt after State succession in no way signifies that it is liable for that debt under the rules of succession. The debt passes, as it were, through the phase of State succession without undergoing any change.

266. The fact that prior debts proper to the dependent territory may have been contracted with the administering Power is irrelevant as a justification for including them in the present study. The status of the creditor—whether a third State or the predecessor State—does not affect the issue. Indeed, if prior debts proper to the dependent territory were to be discussed here only because they had been contracted with the administering Power, it would be necessary in this study to deal with the *debt-claims of the predecessor State*, whereas the study is confined to that State's debts. The prior debts proper to the dependent territory are in fact identical with the debt-claims of the predecessor State if they were contracted with the administering Power.

267. Some time before his death, during an official visit to French-speaking Africa, the President of the French Republic, Mr. Georges Pompidou, decided to cancel a debt of about 1 billion francs owed by 14 African coun-

²⁰² Jèze, "L'emprunt dans les rapports internationaux ...", *loc. cit.*, p. 76.

tries, including Madagascar.²⁰³ That gesture, which was well received, does not fall within the scope of this study because, it may be recalled, the study is concerned not with the debt-claims of the predecessor State (in this case France), which are State property, but with the debts of that predecessor State.

268. By stating that prior debts proper to the dependent territory are outside the scope of the present study—and noting in passing that they are normally assumed by the successor State, since an identical territory is involved—the Special Rapporteur does not wish to assert that they must in *all circumstances* and in *all certainty* be assumed by the newly independent State. Such debts may be the subject of a dispute between the former administering Power and the successor State if the legitimacy of their inclusion in the autonomous budget of the dependent territory is subsequently contested by the newly independent State. It is possible—as has in fact occurred—to contest the power of the colonial authorities legitimately to commit the dependent territory (debts incurred without the consent of the inhabitants). It is also possible to question the utility of the loan for the development of the territory. That is the case with debts that were included in the autonomous budget of the colony when in fact they served to finance repression of the independence movement of the territory, development of lands colonized or settled by people from the metropolitan country, or promotion of an economy that was strictly complementary to that of the administering Power—an economy geared chiefly to the satisfaction of the latter's economic interests and proving difficult and costly to reconvert at the time of independence.

269. Thus Cuba liberated itself from Spain in 1898 (only to become a United States protectorate) and refused to assume the Spanish debts that had been used to attempt to repress the national liberation movements in the island.²⁰⁴ Similarly, Indonesia refused to assume as debts proper to the dependent territory those contracted by the Netherlands to repress various Indonesian insurrectionary movements.²⁰⁵ Algeria, as the last of the few examples cited, contested the inclusion in its autonomous budget on the eve of independence of debts relating to the financing of the struggle against its war of national liberation.²⁰⁶

270. However, the fact that such problems arise from time to time in the course of this study is clearly due less to the erroneous characterization of debts of this kind as prior debts proper to the dependent territory than to their true nature as State debts—debts of the predecessor State.

²⁰³ Act No. 74-648 of 18 July 1974 laying down the definitive regulations governing the 1972 budget, article 20, which "definitively cancels the outstanding entries in the account entitled 'Loans from the Economic and Social Development Fund', as well as the balance remaining payable as at 1 July 1972 from the advances granted for the financing" of the development programmes of those countries (*Journal officiel de la République française, Lois et décrets* (Paris, 20 July 1974), 106th year, No. 170, p. 7577.

²⁰⁴ See paras. 159 *et seq.* above.

²⁰⁵ See paras. 169 *et seq.* above.

²⁰⁶ See para. 334 below.

2. INCLUSION OF DEBTS CONTRACTED BY THE ADMINISTERING POWER ON BEHALF OF THE DEPENDENT TERRITORY

271. A *second category of debts* is fairly similar to the first, although not so much by reason of the procedure used as by the result sought. Instead of arranging for the debt to be contracted by the central authority of the still dependent territory (for example, the Governor-General of the colony), the government of the administering Power decided to assume a commitment on behalf of the dependent territory. The loan here may have been one that the metropolitan country contracted for the needs of the colony. But although the result is the same in both cases, namely, allocation of resources for the needs of the colony, the differences in the procedures employed result in distinctive characteristics for each category of debts: where action is taken by the colonial authorities of the dependent territory, the debts in question are proper to the territory, whereas in the second case, which involves the central government of the administering Power, the debts are State debts of that Power. The latter category, therefore, unlike the first, falls within the scope of the present study.

3. DEBTS PROPER TO THE DEPENDENT TERRITORY GUARANTEED BY THE ADMINISTERING POWER

272. A *third category of debts* proper to the dependent territory, assumed prior to independence, comprises debts contracted by that territory, *but with the guarantee of the administering Power*. That was the case in particular for most loans contracted between dependent territories and IBRD.²⁰⁷ The latter required a particularly sound guarantee from the administering Power.

273. The present study is necessarily concerned with this category of debts, but to the precise extent that the administering Power, i.e. the predecessor State, is itself concerned with these debts. The guarantee given is an undertaking that creates obligations on the part of the predecessor State, and the problem here is what becomes of the guarantee that the predecessor State has agreed to provide for debts that are not its own but those of the dependent territory. In other words, it is less a question of what becomes of the debt of the territory (which is in fact normally assumed by the newly independent successor State) than of what becomes of a firm guarantee provided by the administering Power.

²⁰⁷ Several examples may be given: Guarantee Agreement (Northern Rhodesia—Rhodesia Railways Project) between the United Kingdom and IBRD, signed at Washington on 11 March 1953 (United Nations, *Treaty Series*, vol. 172, p. 115); Guarantee Agreement (Rhodesia Railways Project) between the Federation of Rhodesia and Nyasaland and IBRD and the United Kingdom and the Colony of Southern Rhodesia and the Territory of Northern Rhodesia, signed at Washington on 2 October 1954 (*ibid.*, vol. 201, p. 179); Guarantee Agreement (Rhodesia Railways Project) between the United Kingdom and IBRD, signed at New York on 16 June 1958 (*ibid.*, vol. 309, p. 35); Guarantee Agreement (Kenya—Land Settlement and Development Project) between the United Kingdom and IBRD, signed at Washington on 29 November 1961 (*ibid.*, vol. 426, p. 49); Guarantee Agreement (Southern Rhodesia—Electric Power Project) between the United Kingdom and IBRD, signed at Washington on 27 February 1952 (*ibid.*, vol. 159, p. 181); Guarantee Agreement (Kariba Project) between the United Kingdom and IBRD, signed at Washington on 21 June 1956 (*ibid.*, vol. 285, p. 317).

274. All guarantee agreements concluded between IBRD and an administering Power for a dependent territory include two important articles, II and III.

Article II

Section 2.01. Without limitation or restriction upon any of the other covenants in this Agreement contained, the Guarantor hereby unconditionally guarantees, *as primary obligor and not as surety merely*, * the due and punctual payment of the principal of, and the interest and other charges on, the Loan ...

Section 2.02. Whenever there is reasonable cause to believe that the Borrower will not have sufficient funds to carry out or cause to be carried out the Project in conformity with the Loan Agreement, the Guarantor will, in consultation with the Bank and the Borrower, take appropriate measures to assist the Borrower to obtain the additional funds necessary therefor.

Article III

Section 3.01. It is the mutual understanding of the Guarantor and the Bank that, except as otherwise herein provided, the Guarantor will not grant in favour of any external debt any preference or priority over the Loan ...

As may be seen, the guarantee unconditionally binds the predecessor State *as primary obligor and not as surety merely*. This type of obligation must therefore be examined and assimilated, as it were, to the study of the State debts for which the predecessor State is responsible.

4. EXCLUSION OF DEBTS RELATING TO THE SETTLEMENT OF SUCCESSION OF STATES AND ARISING *EX POST FACTO*

275. A *fourth category of debts of the newly independent State* must be carefully isolated from the others. These are debts that are charged to, or indeed imposed on, the newly independent State as the price, so to speak, for its accession to sovereignty. They include miscellaneous debts resulting from the take-over by the newly independent State of all public services, and assumed by it as compensation for the take-over or in respect of the repurchase of certain property.

276. This category of debts arises *during* State succession or even during the closure or discharge of succession, unlike the other categories of debts, which existed *before* the territorial change. This fourth type does not concern the present inquiry; first, because succession of States concerns debts existing at the date on which succession begins and, secondly, because subsequent debts are completely different and presuppose that the problem of succession of States has already been resolved, since they correspond to what the successor State must pay for the final settlement of State succession. They are debts *ex post* and not *ex ante*. Finally, and above all, they are not *debts of the predecessor State*—the only ones involved in succession of States—but *debt-claims* of the predecessor State against the successor State for the settlement of a dispute arising on the occasion of this succession of States.

5. EXCLUSION OF THE NATIONAL PUBLIC DEBT OF THE ADMINISTERING POWER

277. A *fifth and last category of debts* that might, in theory at least, be relevant to this study are debts that were contracted by the predecessor State for its own

account and for national metropolitan use, but part of which, it decided, should be borne by its various dependent territories. This category covers two kinds of cases. The first goes back to the time of the colonial empires which supplied resources and raw materials able to “cover” the metropolitan loan. It has now disappeared and is too archaic to concern the present attempt at codification. The second is not so remote but is nevertheless exceptional: in order to face a national or international danger (the First or Second World War), the colonial Power may have contracted loans to sustain its war effort and associated its overseas territories in such ventures by requesting them to contribute. Such a case, which is perfectly conceivable and has indeed occurred in practice, is to be distinguished from the case already mentioned by the Special Rapporteur, in which the war effort of the colonial Power was directed against the dependent territory itself. Here the reference is to an international war involving a number of Powers, which associate their respective dependent territories in their war efforts. However, the Special Rapporteur will disregard this fifth category of debts, which has really become quite exceptional.

278. To sum up, the following debts are not relevant to this study: prior debts proper to the dependent territory and contracted by one of its authorities; debts for the settlement of succession of States arising *ex post facto*; and national debts of the administering Power. The study will deal with prior debts contracted by the administering Power for and on behalf of the dependent territory and with prior debts contracted directly by the dependent territory but with the guarantee of the administering Power.

D. Treatment of State debts in early cases of decolonization

279. Gaston Jèze writes:

Here are two contrary examples that concern the basic principle of participation [in debts] when in fact the situations were similar: I. in the late eighteenth century, in 1783, the *American colonies* which had become independent from England refused to make any contribution whatsoever to the British public debt; II. conversely, in the early nineteenth century, in 1823, the *Spanish-American colonies* which had revolted against the metropolitan country and had become sovereign States took over a part of the Spanish public debt.²⁰⁸

1. INDEPENDENCE OF THE SPANISH COLONIES IN AMERICA

280. The case dealt with by Jèze is one that the Special Rapporteur has disregarded as being archaic: the metropolitan country, at the time of the old colonial empires, was able to cover a part of its *own national debt* by appropriating some of the resources or raw materials of the colonies.²⁰⁹ The American colonies had broken

²⁰⁸ Jèze, “L’emprunt dans les rapports internationaux...”, *loc. cit.*, p. 76. See also J. B. Moore, *A Digest of International Law* (Washington, D.C., Government Printing Office, 1906), vol. I, pp. 342 and 343.

²⁰⁹ See para. 277 above.

with England mainly for economic and financial reasons, and it was therefore in no way surprising that they refused to take over any part of the national debt of the predecessor State.

281. If the archaic cases of unlimited colonial exploitation of all the resources of a colony are excluded, it may be observed that, with certain rare exceptions and apart from the loans contracted by the administering Power to fight European wars, it has never been maintained that a colony should contribute to a debt contracted by the metropolitan country for its own national needs. In spite of the fact that overseas possessions were considered under the colonial law of the time as a territorial extension of the metropolitan country, and forming a single territory with it, it did not occur to writers that any part of the national public debt of the metropolitan country should be imposed on those possessions. This was a natural solution, according to Jèze, because "the creditors (of the metropolitan country) could not reasonably assume that their debts would be paid out of the resources to be derived from the financially autonomous territory".²¹⁰ From this viewpoint, the precedent of the Spanish-American colonies which had revolted against Spain would indeed have been surprising *had it really had the meaning attributed to it in the literature*. However, the Special Rapporteur's investigations support the view that what was involved was not a participation of the former Spanish-American colonies in the *national* debt of the *metropolitan* territory of Spain, but an assumption by those colonies of State debts, admittedly of Spain, but contracted by the metropolitan country on behalf and for the benefit of its overseas possessions. This, then, is quite another matter. It must also be pointed out that in certain treaties there was a desire to achieve a "package deal" involving various reciprocal compensations rather than any real participation in the debts contracted by the predecessor State for and on behalf of the colony.

282. Article 7 of the Treaty of Peace and Friendship, signed at Madrid on 28 December 1836 between Spain and newly independent Mexico, reads as follows:

Considering that the Mexican Republic, by a Law passed on the 28th of June 1824, in its General Congress, has voluntarily and spontaneously recognized as its own and as national, all debt contracted *upon its Treasury* * by the Spanish Government of the Mother Country and by its Authorities, during the time they ruled the now independent Mexican Nation, * until, in 1821, they entirely ceased to govern it ..., Her Catholic Majesty ... and the Mexican Republic, by common accord, desist from all claim or pretension which might arise upon these points, and declare that the 2 High Contracting Parties remain free and quit from henceforward for ever from all responsibility on this head.²¹¹

It is thus perfectly clear that, by its unilateral statement, independent Mexico had taken over only those debts of the Spanish State that had been contracted for and on behalf of Mexico and had already been charged to the Mexican Treasury.

²¹⁰ Jèze, "L'emprunt dans les rapports internationaux...", *loc. cit.*, p. 74.

²¹¹ *British and Foreign State Papers, 1835-1836* (London, Ridgway, 1853), vol. 24, p. 864.

283. Article 5 of the Treaty of Peace, Friendship and Recognition, signed at Madrid on 16 February 1840 between Spain and Ecuador, in turn provided that:

The Republic of Ecuador ... [recognizes] voluntarily and spontaneously *every debt contracted upon the credit of its Treasury, whether by direct orders of the Spanish Government or by its authorities established in the Territory* * of Ecuador, provided that such debts are always registered in the account books belonging to the treasuries of the ancient kingdom and presidency of Quito, or provided that it is shown through some other legal and equivalent means that they have been contracted within the said Territory by the said Spanish Government and its authorities while they administered the now independent Ecuadorian Republic, until they ceased governing it in the year 1822 ...²¹²

284. It will be noted that, in terms of the different categories of "colonial" debts established in this study,²¹³ the same approach is adopted in the two treaties to *State debts of Spain* contracted by the latter for and on behalf of the dependent territory and to debts contracted by an *organ of the colony*, the latter being in fact debts proper to the dependent territory. However, the solution whereby both categories of debts passed to the successor was legally correct, although that would not have been the case had it been demonstrated that they were debts of Spain improperly charged to the treasury of the colony, as occurred later in the Cuban affair of 1898.²¹⁴

285. A provision more or less similar to the one in the other treaties mentioned above may be found in article V of the Treaty of 30 March 1845 between Spain and Venezuela, in which Venezuela recognized.

as a national debt ... the sum to which the debt owing by the Treasury of the Spanish Government amounts and which will be found entered in the ledgers and account books of the former Captaincy-General of Venezuela, or which may arise from other fair and legitimate claims.²¹⁵

Very similar wording occurs in article IV of the Spanish-Argentine treaty of 9 July 1859 and in article IV of 19 July 1870 between Spain and the Eastern Republic of Uruguay.²¹⁶

286. A single case, to the knowledge of the Special Rapporteur, is surprising because of the extent of the categories of debts assumed by the successor State, and conflicts with the other Spanish-American precedents, several of which have been recalled above. This relates to the independence of Bolivia. A Treaty of Recognition,

²¹² Marqués de Olivart, *Colección de los Tratados, Convenios y Documentas Internacionales* (Madrid, El Progreso Editorial, 1890), vol. I, pp. 144-145.

²¹³ See paras. 261-278 above.

²¹⁴ See paras. 159 *et seq.* above.

²¹⁵ *British and Foreign State Papers, 1846-1847* (London, Harrison, 1860), vol. 35, p. 302.

²¹⁶ See *British and Foreign State Papers, 1859-1860* (London, Ridgway, 1867), vol. 50, p. 1161; and *ibid.*, 1876-1877 (1884), vol. 68, p. 459. See also article V of the Treaty between Spain and Costa Rica of 10 May 1850 (*ibid.*, 1849-1850 (Harrison, 1863), vol. 39, p. 1341); article V of the Treaty between Spain and Nicaragua of 25 July 1850 (*ibid.*, p. 1333); article IV of the Treaty between Spain and Guatemala of 29 May 1863 (*ibid.*, 1868-1869 (Ridgway, 1874), vol. 59, p. 1200); article IV of the Treaty between Spain and El Salvador of 24 June 1865 (*ibid.*, 1867-1868) (1873), vol. 58, pp. 1251 and 1252) and others.

Peace and Friendship signed between Spain and Bolivia on 21 July 1847 provides in article V that:

The Republic of Bolivia ... has already spontaneously recognized, by the law of 11 November 1844, *the debt contracted against its Treasury, either by direct orders of the Spanish Government,** or by orders emanating from the established authorities of that Government in the Territory of Upper Peru, now the Republic of Bolivia ... and [recognizes] as consolidated debt of the Republic, in the same category as the most highly privileged debt, *all the credits, of whatever description, for pensions, salaries, supplies, advances, freights, forced loans, deposits, contracts and every other debt, either arising from the war or prior thereto,** which are a charge upon the aforesaid Treasury, provided always that such credits proceed *from the direct orders of the Spanish Government** or of their established authorities in the provinces which now form the Republic of Bolivia ...²¹⁷

Consequently this article covers even war debts or régime debts, which are normally excluded from succession, and which the same administering Power—Spain—was unable to impose on Cuba in 1898.²¹⁸

287. From all the foregoing it may be concluded that, in addition to debts contracted on behalf of the colony by a local organ of that colony (debts that should not concern this study since they are debts proper to the dependent territory which it should naturally assume after attaining independence), *the newly independent State assumed the debts contracted by the Spanish State for and on behalf of the colony.* It is perfectly clear, however, that the South American republics which achieved independence did not seek to determine whether the metropolitan country had been fully justified in including the debt among the liabilities of their respective treasuries. The inclusion of that debt in the accounts of the treasury of the colony by the metropolitan country *was based on an assumption* that the debt had been concluded on behalf and for the benefit of the colony. As will be seen in connexion with the Cuban debts in 1898, that assumption came under heavy, and indeed pulverizing, attack. As a result, the precedents set by the South American republics were not followed in subsequent cases. The same was true of the excessively broad provisions (encompassing even war debts) under which Bolivia accepted in 1847 the transfer of debts that normally should not have concerned the newly independent State.

2. INDEPENDENCE OF THE BRITISH COLONIES IN AMERICA

288. There remains the North American precedent which, by contrast, involved the total rejection of any transfer of debts to the 13 colonies that had become independent of the British Crown. The implications of that precedent were minimized by Spain when it was involved in a confrontation with the United States in 1898. During the negotiations following the Spanish-American War, the Spanish delegation asserted that, according to certain publicists, the American colonies that had become independent had contributed £15 million to the payment of the British national debt. The United States delegation vigorously rejected that assertion, pointing out that no relevant treaty and no American

text or declaration contained any stipulation of the kind referred to and that in fact no contribution to the payment of the British national debt had been agreed to by the 13 American colonies after they achieved independence.²¹⁹

3. INDEPENDENCE OF BRAZIL FROM PORTUGUESE COLONIZATION

289. The North American precedent was confirmed by another when Brazil freed itself from Portuguese colonization. During the negotiations in London in 1822, the Portuguese Government claimed that part of its national debt should be assumed by the new State. In a dispatch of 2 August 1824 the Brazilian plenipotentiaries informed their government of the way in which they had opposed that claim, which they deemed inconsistent with the examples furnished by diplomatic history. The dispatch states:

Neither Holland nor Portugal itself, * when they separated from the Spanish Crown, paid anything to the Court of Madrid in exchange for recognition of their independence; recently, the United States likewise paid no monetary compensation to Great Britain for similar recognition.²²⁰

The treaty between Brazil and Portugal of 29 August 1825 resulting from the negotiations in fact made no express reference to the transfer of part of the Portuguese State debt to Brazil. However, since there were reciprocal claims involving the two States, a separate instrument—an additional agreement of the same date—placed upon Brazil the responsibility for paying upon £2 million sterling as part of a package deal designed to liquidate those reciprocal claims.

4. END OF SPANISH DOMINATION OF CUBA

290. The Anglo-American precedent of 1783 and the Portuguese-Brazilian precedent of 1825 were reinforced when the Latin American precedents were disregarded following the war between the United States and Spain that ended with the Peace Treaty of Paris of 1898.²²¹ The charging of Spanish State debts to the budget of Cuba by Spain was contested. The assumption that charging a debt to the accounts of the Cuban treasury meant that the debt had been contracted on behalf and for the benefit of the island was successfully challenged by the United States plenipotentiaries. In fact, Cuba did not succeed to the Spanish State debt relating to the island. The example virtually follows the precedent set by the 13 American colonies liberated in 1783 and the Brazilian case of 1825. The Treaty of Paris of

²¹⁹ Feilchenfeld, *op. cit.*, p. 54, foot-note 95.

²²⁰ Dispatch of 2 August 1824, in *Archivo diplomático da independência*, vol. II, p. 95, cited by H. Accioly in *Traité de droit international public* (Paris, Sirey, 1940), pp. 198 and 199 (French translation by P. Goulé). Unless the plenipotentiaries were expressing themselves somewhat loosely, which would be surprising, it was thus less a question of Brazil's taking over part of the Portuguese State public debt than of the payment of "compensation" in exchange for "recognition of independence".

²²¹ The literature refers to the "independence" of Cuba. But it is perfectly obvious that at that time Cuba freed itself from the domination of Spain only to become subject to that of the United States.

²¹⁷ *Ibid.*, 1868-1869 (1874), vol. 59, p. 423.

²¹⁸ See paras. 159 *et seq.* above.

10 December 1898 freed Spain only from liability for debts proper to Cuba, that is, debts contracted after 24 February 1895 and the mortgage debts of the municipality of Havana; it did not allow succession to any portion of the Spanish State debt that Spain had charged to Cuba. Gaston Jèze writes in this connexion: "This national debt had not been contracted by Cuba; it had been contracted by *Spain and for Spain** and had then been arbitrarily charged to Cuba."²²²

5. THE LESSONS OF EARLY DECOLONIZATION

291. The time has come to draw some general lessons from the decolonization of the New World.

The accession of the British colonies in America to independence (1776-1783) was accompanied by refusal to assume any part of the British State debt. The reasons for this seem quite obvious. It should be remembered that this case, unlike other cases of colonization, in no way involved racial and ethnic subjugation in addition to economic exploitation. The accession of the British colonies in America to independence involved a conflict between Europeans. The real goal of the colonies in seeking independence was in fact financial autonomy. "No taxation without representation" was the slogan of the time. The reason for the outbreak of the War of Independence was thus primarily a financial dispute. It was therefore quite natural that the American colonies, having become independent, should have been unwilling to make financial concessions. It should also be noted that independence was obtained by means of a war; hence there was rupture rather than continuity, at least in the matter of finance, which was at the heart of the dispute.

292. With regard to the achievement of independence by the Spanish-American countries in the early nineteenth century, it is necessary to stress the major fact that the Spanish State debts were assumed by a unilateral act, generally through internal laws, as was the case in Mexico, Bolivia, Guatemala and Chile, even before the conclusion with Spain of treaties that often merely took note of the provisions of these internal laws. However, none of these Spanish-American treaties contained provisions recognizing as an incontestable rule of law the principle of succession to State debts contracted by the former colonial Power in the colony. Most of the relevant treaty provisions stated that what was involved was a "voluntary and spontaneous" decision by the newly independent State and confined themselves to taking note of that fact.²²³

293. Moreover, as in the North American colonies, nineteenth-century decolonization was brought about not by the indigenous population of the South American dependent territories, but by European colonists who—like those in modern Rhodesia—had reasons for

²²² Jèze, "L'emprunt dans les rapports internationaux...", *loc. cit.*, p. 84. For more details on the Cuban case of 1898, see paras. 159 *et seq.* above; see also Feilchenfeld, *op. cit.*, pp. 329-343, and Moore, *op. cit.*, pp. 351 *et seq.*

²²³ Possible exceptions are the provisions of the treaties between Spain and Argentina (9 July 1859) and Spain and Uruguay (19 July 1870 and 22 August 1882).

desiring a break with the metropolitan country. Contemporary international law did not recognize the existence of a rule of law to the effect that the territory that became independent should succeed to State debts. In so far as succession to debts was accepted by the former Spanish colonies in America, these precedents bear a marked similarity to the case of separation of part of a territory. The comparison is strengthened by what the aforementioned treaties significantly referred to as identity of ethnic origin between the artisans of South American secessions and the inhabitants of the Spanish "mother country".²²⁴ These precedents could thus serve in the context of other types of State succession.

294. It should also be noted that the nineteenth-century treaties between Spain and the new South American Republics were concluded after uprisings or wars of independence that constituted a form of rupture, especially at the financial level. It had been quite easy for Spain to float loans, which it had used for its national territory or its colonies, the latter being richer than Spain itself, and it was in the interests of the overseas dependent territories to escape from the position of principal debtor in which Spain had placed them by charging the corresponding debt to their treasuries. Furthermore, the rich store of raw materials possessed by those colonies constituted both the reason for their desire for independence and the means of acquiring it. Spain was in a less advantageous position from that standpoint. In that sense, acceptance by the former colonies of the Spanish State debts more or less legitimately charged to the treasuries of the various dependent territories was the price of "peace and friendship with Spain" (a phrase that appears in the title of all the treaties concluded to end the wars of independence).

All these practical considerations lend the decolonization that occurred in North and South America in the eighteenth and nineteenth centuries its specificity and its distinctive character.

E. Treatment of State debts in decolonization occurring since the Second World War

295. It seems appropriate to recall the Special Rapporteur's intention to confine his study essentially to two categories of debts that prove to be the only ones affected by the phenomenon of succession of States properly speaking. These are, first, debts contracted by the predecessor State for and on behalf of a dependent territory and, second, debts proper to the dependent territory contracted prior to independence, but with the guarantee of the administering Power.

296. The practice of the newly independent States of Asia and Africa in respect of these two categories of debts is far from uniform. There are precedents both in favour of succession and against, and even cases of

²²⁴ As noted in paragraph 289 above, the Brazilian plenipotentiaries at the London negotiations told their Portuguese counterparts that a comparison could be made between the "separation" of part of Brazil from Portugal and the separation of Holland and Portugal from Spain.

repudiation of debts after their acceptance. This is apparent from a study of the cases that follow; the Special Rapporteur wished to avoid overburdening the report by including a complete catalogue of all the newly independent States.

1. CASE OF THE PHILIPPINES (1946)

297. It was in connexion with the Philippines that Professor Rousseau could write: "This is one of the rare cases in which the transfer of debts was correctly managed".²²⁵ What debts were these and what was the context? The answer to those two questions may perhaps be sought mainly in the Tydings-McDuffie Act of 24 March 1934. This is the Act "by which the United States created the machinery for independence of the Philippines", according to Professor O'Connell.²²⁶

298. The Act states (section 2, b, para. 3) the principle succession to debts contracted during the colonial period. A distinction is made, however, between the bonds issued by the Philippines with the authorization of the United States prior to 1 May 1934 and other public debts. It is the first of these categories of debts, involving a form of guarantee by the United States, that more directly concerns this study.

What was to become of these debts, which had been authorized, if not guaranteed, by the United States? In principle, the answer to this question was succession of the archipelago to this type of debt, as well, indeed, as to other debts. It is necessary, however, to clarify the principle by referring to the section of the Tydings-McDuffie Act concerning debts incurred subsequently to 1 May 1934, for which the United States declined all responsibility. This implies *a contrario* that, "under this provision, the American Congress acknowledged the obligation of the United States, in the event of default by the Philippines, to reimburse the public debt contracted prior to that date, following authorization given by an American law".²²⁷

299. To guard against any default by the Philippines, the United States had to impose "special measures regarding debts for which it believed it was assuming a certain responsibility".²²⁸ Those measures were set out in the Act of 7 August 1939, which allocated the proceeds of export taxes to the United States Treasury for the establishment of a special fund to cover debts contracted by the Philippines with United States authorization.

300. Finally, under the Tydings-McDuffie Act of 24 March 1934, supplemented by the Act of 7 August 1939, the Philippines was never to repudiate loans authorized by the predecessor State. This principle of succession was to be confirmed by the Constitution of the Philippines of 8 February 1935 and by the Treaty between the United States and the Philippines of 4 July 1946.

²²⁵ Rousseau, *op. cit.*, p. 450, No. 326.

²²⁶ O'Connell, *op. cit.*, p. 433.

²²⁷ G. Fischer, *Un cas de décolonisation—Les Etats-Unis et les Philippines* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 264.

²²⁸ *Ibid.*, p. 265.

2. CASE OF INDIA AND PAKISTAN (1947)

301. This is yet another example of the successor State accepting the debts of the predecessor State. It would be more correct to speak of successor States; in fact this was a two-stage succession as a result of the partition, Pakistan succeeding to India, which had succeeded to the United Kingdom. As O'Connell writes:

There was no direct repartition of the debts between the two Dominions. All financial obligations, including loans and guarantees, of the central government of British India remained the responsibility of India.²²⁹

302. It does not appear that many distinctions were made regarding the different categories of debt. Only one appears to have been made by the Committee of Experts. This concerned the public debt, composed of long-term loans, Treasury bonds and special loans, as against the unfunded debt, which comprised savings bank deposits and bank deposits. These various obligations were assigned to India, but it is hard to tell whether they were debts proper to the dependent territory, which would have devolved upon it in any event, or debts of the predecessor State, which would thus have been transferred to the successor State.

303. The problem to which the Committee of Experts devoted most attention appears to have been that of establishing the modalities for apportioning the debt between India and Pakistan, as is apparent from section 9 of the Indian Independence Act of 1947. An agreement of 1 December 1947 between the two States was to embody the practical consequences of this and determine the respective contributions. This division was subsequently denounced by Pakistan. (Such problems relating to separation of States will be considered in greater detail in the context of a more appropriate typology of succession.)

3. CASE OF INDONESIA (1949-1956)

304. The debt problems arising from the succession of Indonesia to the Kingdom of the Netherlands were resolved essentially in two instruments: the Round Table Conference Agreements signed at The Hague on 2 November 1949,²³⁰ and the Indonesian Decree of 15 February 1956 repudiating the debts, Indonesia having denounced the 1949 Agreements on 13 February.

The Financial and Economic Agreement (which was only one of the Round Table Conference Agreements) specified the debts that Indonesia agreed to assume.²³¹ Article 25 distinguished four series of debts: (a) a series of six consolidated loans; (b) debts third countries; (c) debts to the Kingdom of the Netherlands; (d) Indonesia's internal debts.

305. The last two categories of debts, which need not be taken into consideration in this study, may be dismissed at once.

Indonesia's debts to the Kingdom of the Netherlands were in fact debt-claims of the predecessor State, and thus

²²⁹ O'Connell, *op. cit.*, p. 404.

²³⁰ United Nations, *Treaty Series*, vol. 69, p. 3.

²³¹ *Ibid.*, pp. 252-258, draft financial and economic agreement, articles 25-27.

do not concern this study. Moreover, those debts were specifically settled in article 27 of the financial and economic agreement, which provided that:

The remaining debts of the Body-Corporate of Indonesia to the Kingdom of the Netherlands at the date of transfer of sovereignty shall be deemed cancelled after the debts of the Kingdom of the Netherlands to the Body-Corporate of Indonesia at the same date have been offset, which involves a reduction of the external debt due to the Netherlands by the sum, calculated as of 31 December 1949, of 2 billion Netherlands guilders.

"All internal debts of Indonesia at the date of transfer of sovereignty" should also be eliminated. These debts, so described in article 25, paragraph D, of the above-mentioned agreement, are excluded by definition from this study.

306. Only the debts of the predecessor State and their assignment need concern this study. It should be noted, however, that this category was very inadequately defined and the predecessor State was later able, by adding to it unduly, to include debts that could be described as war debts or odious debts. It was in fact only after a long and hard struggle to maintain itself in the "East Indies" that the Netherlands recognized the sovereignty of Indonesia. Such undue assumption of "odious debts" may well have been a factor in the denunciation and repudiation of the debt in 1956.²³²

That leaves the first two categories of debts to be considered.

307. The consolidated debts²³³ consisted of a series of loans issued before the Second World War, which some writers consider were contracted by Indonesia "on its own behalf and for its own account"²³⁴ on the ground that Indonesia had possessed legal personality since 1912. This point of view appears very much open to question. In reality, *these loans had been contracted under Netherlands legislation*,²³⁵ and thus by the metropolitan country for the account of the dependent territory. It should, moreover, be noted that some of the sums to be paid were only "Indonesia's share of the Netherlands National Consolidated Debt".

308. Debts to third countries,²³⁶ according to article 25 of the financial and economic agreement, comprised the following: (1) "Loan of the Export-Import Bank on behalf of Indonesia"—this bank is a United States bank and the loan was issued under the Marshall Plan under an agreement of 28 October 1948; (2) "A line of credit granted by the United States Government to the Netherlands Indies Government for the purchase of United States surplus property (agreement of 28 May 1947)";

²³² See "L'Indonésie répudie sa dette envers les Pays-Bas", in *Libre Belgique* of 12 August 1956, reproduced in: France, Présidence du Conseil et Ministère des affaires étrangères, *La documentation française—Problèmes économiques* (Paris, 28 August 1956), No. 452, pp. 17 and 18.

²³³ Paenson, *op. cit.*, p. 77.

²³⁴ Rousseau, *op. cit.*, p. 451. On the same subject, see O'Connell, *op. cit.*, p. 437.

²³⁵ Details of these loans are given in article 25 of the financial and economic agreement of 2 November 1949.

²³⁶ Paenson, *op. cit.*, p. 77.

(3) "Loan from Canada (agreement of 9 October 1945)"; (4) "Settlement between the Government of Australia and the Government of Indonesia (agreement of 17 August 1949)".

309. The Special Rapporteur understands that, during the Round Table Conference, Indonesia brought up the problems relating to the degree of autonomy that its organs had possessed by comparison with those of the metropolitan country at the time when the loans had been contracted. The Indonesian plenipotentiaries also, and in particular, referred to the problem of the assignment, utilization of and benefit derived from those loans by the territory. However, there appears to be no doubt that the results of the negotiations at The Hague constituted a package deal, as often occurs in such cases. Moreover, it should not be forgotten that at that time the negotiations had led to the creation of a "Netherlands Indonesian Union". When that Union was dissolved in 1954, the Round Table Conference Agreements of 1949 lost their validity. Indonesia's repudiation of all debts occurred in 1956.

4. CASE OF LIBYA

310. As far as Libya is concerned, the General Assembly of the United Nations resolved the problem of succession of States, including succession to debts, in resolution 388 A (V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya", article IV of which stated that "Libya shall be exempt from the payment of any portion of the Italian public debt".

5. CASE OF GUINEA (1958)

311. Guinea acceded to independence in 1958, following its negative vote in the constitutional referendum of 28 September of the same year establishing the Fifth Republic and the French Community. "Rarely in the history of international relations has a succession of States begun so abruptly", writes Professor Gonidec.²³⁷

Since that time, relations between the former colonial Power and the new State have been particularly difficult. The implementation of a monetary reform in Guinea led to that country's leaving the franc area. In addition, diplomatic relations were long severed. This combination of factors was not conducive to the swift solution of problems of State succession arising some 20 years earlier. However, a trend towards settlement seems to have emerged since the resumption of diplomatic relations between the two States in 1975. But apparently the problem of debts has not assumed significant importance in the relations between the two States; it seems to be reduced essentially to questions regarding civilian and military pensions.

²³⁷ Quoted by G. Tixier, "La succession à la régie des chemins de fer de l'AOF", *Annuaire français de droit international*, 1965, vol. XI (Paris, 1966), p. 921.

6. CASE OF MADAGASCAR (1960)²³⁸(a) *Type of debts to which State succession applied in Madagascar*

312. According to the definition adopted by the Special Rapporteur, succession to debts concerns only debts contracted by the predecessor State on its own initiative but on behalf of the colony, or loans subscribed by the latter but guaranteed by the administering Power.

In Madagascar, the types of debts fell for the most part into the latter category. Madagascar, like all former French overseas territories in general, had legal personality, implying a degree of financial autonomy. The island was thus able to subscribe loans and exercised that right on the occasion of five public loans, in 1897, 1900, 1905, 1931 and 1942.

313. These loans constituted debts proper to Madagascar, at least at first sight, and thus should not come within the scope of the present study. In fact, however, they remained subject to a legal régime implying so great a degree of intervention on the part of the metropolitan administering Power that they could rightly be considered debts of the latter, at least as regards the guarantee given by it, without which the loans would not have been granted.

(b) *Legal régime governing the Malagasy loans*

314. Two stages can and must be distinguished: (a) that of the apparent decision, falling within the competence of the dependent territory; (b) that of the actual decision, falling within the competence of the administering Power.

315. The *decision of principle* to issue the loan was made in Madagascar by the Governor-General, who was given the views of various administrative organs and economic and financial delegations. Had the process stopped there, and had it been possible for the public actually to subscribe to the loan, the debt would have been contracted simply on the basis of the financial autonomy of the dependent territory. It would then have had to be termed a "debt proper to the territory" and could not have been attributed to the predecessor State; consequently, it would not have been considered in the present report.²³⁹

316. In fact, *the effective decision* depended upon the administering Power, so that the decision-making process, begun in Madagascar, was completed *only within the framework of the laws and regulations of the central government of the administering Power*. Approval could

²³⁸ To avoid a cumbersome list, the Special Rapporteur will confine himself to the case of Madagascar to illustrate the decolonization, in 1960, of the countries of French-speaking black Africa. He has available for this purpose a particularly scholarly work, that of Daniel Bardonnnet: *La succession d'Etats à Madagascar—Succession au droit conventionnel et aux droits patrimoniaux* (Paris, Librairie générale de droit et de jurisprudence, 1970). See in particular pp. 645-659.

²³⁹ For a different reason, the first Malagasy loan of 1897 must be set aside. It was subscribed for a term of 60 years, and redemption was completed in 1957. Whether it is defined as a debt exclusive to the territory or a debt of the metropolitan country, this loan clearly does not concern succession of States. It remains an exclusively colonial affair. The other loans, by contrast, concern succession of States because their financial consequences continued in the context of decolonization.

have been given either by a decree adopted in the Conseil d'Etat or by statute. In fact, all the Malagasy loans were subject to legislative authorization by the metropolitan country.²⁴⁰

317. This authorization constituted a substantive condition of the loan, a *sine qua non* for the issue of the loan. That would appear to demonstrate the insufficiency of the financial autonomy of the dependent collectivity. Power to enter into a genuine commitment in this regard lay only with the administering Power which, by so doing, assumed an obligation that might be compared with the guarantees required by IBRD, which confer on the predecessor State the status of "primary obligor" and not of "surety merely".²⁴¹

To these theoretical considerations must be added practical considerations, as a result of which, in the final analysis, those who issue the loan enter into a commitment only upon intervention by the administering Power, on which they confer, in a sense, the "status" of "primary obligor".

(c) *Treatment of the debts*

318. The debts were assumed by the Malagasy Republic, which did not dispute them, and Professor Bardonnnet was able to conclude that Madagascar "thus seems to have conformed spontaneously to international custom in this respect".²⁴² The negotiators of the Franco-Malagasy Agreement on co-operation in monetary, economic and financial matters of 27 June 1960 thus did not have to work out any special provisions for this succession, which placed an obligation on Madagascar as though, as Professor Bardonnnet notes, "the automatic character of the transfer ... were self-evident".²⁴³

7. CASE OF THE FORMER BELGIAN CONGO (1960)

319. The Congo acceded to independence on 30 June 1960, in accordance with article 259 of the Belgian Act of 19 May 1960 concerning the structures of the Congo. Very swiftly came foreign intervention, civil war and the severance of diplomatic relations between the two States from 1960 to 1962. These circumstances were to delay the solution of the problems of succession of States, which took place only five years later, in two conventions dated 6 February 1965. The first related to "the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony".²⁴⁴ The second concerned the statutes of the "Belgo-Congolese Amortization and Administration Fund".²⁴⁵

CLASSIFICATION OF DEBTS

320. The classification of debts was set out in article 2 of the Convention for the settlement of questions relating

²⁴⁰ See Act of 5 April 1897; Act of 14 April 1900; Act of 19 March 1905; Act of 22 February 1931; Act of 16 April 1942. For further details, see the table of Malagasy public loans in Bardonnnet, *op. cit.*, p. 650.

²⁴¹ See para. 274 above.

²⁴² Bardonnnet, *op. cit.*, p. 654.

²⁴³ *Ibid.*

²⁴⁴ United Nations, *Treaty Series*, vol. 540, p. 227.

²⁴⁵ *Ibid.*, p. 275.

to the public debt, which distinguished three categories of debts: 1. "Debt expressed in Congolese francs and the debt expressed in foreign currencies held by public agencies of the Congo as at 30 June 1960"; 2. "Debt expressed in foreign currencies and guaranteed by Belgium"; 3. "Debt expressed in foreign currencies and not guaranteed by Belgium (except the securities of such debt held by public agencies of the Congo)".

In other words, this classification led ultimately to a distinction between the internal debt and the external debt.

321. *The internal debt* will not engage the attention of the Special Rapporteur for long, not because it was internal but because it was held by public agencies of the Congo,²⁴⁶ or, as one writer specifies, three quarters of it was.²⁴⁷ It was thus merged with the debts of the public services, and hence cannot be regarded as a State debt of the predecessor State. What must now be considered is the external debt.

EXTERNAL DEBT

322. This debt was subdivided into guaranteed and non-guaranteed external debt. The first subdivision unquestionably merits the attention of the Special Rapporteur. The second, however, raises some thorny problems.

(a) *External debt guaranteed or assigned by Belgium*

323. This guarantee extended to two categories of debts, which are set forth in schedule 3 annexed to the aforementioned convention.²⁴⁸

The first concerned the Congolese debt in respect of which Belgium was involved only as guarantor. It was a debt denominated in foreign currencies (United States dollars, Swiss francs or other). In this category may be mentioned the loan agreements concluded between the Belgian Congo and IBRD, which are referred to in article 4 of the Belgo-Congolese agreement. The guarantee and liability of Belgium could naturally not extend, with regard to the IBRD loans, beyond "the amounts withdrawn by the Belgian Congo... before 30 June 1960", i.e. before independence. When it granted its guarantee, Belgium apparently intended to act "as primary obligor and not as surety merely". In the terms of the agreements with IBRD, this character of State debt of the predecessor State emerges even more clearly in the case of the second category of debts guaranteed by Belgium.

324. The second type of external debt was what is known as an *assigned debt*; it covered "loans subscribed by Belgium, the proceeds of which were assigned to the Belgian Congo".²⁴⁹ This is a particularly striking illustration of a State debt of the predecessor State. Belgium was no longer a mere guarantor: the obligation fell directly on Belgium, and it alone was the debtor.

²⁴⁶ A list of these agencies and funds is annexed to the Convention: *ibid.*, p. 253.

²⁴⁷ C. Lejeune, "Le contentieux financier belgo-congolais", *Revue belge de droit international*, No. 2 (Brussels, 1969), p. 546.

²⁴⁸ United Nations, *Treaty Series*, vol. 540, p. 255.

²⁴⁹ *Ibid.*, p. 257.

325. Responsibility for the two types of debt, guaranteed and assigned, was to rest with Belgium. That is what was provided in article 4 of the Convention for the settlement of questions relating to the public debt, in the following terms:

1. Belgium shall assume sole liability in every respect for the part of the public debt listed in schedule 3, which is annexed to this Convention and which forms an integral part thereof. [The contents of schedule 3 have just been analysed.]

...

2. With regard to the Loan Agreements concluded between the Belgian Congo and the International Bank for Reconstruction and Development, the part of the public debt referred to in paragraph 1 of this article shall comprise only the amounts withdrawn by the Belgian Congo, under those Agreements, before 30 June 1960.

(b) *External debt not guaranteed by Belgium*

326. This debt, which was expressed in foreign currency in the case of the "Dillon loan" issued in the United States and in Belgian currency in the case of other loans, was owed, as one writer says, to "people who have been referred to as 'the holders of colonial bonds' ".²⁵⁰ "Ninety-five per cent of them", he states, "were Belgians". Here, it seems, was a type of "colonial debt" that is outside the scope of this study. It might, however, be relevant if Professor Rousseau's view is adopted "that the financial autonomy of the Belgian Congo was purely formal in nature and that the administration of the colony was completely in the hands of the Belgian authorities".²⁵¹

327. However, neither Belgium nor, much less, the Congo agreed that the debt devolve upon it, and the two countries avoided the difficulty by setting up a special international agency to handle the debt. That is the significance of articles 5 to 7 of the Convention for the settlement of questions relating to the public debt, which established a Fund.²⁵²

328. The establishment of the Fund, as an *institution of public international law*, and the arrangement for joint contributions to it, had two consequences:

1. In no sense did this imply that the two States were accepting the status of debtors. That is made clear by article 14 of the Convention:

The settlement of the public debt of the Belgian Congo, which is the subject of the foregoing provisions, constitutes a solution in which each of the High Contracting Parties reserves its legal position with regard to recognition of the public debt of the Belgian Congo.

2. The two States nevertheless regarded the matter as having been finally settled. That is stated in the first paragraph of article 18 of the Convention:

The foregoing provisions being intended to constitute a final settlement of the problems to which they relate, the High Contract-

²⁵⁰ Lejeune, *loc. cit.*, p. 546.

²⁵¹ Rousseau, *op. cit.*, p. 453.

²⁵² See article 5, paragraph 1, of the Convention:

Belgium and the Congo jointly establish, by this Convention, an autonomous international public agency to be known as "the Belgo-Congolese Amortization and Administration Fund", hereinafter referred to as "the Fund". The Statutes of the Fund shall be established by a separate Convention. The Fund was to receive an annual contribution in Belgian francs from the two States, two fifths of which was to come from Belgium and three fifths from the Congo (article 11 of the Convention).

ing Parties undertake to refrain in the future from any discussion and from any action or recourse whatsoever in connexion either with the public debt or with the portfolio of the Belgian Congo. Each Party shall hold the other harmless, fully and irrevocably, for any administrative or other act performed by the latter Party in connexion with the public debt and portfolio of the Belgian Congo before the date of the entry into force of this Convention.

8. CASE OF ALGERIA (1962)

329. Article 18 of the Declaration of Principles concerning Economic and Financial Co-operation contained in the Evian Agreement,²⁵³ provided for the succession of the Algerian State to France's rights and obligations in Algeria. However, neither this declaration of principles nor the others contained in the Evian Agreements referred specifically to public debts, much less to the various categories of such debts, so that Rousseau and O'Connell took the view that the Agreements were silent on the matter.²⁵⁴

330. Negotiations on public debts were conducted by the two countries from 1963 until the end of 1966. They resulted in a number of agreements, the most important of which was that of 23 December 1966, which settled the financial differences between the two countries through the payment by Algeria to France of a lump sum of 400 million francs (40 billion old francs). Algeria does not seem to have succeeded to the "State debts of the predecessor State" by making the payment; had that been the case, it would have paid the money not to the predecessor State, which would by definition have been the debtor, but to any third parties to which France owed money in connexion with its previous activities in Algeria. What was involved was, rather, debts to which the Special Rapporteur has referred in his set of definitions as miscellaneous debts resulting from the take-over of all public services by the newly independent State, assumed by it as compensation for that take-over or in respect of the repurchase of certain property. Also included were *ex post facto* debts covering what the successor State had to pay to the predecessor State as a final settlement of the succession of States. Algeria was not assuming France's State debts (to third States) connected with activities in Algeria.

331. In the negotiations, Algeria argued that it had agreed to succeed to France's "obligations" only in return for certain French commitments to independent Algeria. Under the aforementioned Declaration of principles, a "French contribution to Algerian economic and social development" and "facilities for marketing Algerian surplus products [wine] in France"²⁵⁵ were to be the *quid pro quo* for the obligations assumed by Algeria under Article 18 of the Declaration. The Algerian negotiators maintained that such a "contractual" undertaking between Algeria and France could be regarded as valid only if two conditions were met: (a) if the respective obligations were properly balanced, and (b) if the financial

situation inherited by Algeria was a sound one. With regard to the first condition, France's annual contribution had so dwindled that it was rapidly approaching zero, and exports of Algerian wine to France had been halted. With regard to the second condition, the Algerian delegation noted that the treasury inherited by Algeria under an agreement of 31 December 1962 had been so heavily encumbered with debts that the "liquid assets" were in fact a minus quantity.

332. Algeria also refused to assume debts representing loans contracted by France for the purpose of carrying out economic projects in Algeria during the war of independence. The Algerian delegation argued that the projects had been undertaken in a particular political and military context, in order to advance the interests of the French settlers and of the French presence in general, and that they were part of France's over-all economic strategy, since virtually the whole of France's investment in Algeria had been complementary in nature. The Algerian delegation, also pointed out that the departure of the French population during the months preceding independence had resulted in massive disinvestment and that Algeria could not pay for investments at a time when not only had the corresponding income dried up but, in addition, a process of disinvestment had developed.

333. The Algerian negotiators noted that a substantial part of the economic programme in Algeria had had the effect of incurring debts for that country while it still had dependent status. They argued that, during the seven and one half years of war, the administering Power had for political reasons been overgenerous in pledging Algeria's backing for numerous loans, thus seriously compromising the Algerian Treasury.

334. Finally, the Algerian negotiators refused to assume certain "odious debts" or war debts that France had charged to Algeria (payment of compensation under the territorial budget to the victims of what was referred to at the time as "Algerian terrorism", assumption of expenditures in connexion with the establishment and maintenance of the *harki* force [composed of Algerian collaborators with the colonial Power], etc.).

335. This brief account, which shows the extent of the controversy surrounding even the designation of the debts (French State debts, or debts proper to the dependent territory), gives only the merest suggestion of the complexity of the Algerian-French financial dispute, which the negotiators finally settled at the end of 1966.²⁵⁶

F. Financial burden of newly independent States

336. International law cannot be codified or progressively developed in isolation from the current political and economic context. The rules that the Commission proposes to the international community must reflect

²⁵³ Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement between France and Algeria: United Nations, *Treaty Series*, vol. 507, p. 25.

²⁵⁴ Rousseau, *op. cit.*, p. 454, and O'Connell, *op. cit.*, pp. 444-446.

²⁵⁵ United Nations, *Treaty Series*, vol. 507, pp. 56 and 58.

²⁵⁶ Facile conclusions and definitive judgements should therefore be eschewed. See C. Rousseau, "Chronique des faits internationaux—Algérie et France", *Revue générale de droit international public*, 3rd series, vol. XXXVIII, No. 3 (Paris, July-Sept. 1967), pp. 271 and 722, and *Droit international public (op. cit.)*, p. 454.

that community's concerns and needs. For that reason, a set of rules concerning State debts for which newly independent States are liable cannot be evolved without to some extent taking account of the catastrophic and indeed intolerable situation in which a number of newly independent States find themselves.

337. Unfortunately, there is a lack of statistical data that would make it possible to determine accurately how much these countries' disastrous and extensive debt problem is due to their having attained independence and assumed certain debts in connexion with succession of States, and how much to the loans that they have had to contract as sovereign States in an attempt to overcome their underdevelopment.²⁵⁷ Similarly, the relevant statistics covering all the so-called developing countries cannot easily be broken down in order to individualize and illustrate the specific situation of the newly independent States since the Second World War. The figures given below relate to the external debt of developing countries; they include the Latin American countries, that is, countries decolonized a long time ago. Here the aim is not so much to calculate precisely the financial burden resulting from the assumption by the newly independent States of the debts of the predecessor States, but rather to *highlight a dramatic and widespread debt problem* affecting the majority of developing countries. This context and this situation lend special and specific overtones to succession of States in respect of newly independent States.

338. The increasingly insupportable debt problem of these countries has become a structural phenomenon, whose profound effects were apparent long before the current international economic crisis. The Commission on International Development (known as the Pearson Commission) estimated that by 1977 debt service alone, namely, annual amortization and interest payments, would exceed the total amount of new loans by 20 per cent in Africa and by 30 per cent in Latin America.

339. By 1960, the external public debt of developing countries amounted to several billion dollars. During the 1960s, the total indebtedness of the 80 developing countries studied by UNCTAD increased at an annual rate of 14 per cent, so that at the end of 1969 their external public debt amounted to \$59 billion.²⁵⁸ At the same date the total disbursed by those countries simply on servicing of the public debt and repatriation of profits was estimated at \$11 billion.²⁵⁹ Already then, in some developing countries, servicing of the public debt alone consumed over 20 per cent of their total export earnings. As at

²⁵⁷ The statistics published or made available by international economic or financial organizations are not sufficiently detailed to permit a distinction to be drawn between debts contracted prior or subsequently to independence. OECD has published various studies and numerous tables giving a break-down of debts by debtor country, type of creditor and type of debt, but with no indication whether the debts are "colonial debts". See OECD, *Total external liabilities of developing countries* (Paris, 1974).

²⁵⁸ UNCTAD, *Debt problems of developing countries: report by the UNCTAD secretariat* (United Nations publication, Sales No. E.72.II.D.12), para. 12.

²⁵⁹ See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. III, *Financing and invisibles* (United Nations publication, Sales No. E.73.II.D).

31 December 1973, the data collected by IBRD for 86 developing countries showed a total outstanding external public debt of \$119 billion,²⁶⁰ or about double the amount calculated by UNCTAD in 1969 for 80 countries. Service payments on the public debt alone, excluding all other financial outflows, then amounted to \$11 billion.²⁶¹

340. This considerable increase in the external debt placed an insupportable burden on certain countries. For Zambia, for example, service payments on the external public debt represented 28 per cent of the value of exports in 1973, compared with 2.4 per cent in 1967; for Peru, the figure was 32.5 per cent compared with 3 per cent; for Uruguay, 30.1 per cent compared with 17 per cent; and for Egypt, 34.6 per cent compared with 19.5 per cent. Facing the same difficulties, India renegotiated its debt in 1971, Chile and Pakistan did so in 1972, and India again, along with Pakistan, did so in 1973. But other developing countries were in an equally alarming position:

During the past years, a growing number of developing countries have experienced debt crises which warranted debt relief operations. Multilateral debt renegotiations were undertaken, often repeatedly, for Argentina, Bangladesh, Brazil, Chile, Ghana, India, Indonesia, Pakistan, Peru and Turkey. In addition, around a dozen developing countries were the subject of bilateral debt renegotiations. Debt crises have disruptive effects on the economies of developing countries and a disturbing influence on creditor/debtor relationships. Resource providers and recipients should therefore ensure that the international resource transfer is effected in such a way that it avoids debt difficulties of developing countries.²⁶²

341. The considerable acceleration of inflation in the industrialized economies since 1973 was to have serious consequences for developing countries, which depend heavily on those economies for their imports, and thus aggravated their external debt. Whereas the average annual rate of inflation had been 4 per cent from 1962 to 1972 in the industrialized economies, it rose sharply to 7.1 per cent in 1973, 11.9 per cent in 1974 and 10.5 per cent in 1975.²⁶³ Certain countries, for example Japan and the United Kingdom, experienced inflation rates of 20.8 per cent in 1974 and 20 per cent in 1975 respectively. As a result, the prices of manufactures exported by the industrialized countries increased at an unprecedented rate, leading to a further deterioration in terms of trade to the detriment of developing countries.

342. In fact, the current deficit of these non-oil-exporting countries increased from \$9.1 billion in 1973 to \$27.5 billion in 1974 and \$35 billion in 1976.²⁶⁴ These deficits resulted in a huge increase in the outstanding external debt of developing countries and in service payments

²⁶⁰ IBRD, *Annual report, 1975* (Washington, D.C.), p. 81.

²⁶¹ *Ibid.*, p. 97, statistical annex, table 8. See also OECD, *Development co-operation—1976 Review* (report by M. J. Williams, Chairman of the Development Assistance Committee) (Paris, 1976), pp. 41 *et seq.* and 254 *et seq.*

²⁶² OECD, *Debt problems of developing countries* (Paris, 1974), p. 2.

²⁶³ IMF, "World economic outlook: General survey" (December 1975), p. 3, table 1.

²⁶⁴ IMF, "World economic outlook: Development and prospects in the non-oil primary producing countries", p. 4, table 1.

on that debt in 1974 and 1975. The preliminary information available indicates that the outstanding external public debt of these countries increased by at least one third between 1973 and the end of 1975. If this information proves accurate, it would mean for 31 December 1975 *an outstanding debt of well over \$150 billion* for the sample of 86 countries used by IBRD, which includes oil-exporting countries with large deficits such as Algeria and Indonesia.

343. This assumption appears to be confirmed by the results of a recent IMF study, which reveals that the total outstanding guaranteed public debt increased from about \$62 billion in 1973 to an estimated \$95.6 billion in 1975—an increase of one third.^{265,266}

344. In addition, while the developing countries' indebtedness was increasing, the relative value of official development assistance was declining: the volume of such transfers has declined from 0.33 per cent of GNP in 1970-1972 to 0.29 per cent, although the International Development Strategy called for a minimum transfer of 1 per cent.

345. In parallel and simultaneously with this trend, there was a considerable increase in reverse transfers of resources in the form of repatriation of profits made by investors from industrialized countries in developing countries. According to data for the balance of payments of 73 developing countries, financial outflows of such profits increased from \$6 billion in 1970 to \$12 billion in 1973, so that the growth in absolute value of the resources transferred to developing countries in fact conceals a worsening of those countries' debt situation. It has been estimated that *the total percentage of export earnings used for debt service will be 29 per cent in 1977, compared with 9 per cent in 1965.*

346. The solutions proposed by the developing countries to remedy this dramatic situation have not met with the approval of the industrialized creditor States. The debtor countries have established quite clearly that, for all of them, *the terms of their indebtedness are such that, if they are not reconsidered, they may cancel out any development effort.* At the fourth Conference of Heads of State or Government of Non-Aligned Countries, in 1973, the problem was stated at a global level in terms that were both solemn and alarming, but by no means exaggerated. One of the texts adopted at this Conference states:

The adverse consequences for the current and future development of developing countries arising from *the burden of external debt contracted on hard terms* * should be neutralized by appropriate international action ...

Appropriate measures should be taken to alleviate the heavy burden of debt-servicing, including the method of rescheduling.²⁶⁷

²⁶⁵ IMF, "World economic outlook: Developments and prospects in the non-oil primary producing countries", table 8.

²⁶⁶ The figures differ from those of IBRD because of differences in the countries selected, the elements studied and the method of calculation used.

²⁶⁷ Fourth Conference of Heads of State or Government of Non-Aligned Countries (Algiers, September 1973), "Action programme for economic co-operation" [A/9330 and Corr.1], section entitled "International monetary and financial systems", paras. 6 and 7.

347. Speaking at the sixth special session of the United Nations General Assembly, in his capacity as Chairman of the fourth Conference of Heads of State or Government of Non-Aligned Countries, the Head of State of Algeria declared:

In this regard it would be highly desirable to examine the problem of the present indebtedness of the developing countries. *In this examination, we should consider the cancellation of the debt in a great number of cases* * and, in other cases, refinancing on better terms as regards maturity dates, deferrals and rates of interest.²⁶⁸

348. This problem has constantly been raised by the newly independent States. The cancellation of the debts of the former colonized countries had already been brought up at the second session of the United Nations Conference on Trade and Development, held in New Delhi, Mr. Louis Nègre, Minister of Finance of Mali, stated at the 58th plenary meeting:

Many [developing] countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign Powers * ... the developing countries asked their creditors to show a greater spirit of equity and suggested that, during the present Conference, they might decree... *the cancellation of all debts contracted during the colonial period* * ...²⁶⁹

349. The United Nations General Assembly finally adopted resolution 3202 (S-VI), entitled "Programme of Action on the Establishment of a New International Economic Order", which recognized, in section II, 2, that:

(f) Appropriate urgent measures, including international action, should be taken to *mitigate adverse consequences* * for the current and future development of developing countries arising from *the burden of external debt contracted on hard terms*; *

(g) Debt renegotiation on a case-by-case basis with a view to concluding agreements on *debt cancellation*, * moratorium, rescheduling or interest subsidization.

350. A draft resolution submitted on 7 December 1976 to the Second Committee of the General Assembly of the United Nations, entitled "Debt problems of developing countries", stated that:

(a) The least developed, land-locked and island developing countries should have their official debts *converted into grants*; *

(b) Other most seriously affected countries should *receive the same treatment* * as above, or as a minimum should have their outstanding official debts recomputed at the present terms of the International Development Association with a *minimum grant element of 90 per cent*; *

(c) Debt relief should also be provided by developed bilateral creditors and donors to other developing countries seeking relief.²⁷⁰

²⁶⁸ *Official Records of the General Assembly, Sixth Special Session, Plenary Meetings*, 2208th meeting, para. 136.

²⁶⁹ *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I [and Corr.1, 3 and 4, and Add.2], *Report and annexes* (United Nations publication, Sales No. E.68.II.D.14), annex V, p. 140.

²⁷⁰ Draft resolution A/C.2/31/L.46/Rev.1 submitted by Bangladesh, Central African Republic, Democratic Yemen, Ethiopia, India, Pakistan, Philippines, Sudan, Uganda and United Republic of Cameroon (see *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 56, doc. A/31/231 and Add.1, Part II, para. 17).

351. Finally, the General Assembly, by its resolution 31/158 of 21 December 1976, entitled "Debt problems of developing countries", declared:

The General Assembly,

...

Noting with grave concern ... [the] heavy debt-service payments ...

...

Convinced that the situation facing the developing countries can be mitigated by decisive and urgent relief measures in respect of ... their official ... debts ...

Acknowledging that, in the present circumstances, there are sufficient common elements in the debt-servicing difficulties faced by various developing countries to warrant the adoption of general measures relating to their existing debt,

Recognizing the especially difficult circumstances and debt burden of the most seriously affected, least developed, land-locked and island developing countries,

1. *Considers that it is integral to the establishment of the new international economic order to give a new orientation to procedures of reorganization of debt owed to developed countries away from the past experience of a primarily commercial framework towards a developmental approach;*

2. *Affirms the urgency of reaching a general and effective solution to the debt problems of developing countries;*

3. *Agrees that future debt negotiations should be considered within the context of internationally agreed development targets, national development objectives and international financial co-operation, ...;*

4. *Stresses that all these measures should be considered and implemented in a manner not prejudicial to the credit-worthiness of any developing country;*

5. *Urges the International Conference on Economic Co-operation to reach an early agreement on the question of immediate and generalized debt relief of the official debts of the developing countries, in particular of the most seriously affected, least developed, land-locked and island developing countries, and on the reorganization of the entire system of debt renegotiations to give it a developmental rather than a commercial orientation;*

...

352. At the Conference on International Economic Co-operation (sometimes known as the "North-South Conference"), the developing countries from the outset placed the debt problem at the head of their list of priorities. They requested an *immediate* and *global* reorganization of the public debt of the least developed of the developing countries and those most seriously affected by the international economic crisis. They also proposed an objective method for the re-examination of the debt for those among them that might be affected in the future.

The industrialized countries, for their part, refuse for the time being to consider any immediate and global reorganization and insist, even for the category of the least developed countries, on a *case-by-case* study. As regards the second part of the problem (future cases of reorganization), their counterproposals permit some relaxation of the current methods of examining debts and extend the new system to all the developing countries concerned.

A compromise proposal by Sweden relates in particular to the immediate global reorganization of the debt of the east developed countries, to which it agrees in principle.

353. In short, then, an immediate and global reorganization of debts is the current stumbling-block in the negotiations. It would seem, in fact, that the developed countries would at most be prepared to agree to the *cancellation of the public debt of the least developed countries* (namely, 28 countries classified as such by the United Nations). But the countries most heavily burdened by debt (India, Pakistan, Indonesia, Brazil) would be excluded from that category and there would thus be no comprehensive solution to the grave and agonizing problem of the debt burden of developing countries.

G. Some elements of a solution

354. Although decolonization was not involved, but rather a new colonization through a change in administering Power, it is useful to consider the manner in which the debts of the German colonies were dealt with in 1919. Article 257, paragraph 7, of the Treaty of Versailles²⁷¹ provided that:

*In the case of the former German territories, including colonies, protectorates or dependencies, administered by a Mandatory under Article 22 of Part I of the present Treaty, neither the territory nor the Mandatory Power shall be charged with any portion of the debt of the German Empire or States.**

This solution was subsequently confirmed by article III, paragraph B, of the Hague Convention of 20 January 1930.²⁷²

355. It is interesting to note the arguments with which the Allies justified the solution provided for in the Treaty of Versailles.²⁷³ Those arguments were based, *inter alia*, on:

1. The fact that the budget of the German colonies had often shown deficits and that those colonies were therefore unable to assume part of the German debt;

2. The consideration that *the indigenous inhabitants had derived no benefit from German investments, Germany's expenditure having generally been of a military and unproductive nature and having been made in the exclusive interest of the metropolitan country;*

3. The consideration that it would have been unjust to make the Mandatory Powers assume responsibility for those debts since they had been appointed trustees on behalf of the League of Nations and thus would derive no profit from the situation.²⁷⁴

356. It is ironic to observe that at least the first two arguments put forward by the Allies at the time could quite well be turned against them today by the newly independent States. Nothing has happened since to reduce their force. The first argument, relating to the deficit in the budget of the colonies and their impecuniosity, has today taken on dramatic relief, as was noted

²⁷¹ For reference, see para. 95 above.

²⁷² Agreement regarding the complete and final settlement of the question of reparations (League of Nations, *Treaty Series*, vol. CIV, p. 243).

²⁷³ See "Reply of the Allied and Associated Powers", *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, parts IV and IX.

²⁷⁴ Feilchenfeld, *op. cit.*, pp. 441-443 and 548-566.

above.²⁷⁵ As for the second, it has never lost its validity. Admittedly, it related to the lack of benefit derived by the colony from investments by the metropolitan country, in other words, a type of "colonial debt" (a debt owing to the metropolitan country) that is excluded from this study, but it would have had the same value and the same relevance had it related to debts contracted by Germany on behalf of its colony, or contracted locally by German organs of the colony.

The two arguments may be used as elements in the search for a solution.

1. NON-TRANSFERABILITY TO THE NEWLY INDEPENDENT STATE OF DEBTS RELATING TO LOANS THAT DID NOT BENEFIT THE DEPENDENT TERRITORY (CRITERION OF UTILITY)

357. This presupposes that the administering Power contracted a loan (a) that was intended for the dependent territory, (b) that was actually allocated to that territory, and (c) that benefited the territory. Thus, loans of the type considered above,²⁷⁶ which gave rise to a national debt improperly assigned by Spain to its South American colonies, are excluded.

358. Although he was writing about a period that is long since past, Bustamante y Sirvén, referring to the criterion of utility, summarized the problem perfectly:

The situation is different when colonies, dependencies or autonomous legal persons that have become independent States are involved. There is no reason in such cases why they should accept, or have imposed upon them, a portion of the metropolitan debts. Those debts were not a direct burden on their budget while they formed part of the former State and should not begin to be a burden on it at the very time when they are separated from that State. But if the debts on which a decision is to be taken belong exclusively to the budget of the region that has become independent, a distinction must be made according to the manner in which they were contracted or issued.* If they were the result of the initiative or the endeavour of the metropolitan country, and if they were created without the consent or intervention of the former colony or dependency, nothing in the general terms warrants their acceptance by the latter, unless they have been used in its territory and for its industrial or commercial—not military—profit or benefit. When such consent and intervention exist, as a result of the exclusive and legitimate will of the colonies or dependencies, without which it would not have been possible to issue or contract the debt, the debt must be assigned wholly to them.²⁷⁷

359. The same writer refers also to the case where a debt benefited both the "colony" and the "metropolitan country" and asks that the portion of the debt chargeable to one or the other should be fixed in proportion to the profit each derived from it:

There may also be debts that in their origin and application are common to the former metropolitan country and to the newly independent territory, a situation in which it is important also to take into account the purpose of the debt and the circumstances that gave rise to it when deciding, in connexion with its payment, what is correct according to the rules set out earlier.²⁷⁸

360. It will also be recalled that the representative of Mali, speaking at the second session of UNCTAD, stated in connexion with the application of the criterion of utility that "many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign Powers ... during the colonial period".²⁷⁹

361. However, the Special Rapporteur does not deny that the criterion of utility, which is fundamentally just, is sometimes difficult to apply in practice. During a regional symposium held by UNITAR at Accra in 1971, the question was raised in the following terms:

To justify the transfer of debts to a newly independent State, it was argued ... that, since in a majority of cases the metropolitan Power made separate fiscal arrangements for the colony, it would be possible to determine the nature and extent of such debts. One speaker argued that any debt contracted on behalf of a given colony was not necessarily used for the benefit of that colony. He suggested that perhaps the determining factor should be whether the particular debt was used for the benefit of the colony. Although this point was generally acceptable to several delegates, doubt was raised as regards how the utility theory would in practice be applied, i.e., who was to determine and in what manner the amount of the debt which had actually been used on behalf of the colony.²⁸⁰

362. But this reasoning can be carried still further. Even in the case of loans granted to the administering Power for the development of the dependent territory (criterion of intended use and allocation), the *colonial context* in which the development of the territory may take place thanks to these loans disqualifies the undertaking. It is by no means certain that the investment in question did not primarily benefit a foreign colonial settlement or the metropolitan economy of the administering Power. In these circumstances, it would be unjust to make the newly independent State assume the corresponding debt even if that State retained some "trace" of the investment, in the form, for example, of public works infrastructures. Such infrastructures might be obsolete or unusable in the context of decolonization, with the new orientation of the economy or the new planning priorities decided upon by the newly independent State.

363. Indeed, there is no perceptible difference in kind or even in degree between the loans that enabled Germany to establish its settlers in Posen, and that were rightly rejected by Poland after the First World War,²⁸¹ and those that an administering Power may have contracted for the same purpose of settlement, of development for the benefit of its settler nationals, and of perpetuation of colonization in a dependent territory.

364. A rule could thus be formulated to reflect this idea. Its purpose would be to affirm, as a matter of principle and by reason of the colonial context, the non-transferability of the debts in question unless it is

²⁷⁵ See paras. 336-353 above.

²⁷⁶ See para. 290.

²⁷⁷ Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 296 and 297.

²⁷⁸ *Ibid.*, p. 297.

²⁷⁹ See para. 348 above.

²⁸⁰ Report of the United Nations Regional Symposium on International Law for Africa, held at Accra, Ghana, from 14 to 28 January 1971, organized by UNITAR at the invitation of the Ghanaian Government, p. 9.

²⁸¹ See para. 168 above.

proved that they actually benefited the newly independent State. This rule could be formulated as follows:

Article F. Non-transferability of debts contracted by the administering Power on behalf and for the account of the dependent territory

Save as otherwise agreed or decided, the newly independent State shall not assume debts contracted on its behalf and for its account by the predecessor State, unless it is established that the corresponding expenditures actually benefited the formerly dependent territory.

365. The rule provisionally proposed by the Special Rapporteur places the burden of proof on the predecessor State rather than on the newly independent State. It enunciates a general principle of non-transferability of the debts of the administering Power, to which exceptions may be allowed if the latter, in its claim, furnishes proof that the debt it contracted actually benefited the dependent territory. This is justified by the colonialism imposed on the territory, which by nature and fundamentally is an "act of exploitation" justifying newly independent States not only in repudiating all the debts of the predecessor State but even in claiming compensation from the administering Power for such exploitation. The Conference of Heads of State or Government of Non-Aligned Countries, held in September 1961 in Belgrade, took such a position, subsequently confirmed by other "summit conferences" of non-aligned countries.

366. Perhaps it will be argued that the rule proposed by the Special Rapporteur goes beyond the legal theory usually invoked in this matter. By and large, this theory makes the successor State liable for "localized" State debts, and that is what is under discussion here. But, as will be seen, the Special Rapporteur will propose that this theory should be made a rule for all types of State succession except in the specific case of decolonization, because of the context of colonial exploitation. In so doing, the Special Rapporteur is simply applying one of the elements of this theory, which itself provides for exceptions to the transfer of debts of the predecessor State localized in the transferred territory when such debts are "contrary to the interests of the territory". It is the colonial climate, the context of domination and the fact of exploitation that make these debts "odious", because they are "contrary to the interests of the territory".

2. MAINTENANCE OF THE GUARANTEE GIVEN BY THE PREDECESSOR STATE IN RESPECT OF LOANS CONTRACTED BY THE THEN DEPENDENT TERRITORY

367. This problem involves three protagonists, in specific and distinct roles: the dependent territory, which contracted the loan, the administering Power, which guaranteed it, and the third State, which granted it.

(a) *The dependent territory*

368. The Special Rapporteur will take a case where the representatives of the administering Power in the dependent territory, acting as organs of the latter in the context of its financial autonomy, have obtained loans from third States (or from their nationals) intended for that territory. In accordance with the typology of debts outlined by the Special Rapporteur,²⁸² these debts do

not concern the present study, which is devoted to the examination of the treatment of State debts of the predecessor State. The Special Rapporteur described them as "debts proper to" the dependent territory. Provided that they have been justified by their usefulness to the dependent territory, it would seem that the latter should remain liable for them when it becomes an independent State. In any case, they need not be considered in this study, which is confined to State debts. They would concern this report only if another element were involved, i.e. that constituted by the guarantee given by the predecessor State when it was the administering Power of the dependent territory.

(b) *The administering Power*

369. The guarantee given by the predecessor State was clearly a decisive element in the conclusion of the loan contract. The creditor did not place its trust in the dependent territory, otherwise it would have required no more than the latter's undertaking. At the very least, it did not place its trust in the territory alone. It was the intervention of the administering Power, in the form of a guarantee, that was presumably the determining factor for the creditor, or at least a far from negligible factor.

370. The guarantee thus furnished by the administering Power legally creates a specific obligation for which it is liable, and a correlative subjective right of the creditor. If succession of States had the effect of extinguishing the guarantee altogether and thus of relieving the predecessor State of one of its obligations, that would unjustifiably extinguish a right of the creditor third State. The problem that has to be resolved here by the study of State succession is not, therefore, what becomes of the debt proper to the dependent territory, but rather what becomes of the element whereby the debt is supported, furnished in the form of a guarantee by the administering Power. The issue, then, is not succession to the debt proper to the dependent territory but succession to the obligation of the predecessor State in respect of the territory's debt.

371. The guarantee may be more or less extensive or have more or less force. It may take the form of a *mere surety*. It may also make the administering Power the genuinely *principal debtor*. Daniel Bardonnet cites the case of loans issued by the "governments-general" of Madagascar that could be contracted only because the Government of metropolitan France guaranteed them in full.²⁸³ The Special Rapporteur has in particular cited the case of loans granted by IBRD to a dependent territory with a *very extensive guarantee* by the administering Power.²⁸⁴ The guarantee agreements negotiated by IBRD, provided that the administering Power had an obligation in respect of the debt in question "as primary obligor and not as surety merely".²⁸⁵

The obligation of the predecessor State in this case gives the third State a right to continue to demand payment of the whole of its debt-claim.

²⁸³ Bardonnet, *op. cit.*, pp. 645-659.

²⁸⁴ See paras. 316 and 317 above.

²⁸⁵ See para. 274 above.

²⁸² See paras. 261 *et seq.* above.

(c) *The creditor third State*

372. When the guarantee is given by the predecessor State in these circumstances, it unquestionably gives the creditor third State a right to demand payment of the whole of its debt-claim solely from the predecessor State, if it prefers, exactly as though the latter, and not the dependent territory, were the sole debtor. It is difficult to see why or how succession of States could destroy this right.

373. The practice followed by IBRD in this regard is clear. It is true that IBRD turns first to the newly independent State, for it considers that the loan agreements signed by the dependent territory are not affected by a succession of States as long as the debtor remains identifiable. For the purposes of these loan agreements, IBRD would appear to take the view that succession of States had not changed the identity of the entity existing before independence. But it considers—and the predecessor State that has guaranteed the loan in no way denies—that the legal effects of the contract of guarantee continue to operate after the territory has become independent, so that IBRD can at any time claim against the predecessor State if the successor State defaults.

The practice of IBRD shows that the predecessor State cannot be relieved of its guarantee obligation as the principal debtor unless a new contract is concluded to this effect between IBRD, the successor State and the predecessor State, or between the first two, aimed at relieving the predecessor State of all the charges and obligations it had assumed by virtue of the guarantee it had given earlier.

374. In consequence of the foregoing, a rule might perhaps be formulated along the following lines:

Article G. Maintenance of the guarantee given by the predecessor State to cover loans contracted by the dependent territory

In the case of a newly independent State, succession of States does not affect as such the guarantee given by the predecessor State for a debt contracted for the account of the dependent territory.

3. CONSIDERATION OF THE SELF-DETERMINATION AND FINANCIAL CAPACITY OF THE NEWLY INDEPENDENT STATE IN RESPECT OF SUCCESSION TO STATE DEBTS

375. The Special Rapporteur has drawn attention to the financial burden borne by most of the newly independent States.²⁸⁶ Not all their debts were contracted after independence; some were contracted by the administering Power on behalf of the dependent territory (or by representatives of the “metropolitan country” as organs of the dependent territory). Succession to such debts places on some States obligations that are so extensive and onerous that it is almost impossible for them to see how they can meet them. Hence the question arises as to the extent to which any principles of international law that might be formulated in respect of succession to debts would not be reversed by other principles of law or other considerations.

²⁸⁶ See paras. 336-353 above.

376. (A) Before considering this situation, however, it would be useful to refer briefly to an age-old problem that by no means arises only in connexion with the emergence of new States, namely, the incapacity of States to pay their debts. In 1935, in his famous course at the Academy of International Law on “default by States”, Professor Gaston Jèze stated:

With the exception of a few small States (Switzerland, Holland), all the others have failed more or less seriously to meet their obligations ...

The example of default by debtors comes from higher up ...

...

The most powerful States, which prided themselves on having always met their obligations, have defaulted: *England, Germany, Belgium, France, the United States*, and so on. Following in their footsteps, most States have done the same.²⁸⁷

Analysing the bankruptcy declared in France in Year VI, the author stresses as a novelty of the time the categorical affirmation of the right of a State to declare bankruptcy: on 8 Vendémiaire of Year VI, Crétet stated in his report to the Council of Elders (Conseil des anciens):

Is a State justified, in law, in reducing its debt in strict proportion to the amount it can pay? ... The State, no more than the individual, is not bound to do the impossible.²⁸⁸

377. Until the formulation at the end of the nineteenth century of the Drago doctrine, which prohibited the use of force to recover debts, creditor States did not hesitate to send demands and even gunboats to support the claims of their nationals.

378. In his study, Jèze draws the conclusion that a principle has emerged to the effect that

a government is justified in suspending or reducing the service of its public debt whenever essential public services would have to be jeopardized or neglected in order to service the debt. In other words, the public debt is not the first public service to be met.²⁸⁹

Moreover, “only the government of the debtor country is competent to say whether essential public services would be jeopardized by servicing the debt”.²⁹⁰ Jèze concludes that “these principles are indisputable and undisputed”.²⁹¹

379. (B) *State practice in the matter of succession to debts shows that the financial capacity of States to which such debts are assigned has traditionally been taken into account.* That was historically so in particular with regard to the apportionment of the Ottoman public debt, but also with regard to the debts of other countries settled by the Treaties of Versailles and Saint-Germain-en-Laye in 1919.²⁹² In so far as the settlement of the debt failed to take into account the financial capacity of the successor State, the latter, faced with what it felt was an injustice, invoked voluntarist arguments: Yugoslavia thus refused to assume a portion of the Turkish debt, invoking the fact that it had not signed the Treaty of Lausanne of 1923. Albania, Yemen and the Hejaz did likewise.

²⁸⁷ Jèze, “Les défaillances d’Etats”, *loc. cit.*, pp. 381 and 386.

²⁸⁸ *Ibid.*, p. 388.

²⁸⁹ *Ibid.*, p. 391.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*, p. 392.

²⁹² See Rousseau, *op. cit.*, pp. 442-447.

380. (C) Admittedly, the idea of taking into account the "financial capacity" of a State is vague and may open the way to abuses. On the other hand, it is neither possible nor realistic to ignore the reasonable limits beyond which the assumption of debts would be destructive for the debtor and without result even for the creditor.

381. When claiming from debtor States repayment of certain loans that it had granted them, the United States Government was to set a good example by rightly stating, in reply to a British note of 1 December 1932, that the principle of capacity to pay did not require that the foreign debtor should pay to the full limit of its current or future capacity. It was essential, the reply continued, to permit the foreign debtor to safeguard and improve its economic situation, to balance its budget and to establish its finances and currency on a sound basis, as well as to maintain and, if possible, to improve the living standard of its citizens; *no settlement that was oppressive and that delayed the recovery and progress of the foreign debtor was in accordance with the true interest of the creditor.*²⁹³

382. Such ideas were given legal expression in the arbitral award of 11 November 1912 between Turkey and Russia concerning the Ottoman debt. The award states, *inter alia*:

The exception of *force majeure* ... may be pleaded ... in public as well as in private international law. *International law must adapt itself to political necessities.* * The Imperial Russian Government expressly admits ... that the obligation of a State to carry out treaties may give way "if the very existence of the State should be in danger, if the observance of the international duty is ... "self-destructive". *

It is incontestable that the Sublime Porte proves, by means of the exception of *force majeure* ... that Turkey was, from 1881 to 1902, in the midst of financial difficulties of the utmost seriousness ...²⁹⁴

383. (D) Transposed to the context of succession to debts in the case of newly independent States, these considerations relating to the financial capacity of the debtor are of great importance. The Special Rapporteur is not unaware of the fact that cases of "State default" involve debts already recognized by and assigned to the debtor, whereas in the cases with which this study is concerned the debt has not yet been "assigned" to the successor State and the whole problem is, first, whether the newly independent State must be made legally responsible for such a debt, and then whether it can assume it financially. Nevertheless, the two questions must be linked if practical and just solutions are to be found to situations in which prevention is better than cure. What purpose is served by affirming in a rule that certain debts are transferable to a newly independent State if its economic and financial difficulties are known in advance? And no State can be better informed than the predecessor State, as the former administering Power, of the financial difficulties of the young State that it is setting free to join the international community.

²⁹³ Cited by Jèze, "Les défaillances d'Etats", *loc. cit.*, p. 392.

²⁹⁴ *The Hague Court Reports* (New York, Oxford University Press, 1916), pp. 317 and 318.

384. Moreover, as the Special Rapporteur observed earlier,²⁹⁵ in various types of State succession historical precedents have taken into account the financial capacity of the successor State. In the case of newly independent States, it may be permissible to go so far as to *assert the existence of an almost undeniable assumption of incapacity to pay*, merely on account of the eloquent "external sign" of the appallingly low *per capita* income published in the statistics of the United Nations and other international organizations.

385. In the case of succession to debts concerning newly independent States, this problem of financial capacity must also be considered in relation to the right to self-determination. Of course, if no limit were recognized to the sovereignty of the State, which could argue at its discretion that it was incapable of paying, there would be no point in formulating rules of international law. On the other hand, those rules should not run counter to the right to self-determination. The 1970 report of the International Law Association made a slight allusion to this in the following terms:

Reconstruction of their economies by several States * have raised questions of the continuity of financial and economic arrangements made by the former colonial Powers or by their territorial administrations.²⁹⁶

The problem of succession to debts arises in the general terms of the reconstruction by newly independent States of their national economies.

386. Formerly, the problem had been approached from the opposite direction, so that the right to self-determination and independence was once more called in question for financial reasons:

Now it appears that Libya is, at least from the economic viewpoint, unable to sustain herself. Is it the responsibility of the United Nations which created Libya to give it financial support ...? Who gained anything by this act of "self-determination"?²⁹⁷

387. Political independence is meaningless without economic independence. Many General Assembly resolutions have emphasized that permanent sovereignty over natural wealth and resources (which may have been pledged as security for debt!) is a fundamental element in the right of peoples to self-determination. Moreover, article 1, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights as well as of the International Covenant on Civil and Political Rights²⁹⁸ provides that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation... *In no case may a people be deprived of its own means of subsistence.* *

388. Consideration should therefore be given to drafting a provisional clause to specify that, in cases where a newly independent State might be bound by certain

²⁹⁵ Para. 379.

²⁹⁶ International Law Association, *op. cit.*, p. 102.

²⁹⁷ C. Eagleton, "Self-determination in the United Nations", *American Journal of International Law*, vol. 47, No. 1 (Washington D.C., January 1953), p. 89.

²⁹⁸ Resolution 2200 A (XXI) of the General Assembly, annex.

State debts of the administering Power, it is important not to lose sight of its capacity to pay, which may be deficient, or of its concern to preserve the full meaning of its act of self-determination and its independence. The provision might, for example, be worded as follows:

Article H. Consideration of the self-determination and financial capacity of the newly independent State in connexion with succession to State debts

Nothing in the assumption of State debts by the newly independent State shall have the effect of seriously jeopardizing its economy or delaying its progress, of running counter to the right of its people to dispose of its own means of subsistence, or of limiting its right to self-determination and to the free disposal of its natural wealth.

Such a provision would be equally valid for debts proper to the dependent territory, which are not the subject of this study.

389. In the final analysis, the above wording might appear to exonerate, or be interpreted as exonerating, the newly independent State from any succession to debts. Even were that so, it would be in no way excessive, in the opinion of the Special Rapporteur, in view of the former exploitation and the current distressed state of the economies of the newly independent States. And when it is noted that for 20 years the great French economist, François Perroux, has been urging the world to build an international economy based essentially on grants, and that increasing consideration is being given at international meetings to the possibility of cancelling debts contracted in a sovereign manner by third world States *after* their independence, it might by the same token appear ridiculous to continue to impose on such States responsibility for debts contracted *prior* to their independence.

390. In adopting articles of the kind proposed above, the Commission would not be settling all problems relating to succession in respect of debts for newly independent States. In fact, *the bulk of the liabilities involved in succession does not, in the case of decolonization, consist of State debts of the predecessor State*, these being the only ones with which this study is concerned. They are debts said to be “proper to the dependent territory”, contracted under a very formal financial autonomy by the organs of colonization in the territory, which consti-

tute a considerable volume of liabilities. As has been seen, disputes have frequently arisen concerning the real nature of debts of this kind, which were at that time considered by the newly independent State as “State debts” of the predecessor State that must remain the responsibility of the latter. This leads, in a way, to the problem of debts contracted without benefit to the territory or even against its interests. It is for that reason that the Special Rapporteur attaches some value to the draft articles relating to the non-transferability of odious debts (war debts, subjugation debts and régime debts), without which there would be an obvious gap in the provisions.

In the case of decolonization, there remains the heavy burden of debts that the Special Rapporteur has also been obliged to exclude from his study and that represent amounts charged to the newly independent State by the predecessor State as the price of taking over all the public services of the territory, together with their liabilities.

H. Recapitulation of the text of the draft articles proposed in this chapter

Article F. Non-transferability of debts contracted by the administering Power on behalf and for the account of the dependent territory

Save as otherwise agreed or decided, the newly independent State shall not assume debts contracted on its behalf and for its account by the predecessor State, unless it is established that the corresponding expenditures actually benefited the formerly dependent territory.

Article G. Maintenance of the guarantee given by the predecessor State to cover loans contracted by the dependent territory

In the case of a newly independent State, the succession of States does not affect as such the guarantee given by the predecessor State for a debt contracted for the account of the dependent territory.

Article H. Consideration of the self-determination and financial capacity of the newly independent State in connexion with succession to State debts

Nothing in the assumption of State debts by the newly independent State shall have the effect of seriously jeopardizing its economy or delaying its progress, of running counter to the right of its people to dispose of its own means of subsistence, or of limiting its right to self-determination and to the free disposal of its natural wealth.

CHAPTER VI

Treatment of state debts in cases of uniting of States

A. Definitions

391. For the purposes of the present study, it is appropriate to recall the definition of uniting of States which, according to article 26 of the 1972 draft on succession of States in respect of treaties,²⁹⁹ means “the uniting of two or more States in one State”. A similar wording appears in article 30 of the 1974 draft³⁰⁰ and in article 14

²⁹⁹ See *Yearbook... 1972*, vol. II, p. 286, document A/8710/Rev.1 chap. II, sect. C.

³⁰⁰ See *Yearbook... 1974*, vol. II (Part One), p. 252, document A/9610/Rev.1, chap. II, sect. D.

of the draft on succession of States in respect of matters other than treaties,³⁰¹ namely, “when two or more States unite and thus form a successor State”. The commentaries on the aforementioned articles explain that they deal with the “uniting in one State of two or more States, which had separate international personalities at the date of the succession”.

392. The constitutional form assumed by the successor State thus created is of considerable importance where

³⁰¹ See *Yearbook... 1976*, vol. II (Part Two), p. 147, document A/31/10, chap. IV, sect. B.

succession to public debts in general and to State debts in particular is concerned, as it is in the case of succession to property. The observations made by the Special Rapporteur on this point in his eighth report entirely hold good in respect of succession to State debts also. If the uniting of two or more States results in the creation of a unitary State, the constituent States cease to exist completely from the standpoint of both international law and internal public law. All powers inevitably pass to the successor State, and the latter should obviously take over all the debts of the constituent States. If, on the other hand, the uniting of States leads to the creation of a confederation or federation, each constituent State retains, in varying degrees, a certain autonomy and the new State's constitutional instrument must in any event effect an apportionment of powers, some matters being assigned to the federal or confederal authorities and others remaining within the jurisdiction of the member States. Such a situation must be taken into account in the context of succession to State debts, not all of which can be attributed to the uniting successor State.³⁰²

393. Moreover, as the Special Rapporteur explained in his eighth report, the case of a uniting of States leading to the formation of a *unitary State* should be carefully distinguished from the case of the *total annexation* of one State by another, which is prohibited by contemporary international law. The fact remains that, in many cases, succession to debts may occur in the same way through the acceptance of such debts by the successor State. Thus, one author agrees that "a State that annexes another and thereby comes into possession of the entire public and private patrimony of another State is, without the slightest doubt, obliged ... to acknowledge and honour its debts". He adds that "it has been the rule that States annexing other States assumed responsibility for their debts".³⁰³ It is true that he was writing at a time when the evolution of international law was still in a relatively permissive phase as far as the annexation of territory was concerned. In the same vein, Fauchille wrote:

Does a State cease to exist as a result of total incorporation in another State? The State that benefits from the incorporation must assume the resulting responsibilities. The payment of the debts of the incorporated State devolves upon it absolutely ... That is true not only of public debts proper, such as those resulting from public loans, but also, beyond that context, of debts incurred to private persons under contracts concluded before the incorporation.³⁰⁴

394. In any event, as the Special Rapporteur has already stated, the fact remains that annexation differs from the creation of a unitary State by the uniting of States because it is illegal; the two cases are also dissimilar in that *annexation does not lead to the creation of a new State, whereas the uniting of States inevitably does*.³⁰⁵

The present study will therefore deal mainly with the uniting of States under contemporary international law,

³⁰² See *Yearbook... 1976*, vol. II (Part One), p. 97, document A/CN.4/292, chap. III, art. 16, para. 4 of commentary.

³⁰³ de Louter, *op. cit.*, pp. 228 and 229.

³⁰⁴ Fauchille, *op. cit.*, p. 378.

³⁰⁵ *Yearbook... 1976*, vol. II (Part One), p. 97, document A/CN.4/292, chap. III, art. 16, para. 6 of the commentary.

whether such a merger results in a confederation of States, a federation or a unitary State. Cases of annexation will consequently be referred to only for the sake of historical comparison. Nevertheless, it remains understood that the general working hypothesis also covers the case where one State merges with another State even if the international personality of the latter subsists after they have united.³⁰⁶

395. Furthermore, as has already been stated, it is quite clear that the constitutional form of the successor State plays a fundamental role in this matter. It is this that indicates the degree to which the predecessor States have merged and determines the treatment of their debts under international conventions or norms of internal law such as a constitution or fundamental law. A study of such instruments is clearly necessary in order to gain a picture of international practice.

B. Treatment of State debts in early cases of uniting of States

396. It is quite exceptional for international conventions or constitutions dealing with problems of State succession, particularly with regard to property, not to deal at the same time with the treatment of debts. As a rule such problems are either dealt with or disregarded altogether, and the same examples may be cited, whether from the past or the present. As regards the past, the most notable examples of uniting of States are those of the United States, the Swiss Confederation, the unification of Germany and the unification of Italy. It would also appear worth while considering the union between Austria and Hungary of 1867, that between Sweden and Norway of 1814 and that between Denmark and Iceland of 1918. Reference may further be made to the cases of the Republic of Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) of 1897 and the Federation of Central America (Costa Rica, El Salvador, Guatemala, Honduras) of 1921 (also known as the Central American Union).

1. FORMATION OF THE UNITED STATES OF AMERICA

397. This formation resulted, of course, from the evolution of the confederacy of 1777 into the federation of 1787. The different instruments drawn up on those occasions had to deal with problems relating to debts. It is worth while considering them in detail.

(a) *Articles of Confederation and Perpetual Union of 1777*

398. Two articles are concerned with debts. They read as follows:

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings

³⁰⁶ See *Yearbook... 1976*, vol. II (Part Two), p. 147, document A/31/10, chap. IV, sect. B, art. 14, para. 1 of the commentary.

and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

399. These two articles should be read in conjunction with article II, which provides that:

Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.³⁰⁷

This article makes clear the degree of integration of the legal order decided upon by the States that signed the Articles of Confederation. This legal order remained in fact very weak, so much so that it was even questioned whether confederations of States possessed an international personality.³⁰⁸ In any case, it must be agreed with Fauchille that:

*a confederation of States is a composite of States rather than a composite State.** Each of the confederate States retains its autonomy, its independence, the enjoyment of its sovereignty, both external and internal, except for minor restrictions inherent in the very idea of association.³⁰⁹

Each State member of the confederation reserves within its territory its full competence in fiscal matters and is responsible generally for the mobilization of its financial resources. Consequently, it must assume responsibility for its own debts.

400. Articles VIII and XII of the Articles of Confederation in no way called this principle into question. They made provision for a minimum of joint financial management of the confederation in the form of a "proportion" of expenses for which "taxes ... shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled", as stipulated in article VIII. However, this method gave rise to a number of practical difficulties and, as one writer put it:

immediately after the war the obvious impotence of the confederacy was revealed. Serious political, financial and administrative difficulties arose; there was no money left in the treasury to pay the army and the government officials; nothing worked, and it quickly became apparent that the Articles of Confederation had to be amended.³¹⁰

However, 10 years were to elapse before a real merger of the 13 States took place.

³⁰⁷ For the text of the articles, see A. H. Kelly and W. A. Harbison, *The American Constitution—its Origins and Development* 3rd ed. (New York, Norton, 1963), appendix 1, pp. 987 *et seq.*

³⁰⁸ On this point, see Fauchille, *op. cit.*, pp. 241 *et seq.*, who analyses the relevant legal opinions.

³⁰⁹ *Ibid.*, p. 242.

³¹⁰ L. le Fur, *Précis de droit international public*, 2nd ed. (Paris, Dalloz, 1933), p. 79.

(b) *Constitution of the United States, 1787*

401. Article VI, clause 1, of the Constitution adopted in 1787 provides as follows:

All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.³¹¹

There would thus appear to be no doubt whatsoever as to the treatment of debts: these were to be taken over by the United States. A writer commenting on the United States Constitution, after pointing out that "the constituent States had no interest in having these obligations cancelled, since the nation's total debt scarcely exceeded \$15 million", explains that, "whatever the government, the debts of the States and of the people of the United States had to be paid in full to national and international creditors".³¹²

402. However, the position was not quite so simple. Unquestionably, the Federation of 1787 had as such the power to impose taxes, in accordance with article I, section VIII, clause 1, of the Constitution:

The Congress shall have power

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States ...³¹³

Nevertheless, the Constitution still allowed a measure of autonomy to the federated States in fiscal matters, since article I, section X, clause 1, provides that: "No State shall ... pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, ...".³¹⁴ The practice of federalism would appear to tend towards the sharing of debts, with each party—the federated State and the federal State—being responsible for its own debts in its own sphere. Thus Fauchille asserts that,

as the State, from the internal point of view, has retained its own individuality, at least in principle, and can thus continue to be a debtor, it is the State itself and not the federal power ... that has ultimate responsibility for its own debts.³¹⁵

Feilchenfeld, for his part, considers that "both the States and the Union assumed the debts which had been contracted by their predecessors, the colonies, the independent States, and the Confederacy". He explains further that

this assumption took place not because of succession but because of legal identity. While it is clear that the assumption was regarded as a matter of course, it is not stated expressly in the constitutional documents that it was considered as an obligation under international law.³¹⁶

2. THE SWISS CONFEDERATION³¹⁷

403. Since 1291, the date of an early text concerning the league of three cantons—Uri, Schwyz and Unter-

³¹¹ *Constitution of the United States* (United States Government Printing Office, Washington, D.C., 1973).

³¹² M. L. Amaimo, *La Constitution des Etats-Unis* (Paris, Rivière, 1947), p. 132.

³¹³ *Constitution of the United States (op. cit.)*.

³¹⁴ *Ibid.*

³¹⁵ Fauchille, *op. cit.*, p. 389.

³¹⁶ Feilchenfeld, *op. cit.*, pp. 58 and 59.

³¹⁷ On the Swiss public debt, see *ibid.*, pp. 167 *et seq.*

wald—a number of instruments have been elaborated defining the status of the Swiss Confederation. The Treaty of Alliance of 16 August 1814 and the two Constitutions of 1848 and 1874 deserve particular attention.

(a) *Treaty of Alliance of 16 August 1814*

404. Article III, paragraph 3, of the Treaty of Alliance among the Cantons of the Confederation stated: "To defray the costs of the war, there shall also be established a federal war treasury ...".³¹⁸ Article XIII acknowledged and fixed the amount of the Swiss debt, stating that "the Swiss national debt, the amount of which was fixed on 1 November 1804 at 3,118,336 Swiss francs, is acknowledged".³¹⁹

405. This debt was again referred to in article LXXXII of the Act of the Congress of Vienna of 1815, which settled the financial dispute between the cantons of Zurich and Berne. It also divided responsibility for the Swiss debt among the various members of the Confederation, taking care to exempt from the debt cantons that had acceded to the alliance after 1813, when the debt was already of long standing. This alliance resulted in a Confederation in which, by definition, cantonal powers maintained an essential place, the implication being that States may assume responsibility only for debts arising from their own actions.

This article reads:

Article LXXXII. To put an end to the discussions which have arisen with respect to the funds invested in England by the cantons of Zurich and Berne, it is determined:

1. That the cantons of Berne and Zurich shall retain ownership of the capital fund, as it existed in 1803 at the time of the dissolution of the Helvetic Government, and shall receive the interest thereof from 1 January 1815.

2. That the accumulated interest due since 1798 up to and including the year 1814 shall be applied to the payment of the remaining capital of the national debt, known under the denomination of the Helvetic debt.

3. That the surplus of the Helvetic debt shall remain the liability of the other cantons, those of Berne and Zurich being exonerated by the above provisions. The quota of each of the cantons remaining liable for this surplus shall be calculated and paid according to the proportion set for the contributions for defrayal of federal expenses; the countries incorporated with Switzerland since 1813 shall not be assessed on account of the former Helvetic debt.³²⁰

(b) *The Helvetic Constitutions of 12 September 1848 and 31 March 1874*

406. In a historical note on Switzerland, it is observed that "grave internal dissensions and the Sonderbund religious war brought about the extinction of the 1815 covenant".³²¹ The confederal system left the cantons too much freedom, which could become dangerous. It was therefore necessary to achieve greater integration

³¹⁸ G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1887), vol. II (1814-1815) [reprint], p. 69.

³¹⁹ *Ibid.*, p. 74.

³²⁰ *Ibid.*, p. 418.

³²¹ F.-R. Dareste and P. Dareste, *Les Constitutions modernes*, 3rd ed. (Paris, Challamel, 1910), vol. I, p. 534.

of these different entities. That was the purpose of the 1848 Constitution, which established a federal system. A first attempt at revision was made in 1872, but the text submitted to the cantons and the people for their approval was rejected because of the excessively unitary tendencies of the draft. It was not until 1874 that a second text was accepted. That is the present Constitution of Switzerland.

407. Neither the Constitution of 1848 nor that of 1874 contained any provisions that could be considered to refer to succession to debts. It may however be presumed that, since the federal system left the cantons a good deal of autonomy, including financial autonomy, they had to assume their own debts. Feilchenfeld seems to agree with this, both as regards Switzerland and the German Empire and, more generally, in connexion with the problem of succession to debts in the context of integration of States leading to a federation. He writes:

When Switzerland was transformed into a federation in 1848, and when the German States united in the North German Confederation, and later in the German Empire, the component States remained charged with their own debts ... although some of their sources of revenue, such as customs revenues, naturally passed to the unions, the arguments has never been advanced that the unions thereby became responsible for portions of the debts of the component States.³²²

3. SUCCESSION TO STATE DEBTS IN THE COURSE OF THE CREATION OF GERMAN UNITY

408. It is generally agreed that the constitutional evolution of Germany from the extinction of the Germanic Holy Roman Empire may be summed up in a series of four confederal instruments through which Germany achieved its unity. 1. The *Confederation of the Rhine States*, created in Paris in 1806 by the signature of 13 German princes, but first and foremost by the will of Napoleon, ceased to exist with the end of the Empire in 1813. 2. The *Germanic Confederation* was the work of the Congress of Vienna, since it derived its charter from the Act on the federative constitution of Germany of 8 June 1815, supplemented by the Final Act of the Congress of Vienna, of 15 May 1820. The history of the Confederation, particularly after 1830, was simply that of the clash between Prussia and Austria over leadership. These struggles ended in 1866 with the defeat of Austria at Sadowa. 3. The *North German Confederation* came into being with the Peace of Prague, of 23 August 1866, which declared the dissolution of the Germanic Confederation. Prussia was thus able to establish under its leadership a confederation of the German States north of the Main, the Constitution of which was drawn up in 1867. 4. The *Constitution of the German Empire*, of 16 April 1871, completed the merger of the German States and thus brought about German unity.

Of these four instruments, the first two and the last will engage the particular attention of the Special Rapporteur.

³²² Feilchenfeld, *op. cit.*, p. 286.

(a) *Treaty establishing the Confederation of the States of the Rhine (12 July 1806)* ³²³

409. The very special nature of this association was clear. It was in fact a Napoleonic protectorate. Moreover, article XII provided that:

His Majesty the Emperor of the French shall be proclaimed Protector of the Confederation and in that capacity shall, upon the death of any Prince Primate, designate his successor.

With regard to the debts of the confederated States, article XXIX provided as follows:

The confederated States shall contribute to the payment of existing debts not only for their former possessions but also for the territories that were respectively subject to their sovereignty. The debt of the *Kreis* of Swabia shall be the responsibility of Their Majesties the Kings of Bavaria and Württemberg, Their Serene Highnesses the Grand Duke of Baden, ..., and shall be divided among them in proportion to the holdings of each of the said Kings and Princes in Swabia.

Article XXX provided for the treatment of proper debts, as follows:

Debts proper to each principality, county or domain coming under the sovereignty of one of the confederated States shall be divided between the said States and the reigning Princes or Counts in proportion to the revenues that the State in question is to acquire and the revenues that the Princes and Counts are to retain pursuant to the above provisions.

410. These two articles settled the question of succession to debts. In the first place, as regards the debts of the confederated States themselves, the States remained responsible for their debts. That was apparently a well-established principle in the Confederation, which left the member States their sovereignty, and hence responsibility for their financial commitments. These articles also covered the case of territories annexed or ceded to the confederated States. Succession to their liabilities occurred in proportion to the amount of territory received. This was a case of annexation and not of merger giving rise to a new State entity, and the spirit of the times thus required that *res transit cum suo onere*. That was apparently a well-established practice in the nineteenth century.

(b) *The Germanic Confederation*

411. Two instruments were adopted within the framework of the Congress of Vienna (1814) to establish the Germanic Confederation. They were the Act of 8 June 1815 and the Final Act of 15 May 1820, to "complete and consolidate the organization of the Germanic Confederation".

The *Act of 8 June 1815* ³²⁴ does not, properly speaking, contain any provision relating to succession to State debts. There is, however, an article 15 reading as follows:

The continuation of direct and subsidiary annuities payable out of the dues for navigation of the Rhine, and the provisions of the

³²³ Treaty of Confederation of the States of the Rhine, signed at Paris on 12 July 1806 and ratified at Saint-Cloud on 19 July; see G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1835), vol. VIII, p. 480.

³²⁴ C. A. Colliard and A. Manin, *Droit international et histoire diplomatique* (Paris, Domat-Monchrestien, 1970), vol. II (Europe), pp. 1 et seq.

ordinance of the deputation of the Empire of 25 February 1803 concerning the payment of debts and pensions granted to individuals or laymen, shall be guaranteed by the Confederation ...

Article II of the Final Act of 15 May 1820 ³²⁵ shows that the member States had decided that the degree of integration and merger entailed by their Confederation should be relatively limited. It provides as follows:

As regards its internal relations, this Confederation forms a body of independent States linked by freely and mutually stipulated rights and duties. As regards its external relations, it constitutes a collective power founded on the principle of political unity.

412. The financial competence of the Confederal Diet is defined in article LII, as follows:

In order to achieve the purpose of the Confederation and to ensure the administration of its affairs, the States of which it is composed shall be assessed financial contributions. The Diet shall therefore be empowered: 1. to fix, in so far as is possible, the over-all amount of regular constitutional expenditures; 2. to establish the special expenditures required to carry out specific orders of the Diet issued for the purpose of achieving recognized purposes of the Confederation, and to determine the contributions required to cover such expenditures; 3. to fix the scale of assessments in accordance with which the various States are to contribute to common expenditures; to regulate and supervise the collection and use of financial contributions and the accounts relating thereto.

413. This provision, as might have been expected, by no means ensured that the Confederation would succeed to the debts of the member States. Its sole aim was to ensure the financing of a minimum of common expenditure, without which no association could possibly function. The confederated States remained responsible for their individual debts, whether incurred before or during the life of the Confederation.

(c) *Constitution of the German Empire (16 April 1871)* ³²⁶

414. Federation or confederation? The legal status of the Empire is not easy to discern, and Fauchille asserts that "it was neither a unitary State nor a confederation of States nor a federal State. It was a new and quite special type." ³²⁷ The fact remains that, under the new Constitution, Germany made significant progress towards unity. That is shown by chapter XII of the Constitution, where provision is made in articles 69 to 73 for the organization of the finances of the Empire. ³²⁸ However, the purpose there was not to settle questions relating to the Empire's possible succession to the debts of the political entities that had preceded it, but to provide the Empire with the financial resources it needed in order to function.

415. Thus article 70 provided as follows:

Common expenditures shall be covered, in the first instance, by common revenue deriving from customs duties, common taxes, the railways, the postal and telegraph services and other branches of the administration. If this revenue is not sufficient to cover

³²⁵ Final Act of the Ministerial Conferences held at Vienna to complete and consolidate the organization of the Germanic Confederation, signed at Vienna on 15 May 1820; see G. F. de Martens, ed., *op. cit.* (1824), vol. V, pp. 467 et seq.

³²⁶ Text in Dareste and Dareste, *op. cit.*, pp. 172 et seq.

³²⁷ Fauchille, *op. cit.*, p. 252.

³²⁸ Dareste and Dareste, *op. cit.*, pp. 197-199.

expenditures, the deficit shall be made up, until such time as a new tax may be established, by means of a contribution assessed against each of the States of the Confederation in proportion to its population and fixed, in an amount not exceeding budgetary requirements, by the Chancellor of the Empire. If these contributions are not covered by surpluses from taxes transferred (*Überweisungen*), they shall be returned to the confederated States to the extent that the other ordinary revenue of the Empire is in excess of its needs. Surpluses from the previous year shall, unless otherwise provided by the Budget Act, be used to cover special common expenditures. It was further provided, in article 73, that, "if special need should arise, a loan accompanied by a guarantee, for which the Empire shall be liable, may be ordered by Act of the Empire".

416. These provisions confirm the financial autonomy of the institutions of the Empire, but also imply that of the member States. Problems relating to succession to the debts of the predecessor States are thus not dealt with directly in the Constitution of the Empire. The limited extent to which the constituent States were merged within the unifying State appears to have precluded the latter's assuming their debts.

4. CREATION OF ITALIAN UNITY AND TREATMENT OF STATE DEBTS³²⁹

417. As one writer put it, "Italy's affairs were for many years the most striking example we have of utter diplomatic confusion. The number of documents of every kind, treaties, conventions, protocols etc., which they spawned is beyond all statistical reckoning."³³⁰ It is therefore out of the question to examine all these instruments; at most, a few of the more significant examples may be considered. Another problem is whether Italian unity came about through a process of unification by merger of States or by annexation of States. It should be recalled that where merger is involved a new State come into being, whereas in the case of annexation, which is now prohibited by international law, the previously existing subject of law survives. Scholarly opinion differs in describing the manner in which Italian unity was achieved, and Anzilotti summed up the various points of view as follows:

Some have regarded the Kingdom of Italy as an enlargement of the Kingdom of Sardinia, arguing that it was formed by means of successive annexations to the Kingdom of Sardinia; others have regarded it as a new subject of law created by the merger of all the former Italian States, including the Kingdom of Sardinia, which thus ceased to exist.³³¹

Keeping in mind this ambiguous situation, the question of the treatment of debts in the course of the creation of Italian unity may now be examined.

418. In a general way, the Kingdom of Italy acknowledged in 1860 the debts of the formerly separate States.³³² That practice had already been instituted by the King

of Sardinia. After the proclamation of the Kingdom of Italy under Victor Emmanuel II, the practice continued. Thus, the Treaty of Vienna of 3 October 1866, under which "His Majesty the Emperor of Austria agrees to the union of the Lombardo-Venetian Kingdom with the Kingdom of Italy" (article III), included an article VI that provided as follows:

The Italian Government shall assume responsibility for: 1. that part of Monte Lombardo Veneto that was retained by Austria under the agreement concluded at Milan in 1860 in application of article 7 of the Treaty of Zurich;³³³ 2. the additional debts contracted by the Monte Lombardo Veneto between 4 June 1859 and the date of conclusion of this Treaty; 3. a sum of 35 million Austrian florins in cash, representing the portion of the 1854 loan attributable to Venezia in respect of the cost of non-transportable war materials. The mode of payment of this sum of 35 million Austrian florins in cash shall, in accordance with the earlier Treaty of Zurich, be specified in an additional article.³³⁴

419. Lastly, the Kingdom of Italy assumed the debts of the Papal States. The example may be cited of the Treaty of 15 September 1864 between France and Italy, under article 4 which:

Italy declares that it is prepared to conclude an agreement providing for its assumption of a proportionate part of the debt of the former Papal States.³³⁵

Unquestionably, in the case of the Italian union, the successor State had to assume the debts of the various States that were to make up the Kingdom of Italy. This was no doubt a reflection of the general sentiment of the time that *res transit cum suo onere*. It was also, above all, if not exclusively, a reflection of the fact that, in the case of Italy, the merger resulted in the creation of a unitary State.

5. SETTLEMENT OF STATE DEBTS IN THE AUSTRO-HUNGARIAN UNION

420. This is often cited as an example of a "real union". The description merits examination. The union of Austria and Hungary was based essentially on two instruments: 1. the Austrian "Act concerning matters of common interest to all the countries of the Austrian Monarchy and the manner of dealing with them" of 21 December 1867; 2. the "Hungarian Act [No. 12] relating to matters of common interest to the countries of the Hungarian Crown and the other countries subject to the sovereignty of His Majesty and the manner of dealing with them", of 12 June 1867.³³⁶

421. These two instruments contain provisions relating, in the first place, to common expenditures. A real union implies, even more than a personal union, the existence of "matters of common interest" involving

³²⁹ See Feilchenfeld, *op. cit.*, pp. 209 *et seq.*
³³⁰ P. Albin, *Les grands traités politiques. Recueil des principaux textes diplomatiques depuis 1815 jusqu'à nos jours, avec des commentaires et des notes* (Paris, Alcan, 1911), p. 62.

³³¹ D. Anzilotti, *Cours de droit international* (Paris, Sirey, 1929), p. 185 [French translation from the third Italian edition by G. Gidel].

³³² De Louter, *op. cit.*, p. 229.

³³⁴ *Ibid.* (1873), vol. XVIII, pp. 405 and 406.

³³⁵ *Ibid.*, p. 24.

³³⁶ Dareste and Dareste, *op. cit.*, pp. 394 *et seq.* for the Austrian Act and pp. 403 *et seq.* for the Hungarian Act.

expenditures. In this connexion, article 3 of the Austrian Act of 21 December 1867 provides:

Expenditures relating to matters of common interest shall be borne by the two parts of the Monarchy in a proportion to be fixed, subject to the approval of the Emperor, by an agreement renewed at certain intervals between the representative bodies (*Reichsrat* and Diet) of each of them.

422. The same article specifies that "ways and means of paying the contribution for which each of the two parts of the Empire is responsible shall remain the exclusive concern of each of them". However, it provides for the eventuality of a joint loan in these terms:

Nevertheless, a joint loan may be contracted to defray expenditures relating to matters of common interest. In that event, all matters relating to the contracting of the loan, as well as the manner in which it is to be employed and repaid, shall be decided jointly. The decision whether there is need to resort to a joint loan shall, however, remain a matter for the legislature of each of the two halves of the Empire.

423. Hungarian Act No. 12 of 1867 provides, for its part, in article 18:

If an understanding is reached regarding such matters [matters recognized as being of common interest] by agreement between the two parts, the proportion in which the countries of the Hungarian Crown shall be responsible for the costs and expenditures relating to matters recognized as being of common interest under Pragmatic Sanction shall be determined in advance by mutual agreement.

The principle of such a contribution by the various member States of a union to the expenditures arising from their joint activities is quite generally accepted, and is to be clearly observed in all unions of States that allow the sovereignty of the member States to subsist.

424. The two aforementioned instruments of the Austro-Hungarian Union also settle the problem of debts. First, the Austrian Act provides, in article 4, that "the contribution to the costs of the pre-existing public debt shall be determined by agreement between the two halves of the Empire".

425. Hungary, on the other hand, showed itself more reluctant to assume State debts. It invoked its sovereignty to dispute the view that it had an obligation to assume them and, when it eventually decided to accept part of the debt, it did so for reasons of equity and on grounds of expediency. Articles 53 to 57 of the Act of 1867, in which Hungary defends its thesis, deserve to be quoted in full:

Article 53. As regards public debts, Hungary, by virtue of its constitutional status, cannot, in strict law, be obliged to assume debts contracted without the legally expressed consent of the country.

Article 54. However, the present Diet has already declared "that, if a genuine constitutional régime is really applied, as soon as possible, in our country, and also in His Majesty's other countries, it is prepared, for considerations of equity and on political grounds, to go beyond its legitimate obligations and to do whatever shall be compatible with the independence and the constitutional rights of the country to the end that His Majesty's other countries, and Hungary with them, may not be ruined by the weight of the expenses accumulated under the régime of absolute power and that the untoward consequences of the tragic period which has just elapsed may be averted".

Article 55. Because of this consideration, and for this reason alone, Hungary is prepared to assume a portion of the public debts and to conclude an agreement to that effect, after prior negotiations, with His Majesty's other countries, as a free people with a free people.

Article 56. In the future, public credit shall be a joint concern in all cases where Hungary and His Majesty's other countries deem it useful to their interests, in the light of the circumstances, to contract together and jointly some new loan. All matters relating to the terms of such a loan and to the utilization and repayment of the sums borrowed shall be decided jointly. However, the prior decision to contract a joint loan shall, in each specific case, in so far as Hungary is concerned, be a matter for the Hungarian Diet.

Article 57. Moreover, Hungary solemnly declares by this resolution that, in accordance with the genuine constitutional principle whereby the country cannot be held responsible for any debt without its consent, Hungary will not in future consider itself responsible for any public debt that shall have been contracted without the consent of the country, formally expressed in legal form.

6. SWEDISH-NORWEGIAN UNION AND TREATMENT OF STATE DEBTS

(a) *Kiel Peace Treaty (14 January 1814)*

426. The history of the union between Sweden and Norway, which is generally regarded as the first major example of a real union, began with the "Treaty of Peace between Their Majesties the Kings of Sweden and Denmark, concluded at Kiel on 14 January 1814".³²⁷ Article IV of the treaty states:

His Majesty the King of Denmark renounces all rights and claims to the Kingdom of Norway irrevocably and for ever, on behalf of himself and his successors, in favour of His Majesty the King of Sweden and his successors ... All rights and benefits shall henceforth be held in full and sovereign possession by His Majesty the King of Sweden, and shall form a kingdom united with the Kingdom of Sweden ...

427. It should be noted, however, that the above-mentioned treaty was not the basis of the Swedish-Norwegian union, which was rather the result of the Act of Union (*Riksakt*) of 6 August 1815. Yet it is worthy of attention here because, according to Feilchenfeld, it was "the first great international treaty of cession which provided for a general distribution of debts, and not merely for the transfer of *dettes hypothéquées* and other locally connected debts".³²⁸ Article VI of the Treaty dealt with the problem of the succession of Sweden to the part of the debt for which Norway was responsible. It read as follows:

Article VI. Since the whole of the debt of the Danish monarchy rests upon the Kingdom of Norway as well as on the other parts of the Kingdom, the King of Sweden, as sovereign of Norway, agrees to assume a part of the said debt proportionate to the population and revenues of Norway. The public debt is understood to include both debt contracted by the Danish Government abroad and that contracted by it within its States. The latter consists of royal and State bonds, bank-notes and other bills issued by royal authority and currently circulating in the two Kingdoms. The exact amount of this debt, as at 1 January 1814, shall be determined by commissioners appointed for the purpose by the two Governments

³²⁷ Text in G. F. de Martens, ed., *op. cit.* (1817), vol. I, pp. 666 *et seq.*

³²⁸ Feilchenfeld, *op. cit.*, p. 142.

and shall be apportioned according to an exact computation of the population and revenues of the Kingdoms of Denmark and Norway. The commissioners shall meet at Copenhagen within one month after the ratification of this treaty, and shall complete their task as soon as possible and at the latest within one year. It is understood that His Majesty the King of Sweden, as sovereign of the Kingdom of Norway, shall not for his part assume any debt contracted by the Kingdom of Denmark, other than the aforementioned, which all the States of that Kingdom prior to the cession of Norway were committed to repay.

The treaty applies the principle *res transit cum suo onere*. Indeed, this concept is one that was often to appear in the numerous treaties for the cession of territories concluded as part of the reorganization of Europe occurring after the collapse of the Napoleonic Empire.

428. Having received Norway, Sweden was to renounce, under article VII, "all rights and claims to the Duchy of Swedish Pomerania and the principality of the Island of Rügen, ... [which] shall henceforth be held in full possession by the Crown of Denmark and shall be incorporated in that Kingdom".

429. With regard to debts, article X stipulated that

The public debt contracted by the Royal Diet of Pomerania shall be the responsibility of His Majesty the King of Denmark, as sovereign of Swedish Pomerania, who shall assume the undertakings given in this connexion for the repayment of the said debt ...

It should be noted that the responsibilities to be assumed by the two States for the territories that they incorporated were not completely parallel. Denmark was obligated only for the debts of the Royal Diet of Pomerania, whereas Sweden had to assume all the part of the public debt attributed to Norway, "both debt contracted by the Danish Government abroad and that contracted by it within its States", as specified in article VI.

(b) *Act of Union (31 July and 6 August 1815) and Constitutions of Sweden and Norway*

430. Rather than in the Treaty of Kiel of 14 January 1814 discussed above,³³⁹ the real basis of the Swedish-Norwegian union is to be found in the Act of Union, or *Riktsakt*, of 6 August 1815, article 1 of which states that "the Kingdom of Norway shall be a free, independent, indivisible and inalienable kingdom, united with Sweden under one King".³⁴⁰ The Act is devoted almost entirely to the rules for the transfer of the Crown and contains no express provision for succession of the Union to the liabilities of the constituent States, which therefore remained responsible for their own debts. This was confirmed by the Constitutions of the two Kingdoms.

431. For example, article 93 of the Norwegian Constitution of 4 November 1814 stated quite clearly that "Norway shall not be bound by any debt other than its national debt".³⁴¹ A similar conclusion may be drawn from the Swedish Constitution of 6 June 1908, which

³³⁹ Para. 426.

³⁴⁰ G. F. de Martens, ed., *op. cit.* (1887), vol. II (1814-1815) [reprinted], p. 609.

³⁴¹ Dareste and Dareste, *op. cit.*, p. 142, foot-note 4.

predates the Act of Union and was in no way amended following that event.³⁴²

432. As was noted by one author, "Norway and Sweden limited their common institutions and their common dealings to the minimum needed for a real union: a common monarch and a common diplomacy".³⁴³ For the rest, each component State enjoyed complete freedom. In particular, the debts of neither State devolved upon the union. In that respect, the Swedish-Norwegian union did not differ from other unions of the same type.

7. PROBLEM OF STATE DEBTS IN THE UNION BETWEEN DENMARK AND ICELAND

433. The nature of the union between Denmark and Iceland has been interpreted in contradictory ways. Fauchille, for example, viewed it as a personal union,³⁴⁴ whereas de Louter regarded it rather as a real union,³⁴⁵ as did Professor Rousseau, although he found that it presented "the strangest characteristics".³⁴⁶ The Act establishing the Union provides:

Denmark and Iceland shall be two free and sovereign States, united by the fact that they have the same King and by the agreement contained in this Act of Alliance. The names of the two States shall be included in the title of the King.³⁴⁷

434. It would be very difficult to conclude from the other provisions of the "Act of Alliance" that the Union assumed responsibility for the debts of the two Kingdoms, especially since section III of article 11 states that, "with regard to the contribution of Iceland to the expenses incurred in connexion with the cases mentioned in this section,* matters that have not been regulated in the foregoing articles shall be dealt with in an agreement between the two countries". The cases in question, to cite only the most important, relate to common concerns such as international relations, inspection of fisheries in Icelandic waters, and so on, which Denmark agreed to handle on behalf of Iceland until such time as the latter decided to deal with them itself.

435. Even the loosest union necessarily involves common concerns for which the financial burden is shared among the various States of the union. The Union between Denmark and Iceland was no exception. Each State was to make its contribution to the common expenses but, for the rest, each was responsible for its own debts.

8. UNITING OF STATES IN CENTRAL AMERICA

436. Following the accession to independence of the Spanish colonies in America, the new States made

³⁴² See articles 66 and 76 of the Constitution in Dareste and Dareste, *op. cit.*, p. 100.

³⁴³ B. Morgenstierne, "Les unions suédo-norvégienne et d'Autriche-Hongrie", *Revue de droit public et de la science politique en France et à l'étranger* (Paris, July-Sept. 1905), vol. XXII, No. 3, p. 533.

³⁴⁴ Fauchille, *op. cit.*, p. 231.

³⁴⁵ De Louter, *op. cit.*, p. 199, foot-note 2.

³⁴⁶ Rousseau, *op. cit.* (1974), vol. II, p. 130.

³⁴⁷ Article 1 of Act No. 619 concerning the Union between Denmark and Iceland of 30 November 1918 (Dareste and Dareste, *op. cit.* (Europe), vol. I, 4th edition, wholly revised, p. 413.

several attempts to unite, especially in Central America. Two examples merit attention and should be considered in the context of the present study.

(a) *Greater Republic of Central America*

437. This uniting of States resulted from the Treaty signed on 20 June 1895 by the three Republics of El Salvador, Honduras and Nicaragua³⁴⁸ which, under the terms of article I, wished to constitute "a single political entity for the exercise of their external sovereignty under the denomination of the Greater Republic of Central America". The States concerned did not, however, intend thereby to renounce their internal autonomy. Article II states:

The Signatory Governments do not by the present Agreement renounce their autonomy or independence as regards the management of internal affairs; and the Constitutions and accessory laws of each State shall remain in force, so far as they are not opposed to the present stipulations.

438. Each State of the Union retained its financial autonomy, and article XIII of the Treaty provides that "the salaries of the members of the Diet shall be fixed by their respective governments, and the general expenses shall be divided in equal parts". In these circumstances, it seems legitimate to say that the Union in no way intended to assume the debts of the predecessor States, which thus presumably remained for those debts.

This conclusion emerges even more clearly in the case of the Treaty establishing the Republic of Central America.

(b) *Republic of Central America*

439. The Treaty of 1895 provided that the Greater Republic of Central America should be named the Republic of Central America once the Treaty had been accepted by the Republics of Costa Rica and Guatemala. That step was taken in the Treaty of 15 June 1897,³⁴⁹ which confirmed the internal autonomy of the States constituting the Republic of Central America. Article III provides:

They retain their autonomic system in regard to their internal 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.

440. The 1897 Treaty was more specific than that of 1895 with regard to the treatment of debts. It expressly states, in article XXXVII, that "the pecuniary or other obligations contracted, or which may be contracted *in the future*, * by any of the States are matters of individual responsibility". Feilchenfeld, referring to this article, concludes that "the debts of the component States were not assumed by the new State".³⁵⁰ An equally plausible conclusion would have been that, if debts contracted in the future were to remain the responsibility of each State, that could mean *a contrario* that past debts were assumed by the union. Logically, however, neither solution seems sounder than the other. The new State

was short-lived and the union was dissolved in 1898.³⁵¹ A further attempt to form a union was to be made in 1921.

(c) *Federation of Central America*

441. The Covenant of Union of Central America of 19 January 1921,³⁵² whereby the Republics of Costa Rica, El Salvador, Guatemala and Honduras established the Federation of Central America, was even more explicit about the treatment of debts than the treaties of 1895 and 1897. Under article 5, paragraph (l), the Covenant provided:

The Federal Government shall administer the national finances, which shall be distinct from those of the States. Federal revenues and taxes shall be created by law.

The internal autonomy of the States in financial matters having thus been confirmed, article 5, paragraph (m), could provide:

The States shall continue the administration of their present internal and external debts. The Federal Government shall be under an obligation to see that the said administration is faithfully carried out, and that the revenues pledged thereto are earmarked for that purpose.

442. This provision is quite unambiguous; the Covenant made no stipulation for succession by the Federation to debts of the States. It stipulated, moreover, that the Federation should oversee the financial commitments of the States to prevent them from contracting foreign debts at haphazard. In a second subparagraph, paragraph (m) provides:

In future none of the States shall be able to make a contract, or to issue foreign loans, without the authorization of a law of the State and the ratification of a Federal Law, or make any contracts which might in any way compromise its sovereignty, its independence or the integrity of its territory.

The Federation itself was subject to particularly severe conditions of authorization if it wished to issue a loan.

C. Recent examples of uniting of States

1. CASE OF MALAYSIA

443. Two mergers of States have occurred in Malaysia. First came the formation in 1957 of the Federation of Malaya, which was succeeded by Malaysia in 1963. The diplomatic and constitutional instruments organizing those two federations included various provisions concerning the problem of succession to debts.

(a) *Constitution of the Federation of Malaya (1957)*³⁵³

444. The Malayan Constitution contains a long article 167 entitled "Rights, liabilities and obligations". Its main provisions are the following:

(1) ... all rights, liabilities and obligations of—

(a) Her Majesty in respect of the government of the Federation, and

³⁴⁸ G. F. de Martens, ed., *op. cit.* (1905), 2nd series, vol. XXXII, p. 276.

³⁴⁹ *Ibid.*, p. 279.

³⁵⁰ Feilchenfeld, *op. cit.*, p. 379.

³⁵¹ G. F. de Martens, ed., *op. cit.*, vol. XXXII, p. 284.

³⁵² League of Nations, *Treaty Series*, vol. 5, p. 19.

³⁵³ *Materials on succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 93.

(b) the Government of the Federation or any public officer on behalf of the Government of the Federation, shall on and after Merdeka Day [the date of uniting] be the rights, liabilities and obligations of the Federation.

(2) ... all rights, liabilities and obligations of—

(a) Her Majesty in respect of the government of Malacca or the government of Penang,

(b) His Highness the Ruler in respect of the government of any State, and

(c) the government of any State, shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States.

445. These provisions thus appear to indicate that each State entity was concerned only with the assets and liabilities of its particular sphere. "Rights, liabilities and obligations" were apportioned in accordance with the division of spheres of competence established between the Federation and the member States. Debts contracted were thus the responsibility of the States in respect of matters falling within their respective spheres of competence at the date of uniting. Article 167 continues:

(3) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Federation Government but which on that date becomes the responsibility of the Government of a State, shall on that day devolve upon that State.

(4) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Government of a State but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation.

Similar provisions are to be found in the *Malaysia Act of 1963*.

(b) *Malaysia Act, 1963*

446. In the Malaysia Bill, specifically in part IV, relating to transitional and temporary provisions, there is a section 76 entitled: "Succession to rights, liabilities and obligations", which reads as follows:

(1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State.

(2) This section does not apply to any rights, liabilities or obligations in relation to which section 75 has effect, nor does it have effect to transfer any person from service under the State to service under the Federation or otherwise affect any rights, liabilities or obligations arising from such service or from any contract of employment; but, subject to that, in this section rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise.

(3) The Attorney-General shall on the application of any party interested in any legal proceedings, other than proceedings between the Federation and a State, certify whether any right, liability or obligation is by virtue of this section a right, liability or obligation of the Federation or of a State named in the certificate, and any such certificate shall for the purposes of those proceedings be final and binding on all courts, but shall not operate to prejudice the rights and obligations of the Federation and any State as between themselves.

(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day.³⁵⁴

A mechanism was thus provided for the division of rights and liabilities between the Federation and the member States similar to that in the Constitution of the Malayan Federation (1957).

447. Similar provisions will be noted in the individual Constitutions of the member States of the Federation. For example, article 50 of the Constitution of the State of Sabah, concerning rights, liabilities and obligations, states:

(1) All rights, liabilities and obligations of Her Majesty in respect of the government of the colony of North Borneo shall on the commencement of this Constitution become rights, liabilities and obligations of the State.

(2) In this article rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise, other than rights to which article 49 applies.³⁵⁵

2. PROVISIONAL CONSTITUTION OF THE UNITED ARAB REPUBLIC (5 MARCH 1958)³⁵⁶

448. As pointed out by the Special Rapporteur in his eighth report,³⁵⁷ this Constitution, which effected the merger of Egypt and Syria, has an article 69 on succession to treaties, but makes no mention of succession to property and is not very explicit as regards succession to the debts of the two States. However, article 29 provides that:

The Government may not contract any loans, nor undertake any project which would be a burden on the State Treasury over one or more future years, except with the consent of the National Assembly.

This provision can be interpreted as giving the legislative authority of the United Arab Republic sole power to contract loans, to the exclusion of Syria and Egypt. Furthermore, since article 70³⁵⁸ envisages a single budget for the two regions, there may be grounds for agreeing with Professor O'Connell that "the UAR would seem to have been the only entity competent to service the debt of the two regions".³⁵⁹

3. CASE OF TANZANIA

449. In the Union of Tanganyika and Zanzibar Act of 26 April 1964,³⁶⁰ which led to the creation of the United

³⁵⁴ United Nations, *Treaty Series*, vol. 750, p. 60.

³⁵⁵ *Ibid.*, p. 110. See also p. 134 (Constitution of the State of Sarawak, article 48) and p. 176 (Constitution of the State of Singapore, article 104).

³⁵⁶ English text in *International and Comparative Law Quarterly* (London), April 1959, vol. 8, pp. 374-387.

³⁵⁷ See *Yearbook... 1976*, vol. II (Part One), p. 101, document A/CN.4/292, chap. III, art. 16, para. 29 of commentary.

³⁵⁸ Article 70 reads as follows:

"A special budget, alongside the State Budget, shall be drawn up and put in force in each of the present regional spheres of each of Syria and Egypt until the coming into effect of the final measures for the introduction of a single budget."

³⁵⁹ O'Connell, *op. cit.*, p. 386.

³⁶⁰ See A. J. Peaslee, *Constitutions of Nations*, 3rd ed., revised (The Hague, Nijhoff, 1965), vol. I (Africa), pp. 1101 *et seq.*

Republic of Tanzania, there is no express reference to succession to State debts. However, it may be pointed out that borrowing is among the matters reserved to the Federal Parliament and Government,³⁶¹ which under the Act of Union are also given very real powers to oversee the States of the Union.

450. The merger brought about by the Act of Union seems indeed to go rather further than strict federalism would require and may be placed somewhere between a federal and a unitary State. That being so, it would not be unreasonable to assume that such a union could not be effected without the federation's accepting responsibility for the debts, if any, of the Republics of Tanganyika and Zanzibar. However, this is not explicitly stated in the Articles of Union.

D. Conclusions to be drawn with respect to State debts

451. The general conclusion that must apparently be drawn from all the examples mentioned above is that, as the Special Rapporteur suggested in his introduction, the treatment of State debts in cases of uniting of States depends basically on the form of the successor State, which is itself determined according to the will of the predecessor States. It may be worth while to recall that the uniting of States envisaged in this study is one that takes place in accordance with international law. This study is not concerned with annexation or absorption of States, and the few examples that might be construed as of that nature (e.g. the ambiguous case of Italian unity) were used only by way of illustration.

452. The uniting of States is, by definition, an operation that takes place in accordance with law and with the expressed will of the constituent States. It implies in principle the prior existence of States. Hence the merging of States can only be voluntary, and the treatment of debts therefore depends primarily on the tenor of the will of the predecessor States, which will take care to endow the successor State with the constitutional form best suited to their needs.

453. If the predecessor States effect a merger that completely annihilates their legal personality, then they

³⁶¹ See in particular the schedule setting out the Articles of Union between the Republic of Tanganyika and Zanzibar, in A. J. Peaslee, *op. cit.*, p. 1107.

clearly intended to constitute a unitary State. To this extent, it seems logical for the new State to succeed to the debts of the predecessor States. In fact, this is generally accepted in the literature. For instance, Fauchille writes: "When States merge to form a new State, their debts become the responsibility of that State."³⁶²

454. If, on the other hand, States unite but retain some degree of competence with respect, for example, to their internal affairs, which necessarily implies a degree of responsibility for the management of those affairs, it stands to reason that the prime area in which the exercise of such responsibility should be left to them is that of debts contracted before the uniting of States. Thus, one writer considered that "if provinces ... are united only by a federal link, if they retain some autonomy and are responsible for managing their own finances and meeting their own expenses, there is no reason to make the federal power responsible for obligations that it did not contract".³⁶³

455. It is quite clear that the degree of autonomy retained by the States, which gives a reasonably accurate indication of the extent of the merger, must be taken into consideration in determining the treatment of debts in cases of succession. Some federations are closer to unitary States, and in that case responsibility for the debts of the predecessor States lies with the federation, despite the supposed formal internal autonomy of the constituent States. As for confederations and the various kinds of personal and real unions, there can be no doubt that States that establish such links retain the greater part, if not all, of their sovereignty. In such cases, each State should continue to be responsible for its own debts.

456. In view of the above considerations, the Special Rapporteur propose the following draft article:

Article W. Treatment of State debts in cases of uniting of States

On the uniting of two or more States in one State, the successor State thus formed shall not succeed to the debts of the constituent States unless:

- (a) the constituent States have otherwise agreed, or
- (b) the uniting of States has given rise to a unitary State.

³⁶² Fauchille, *op. cit.*, p. 380.

³⁶³ R. Piédelievre, *Précis de droit international public ou droit des gens* (Paris, Cotillon, 1894), vol. I, p. 170.

CHAPTER VII

State debts in cases of dissolution of unions

[To be drafted later.]

CHAPTER VIII

State debts in cases of separation of one or more parts of a State

[To be drafted later.]

**QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND
INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE
INTERNATIONAL ORGANIZATIONS**

[Agenda item 4]

DOCUMENT A/CN.4/298

**Sixth report on the question of treaties concluded between States and international organizations or between two or more
international organizations, by Mr. Paul Reuter, Special Rapporteur**

*Draft articles, with commentaries (continued) **

[Original: French]
[11 March 1977]

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ABBREVIATIONS

AETR	European Agreement concerning the work of crews of vehicles engaged in international road transport
CMEA	Council for Mutual Economic Assistance
ECSC	European Coal and Steel Community
EEC	European Economic Community
IBRD	International Bank for Reconstruction and Development
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of Petroleum Exporting Countries
UNCTAD	United Nations Conference on Trade and Development

Draft articles with commentaries (*continued*)PART III. OBSERVANCE, APPLICATION
AND INTERPRETATION OF TREATIESSECTION 4. TREATIES AND NON-PARTY STATES
OR INTERNATIONAL ORGANIZATIONS¹*General introduction*

1. Section 4 of part III of the Vienna Convention on the Law of Treaties² contains five articles, the last of which states that a rule set forth in a treaty may become binding upon a third State as a customary rule of international law. This article could be extended to treaties concluded between States and international organizations or between two or more international organizations simply by means of drafting changes. On the other hand, the first four articles represent a coherent whole concerning the effects of treaties on third States. This is a delicate question, on which the Commission spent a great deal of time when it was preparing the draft articles on treaties between States.

2. The transfer of the formulas used by the Vienna Convention in this connexion (which follow very closely those of the Commission's draft articles) to treaties to which international organizations are parties calls for a thorough preliminary investigation. Accordingly, reference will be made first to the spirit of the articles of the Vienna Convention, and then to the background of the Commission's work on treaties to which international organizations are parties; finally, general solutions to the problem will be presented.

A. SPIRIT OF THE ARTICLES OF THE VIENNA
CONVENTION

3. The relevant provisions of the Vienna Convention may be divided into two parts: basic principles and the

¹ Corresponding title in the Vienna Convention on the Law of Treaties: "Treaties and third States". For an explanation of the change, see para. 27 below.

² 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. 287. The Convention is hereinafter referred to as the "Vienna Convention".

technical conditions for their application. These two parts will be discussed in turn.

4. The fundamental principle of the Vienna Convention is absence of effects of treaties between States with respect to third States. This does not exclude the possibility that a treaty will give rise to rights or obligations with respect to a third State, but both rights and obligations may be attributed to the third State only with the consent of that State. The will of the third State remains paramount with respect to both rights and obligations.

5. This position, which is both clear and firm, is based on two arguments. On the one hand, it represents the general law of all conventional régimes, and the entire Vienna Convention is imbued with the spirit of conventional consensus; on the other hand, the subjects of law that are parties to the agreements in question are equal and sovereign and, more than for other subjects of law, this sovereignty requires that they may not be legally committed by the will of a third party. In its commentary on article 30 of the draft articles (articles 34 of the Vienna Convention), the Commission lays great emphasis on these two arguments concerning the absence of effect of treaties with respect to third parties:

The rule underlying the present article appears originally to have been derived from Roman law in the form of the well-known *maxim pacta tertiis nec nocent nec prosunt*—agreements neither impose obligations nor confer rights upon thirds parties. In international law, however, the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States.³

6. As long as only States are involved, these two arguments are indisputable; however, to the extent that this general rule is to be applied to international organizations, that will no longer be true. In the latter case, although the notion of consensus underlying the law of treaties subsists, the other argument does not. International organizations are neither sovereign nor even equal; all their powers are strictly at the service of their member States; it is the function they assume that

³ *Yearbook... 1966*, vol. II, p. 226, document A/6309/Rev.1, part II, chap. II, para. (1) of the commentary to draft article 30. A little further on it is stated, with respect to the rule set out in article 31 of the draft (article 35 of the Vienna Convention): "That rule is one of the bulwarks of the independence and equality of States." (*Ibid.*, p. 227, para. (1) of the commentary to article 31.)

justifies and circumscribes their activities and their very being. It is therefore necessary to establish to what extent this difference in the basis of the rule requires that the rule be modified, or at least rendered more flexible, in respect of international organizations; this point will be reverted to at a later stage.

7. Since reference has been made to the solid arguments positing the absence of effect on third States of treaties between States, reference must also be made to the limits of the position taken both by the Commission and by the United Nations Conference on the Law of Treaties. The fundamental principles of the relative effect of treaties is fully valid in the context of the law of treaties, but only in that context. Cases may well occur in the international community of a State being validly confronted with a legal act or a situation arising from a treaty in which that State did not participate. In such cases, the solution decided upon would not be based on the rules specifically constituting the law of treaties, but on other general rules of international law. Of course, the question whether such cases should be examined in the context of the law of treaties or in some other context raises considerations of method and expediency that might occasion some hesitation. In 1964, when discussing the question of the effects of treaties on third States, the Special Rapporteur, Sir Humphrey Waldock, suggested draft articles concerning "actual rights" or "objective régimes".⁴ The Commission did not endorse these suggestions, but it would be a mistake to deduce from this that some acts or situations are never applicable to a State that has not participated in the treaty from which they arise. The Commission's decision means only that the basis for such cases, if they arise, does not lie in the rules of the law of treaties; the question of their legal validity has not thereby been settled, and remains open.

8. It may be useful to take an example that will clarify this important point. The question involved in this example is precisely whether treaties give rise to the establishment of "actual rights" or "objective régimes" applicable to third States. The Commission set this question aside when discussing the law of treaties, but encountered it again later, in some measure at least, when discussing State succession in respect of treaties. At the time, it accepted a rule providing that State succession as such shall not affect certain territorial situations arising from treaties. This doubtless opens up the theoretical problem whether the argument in this case should be couched in terms of succession to a treaty or succession to a situation;⁵ however that may be, the Commission considered that the problem concerned primarily succession of States and not the law of treaties. It therefore laid down a rule consistent with the Vienna Convention, and it did so for fundamental reasons of much greater import than article 73 of the Convention, under which the provisions of the Convention shall not prejudice any

question that may arise in regard to a treaty from a succession of States.⁶

9. These particulars concerning the Vienna Convention are of course so general in character that they are also valid with respect to draft articles on treaties involving international organizations. Without returning to this point at this stage, it will be agreed that, in respect of treaties between States and international organizations or between two or more international organizations, there would be no justification for departing from the line followed by the Vienna Convention. Thus the fundamental principle of the relative effect of treaties will be adhered to, subject to rules of international law relating primarily to subjects other than the law of treaties.

10. The spirit of the Vienna Convention having thus been defined in very general terms, consideration must now be given to the manner in which that spirit was to be reflected in practice. Two specific issues then arise, which are dealt with in articles 35, 36 and 37 of the Convention. Once it is accepted that a treaty between States may have certain effects on third States subject to the latter's consent, the mechanism and form of consent must be determined; that is the first specific issue. Once this consent has been given and the effect achieved, it is necessary to establish how far and in what way the effects of the treaty can be modified or ended; that is the second specific issue. Several options were now opened, first to the Commission, and then to the Conference on the Law of Treaties. It is not necessary to recall and discuss them all, but it is essential to determine, with respect to the options decided upon, the respective importance of the influence of consensus and of State sovereignty. Any application or consequence designed only to safeguard the sovereignty and independence of States might prove unnecessary in the case of international organizations.

11. It will be recalled that the Vienna Convention makes a fundamental distinction according to whether the treaty may give rise to rights or obligations in respect of third States.⁷ In such a case, the position is simpler and clearer as regards the mechanism and form of consent and the conditions governing modification of the situation thus created. This case will therefore be dealt with first.

12. When the aim of a treaty between States is to create an obligation that a third State will assume, the treaty is only *an offer to enter into a contract*; only acceptance

⁶ Article 73:

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

⁷ The Vienna Convention (article 36, para. 2) covers cases where a treaty establishes rights under specific conditions, that is, by imposing certain obligations on the beneficiary. However, the case could be extended and expressed in its most general form: what will be the régime for a treaty that gives rise to both rights and obligations with respect to third States? Apparently the strictest rules will apply to the whole, if that whole is indivisible. The Vienna Convention does not reply directly to this question. No draft articles will be proposed on this subject, which has hitherto aroused little comment.

⁴ See *Yearbook... 1964*, vol. II, pp. 19 *et seq.*, document A/CN.4/167 and Add.1-3, articles 62 and 63.

⁵ See *Yearbook... 1974*, vol. II (Part One), pp. 197-198 and 201-202, document A/9610/Rev.1, chap. II, D, paras. (2), (5), (18) and (20) of the commentary to articles 11 and 12.

of the offer by the third State will produce the effect. The chosen mechanism is therefore that of a *collateral agreement*. This interpretation involves only the principles of consensus. The same is true with respect to the question of the conditions under which the situation thus created could be modified. Since the legal source of the obligation is the collateral agreement, only an agreement involving all interested parties could modify or revoke the obligation, that is to say, an agreement of the States parties to the treaty (and to the collateral agreement) and of the third State (party to the collateral agreement). It remains to be decided what form the consent of the third State should take. If nothing more than consensus were involved, the consent of the third State could be given in any form, explicitly or implicitly, orally or in writing. Here, however, there arises a specific requirement connected with State sovereignty and the need to protect that sovereignty; in its draft articles, the Commission had provided for "express" acceptance, and the United Nations Conference on The Law of Treaties went further by requiring acceptance in writing. In the case of an international organization, the question clearly arises whether these requirements should be retained or not.

13. The case of a treaty intended to confer rights on a third State could have been dealt with in an equally straightforward manner. However, the Commission was divided with respect, first, to the mechanism governing the treaty's effect on third States. Some thought that, as in the preceding case, this mechanism was a collateral agreement, but others referred to the mechanism of *stipulation pour autrui*. Finally, noting that the two mechanisms differed only in terms of doctrine, the Commission drafted article 32 (article 36 of the Vienna Convention) in such a way as to make it compatible with either theoretical explanation, since all the members agreed that the consent of the third State was in any case necessary before a right benefiting that State could be established. Here it was no longer a question of attaching conditions to the form of consent; in addition, to make it easier for all members to agree to the proposed text, a rule was laid down to the effect that the consent of the third State was assumed unless the treaty provided otherwise. With respect to the revocation or modification of the right thus established for a third State, the solution agreed upon with respect to obligations should logically have been adopted. However, in compliance with observations made by States between the first and second readings, it was decided to avoid discouraging the establishment of rights benefiting third States, and a formula was proposed for ratification by the Conference under which it was accepted that the right could be revoked or modified unless it could be shown that the parties intended otherwise.⁸

14. This brief account of the spirit underlying the pertinent articles of the Vienna Convention leads to a fairly simple conclusion: the solutions chosen are generally derived from the basic principles of consensus and

⁸ In connexion with all these points, see *Yearbook... 1966*, vol. II, pp. 227 *et seq.*, document A/6309/Rev.1, part II, chapter II (Draft articles on the law of treaties with commentaries), commentaries on articles 32 and 33.

to this extent they are just as valid for international organizations as for States. However, in the formal expression of consent, there are requirements that arise from the desire to protect the sovereignty and independence of States. These are not valid for international organizations, which are dominated entirely by a different concept: performance of a function. It remains to be seen whether this characteristic has particular consequences.

B. BACKGROUND TO THE COMMISSION'S WORK

15. It may be useful to indicate briefly how the question of the effects on third parties of treaties to which an international organization is a party has so far been dealt with by the Commission. This very brief review will show that the content of the problem before the Commission is no longer the same as it was initially, in particular because the Special Rapporteur has sought from the outset to place the problem in the broadest possible perspective. His initial exploratory investigations, it will be seen, led to the abandonment of a number of questions that proved to be too specific, too difficult or perhaps even, despite appearances, irrelevant.

16. In his third report on the law of treaties, Sir Humphrey Waldock considered several questions relating to the effects of treaties on third parties, including international organizations. In particular, he raised the problem of the *representation* of a State by an international organization in the conclusion of a treaty, the organization acting on behalf either of one of its members or of them all.⁹ At the time, the Commission shelved those questions. The Special Rapporteur considers this a very specific problem; a treaty that commits States remains a treaty between States subject to the Vienna Convention even if an organization has represented one or several States: this is the most certain consequence of simple *representation*.¹⁰ The representation of one State by another State or by an international organization or, more generally, of one subject of law by another subject of law probably gives rise to complex problems of treaty law. However, it will be observed that the Commission refrained, as did the United Nations Conference on the Law of Treaties, from dealing with that question. If the Vienna Convention remained silent on the representation of the corporate body by another corporate body, it is reasonable to adopt the same position as regards treaties to which an international organization is a party. In line with the investigations of the Special Rapporteur, the Secretariat produced an excellent study on a specific aspect of the matter.¹¹ However, the study as a whole does not appear to be sufficiently advanced as yet and somewhat outside the main scope

⁹ *Yearbook... 1964*, vol. II, pp. 15-17, document A/CN.4/167 and Add.1-3, commentaries to articles 59 and 60. See *Yearbook... 1972*, vol. II, p. 183, document A/CN.4/258, para. 41.

¹⁰ P. Cahier, "Le problème des effets des traités à l'égard des Etats tiers", *Recueil des cours de l'Académie de droit international de La Haye, 1974-III* (Leyden, Sijthoff, 1975), vol. 143, p. 721.

¹¹ "Possibilities of participation by the United Nations in international agreements on behalf of a territory: study prepared by the Secretariat" (*Yearbook... 1974*, vol. II (Part Two), p. 8, document A/CN.4/281).

of this report. The Special Rapporteur therefore believes he has correctly interpreted the feeling of the Commission in leaving aside questions that are specifically linked to problems of representation.

17. However, this question of representation was not unrelated to another question that was raised at an early stage in the work of the Commission and that cannot be set aside so easily, namely, the effects of international agreements concluded by an organization on its member States. The two questions are linked to the principle of the reality of the international personality of an organization. For a long time, in traditional international law and in its extension in the legal theory of the socialist countries, international organizations were treated as a means of collective action by States rather than as subjects of law; it was therefore easy to consider both that they represented member States and that they committed those States by the agreements they concluded. These considerations gave rise to practical and very specific problems. In 1964 Mr. Tunkin informed the Commission:

Where an international organization entered into a treaty, there would always be the problem of responsibility for the treaty with regard to both the organization and the member States.¹²

At the same time, the question was beginning to be discussed in the United Nations in relation to space matters, and specific solutions were adopted in the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space,¹³ and especially in the Convention on International Liability for Damage Caused by Space Objects.¹⁴

18. The Commission appointed a Special Rapporteur to deal with the question of treaties concluded between States and international organizations or between two or more international organizations. In his very first report, the Special Rapporteur included among the items meriting study by the Commission several items concerning the effects of such treaties on third parties.¹⁵ He pointed out that, in addition to the aforementioned questions of representation, international organizations were quite often given other functions under treaties concluded after their establishment, and that the organizations often accepted such functions in an implicit manner that was not in conformity with the strict conditions laid down in article 35 of the Vienna Convention.

19. Having established that multilateral treaties among States were almost never opened to international organizations, the Special Rapporteur showed that in practice international organizations could rarely remain unconcerned with certain such treaties. That being so, the question arose whether the distinction between third States and States parties to a treaty might not have to be modified in the case of international organizations. Perhaps an intermediate status might be conceived of

between "party" and "third party" that would involve only some of the elements of the status of "party".

20. Meanwhile a detailed questionnaire, dealing *inter alia* with various aspects of the effect of treaties on third parties, had been sent to a number of international organizations. On the basis of the answers received, the Special Rapporteur had attempted, in his second report, to clarify some of these problems: the concept of "party to a treaty";¹⁶ participation by an organization in a treaty on behalf of a territory;¹⁷ effects of treaties on third parties;¹⁸ and, in particular, attribution by treaty of new functions to an organization without the latter's express consent.¹⁹ He also suggested some new conclusions. With regard to the last point, in particular, he suggested that an international organization should be able to give its assent to an extension of its functions in any form. On the other hand, it seemed impossible that its acceptance should confer on it an acquired right to the maintenance of such an extension against the will of the States that had decided it; the purely functional character of international organizations precluded the constitution of rights of that kind as against States.²⁰ He suggested a solution of principle, on the essential question of the effects of treaties concluded by international organizations in respect of their member States.²¹

21. The Commission discussed the first and second reports at its twenty-fifth session.²² Certain comments by the members of the Commission concerned the question of the effect of treaties on third parties. Mr. Ushakov thought that the Commission should adhere to the concept of "party to a treaty", as defined in the Vienna Convention,²³ that any reference to problems of "representation" should be excluded from the draft articles,²⁴ and that the effects of a treaty to which an international organization was a party were the same for member States as for non-member States of the Organization.²⁵

22. Mr. Kearney agreed that acceptance by an organization of the effects of a treaty to which it was not a party should be governed by less restrictive rules than those laid down for States in the Vienna Convention.²⁶ On the same subject, Mr. Tammes expressed the view that the requirement of written consent by an organization was excessive, since the organization could be considered as implicitly accepting in advance all future obligations that might devolve upon it rather than as cautiously consenting to them in accordance with the rules of the

¹⁶ *Yearbook... 1973*, vol. II, pp. 79-81, document A/CN.4/271, paras. 23-33.

¹⁷ *Ibid.*, pp. 86-88, paras. 69-77.

¹⁸ *Ibid.*, pp. 89-93, paras. 89-107.

¹⁹ *Ibid.*, pp. 90-91, para. 96.

²⁰ *Ibid.*, p. 91, para. 97.

²¹ *Ibid.*, pp. 91-93, paras. 98 *et seq.*

²² See *Yearbook... 1973*, vol. I, pp. 187-189, pp. 198 *et seq.*, 1238th meeting, paras. 63 *et seq.*, 1241st and 1243rd meetings.

²³ *Ibid.*, p. 200, 1241st meeting, para. 10.

²⁴ *Ibid.*, para. 12.

²⁵ *Ibid.*, para. 17.

²⁶ *Ibid.*, p. 201, para. 28.

¹² *Yearbook... 1964*, vol. I, p. 62, 733rd meeting, para. 21.

¹³ General Assembly resolution 2345 (XXII), annex.

¹⁴ General Assembly resolution 2777 (XXVI), annex.

¹⁵ *Yearbook... 1972*, vol. II, pp. 189 *et seq.*, document A/CN.4/258, paras. 58 *et seq.*

Vienna Convention.²⁷ Mr. Ustor agreed that an organization was not a third party in respect of a treaty between States that concerned it directly, and he cited the example of an agreement between two economic associations and the position of the member States of those associations.²⁸ Sir Francis Vallat expressed a similar idea:

... article 2, paragraph 1 (h), of the Vienna Convention was inappropriate in the case of international organizations, since there was a special relationship between the organization and its members; hence treaties concluded by the organization might have some effect on its members without their necessarily being parties thereto.²⁹

23. Among the Special Rapporteur's conclusions on this exchange of views, only one specific point will be dealt with here, concerning the problem under study. The question of treaties between States was the subject of the Vienna Convention and there is no question of amending that instrument or even of adding to it. At first sight, therefore, it might be considered that the Commission had now to deal only with the effects of treaties between States and international organizations or between two or more international organizations and that, consequently, it might leave aside the question of the effects on an international organization of treaties concluded with regard to it between States. However, it must be concluded that, at least in the case of a treaty that assigns new functions to an existing organization and that does not entail an amendment of the constituent charter of that organization, acceptance by the organization is the subject of a collateral agreement between the organization and the States parties to the treaty assigning new functions to it. This treaty is therefore clearly a treaty between States and an international organization and is of such a nature as to fall within the purview of the provisions that will be covered by the draft articles.³⁰

C. THE PROBLEM AND GENERAL SOLUTIONS TO IT

24. At the present stage in the progress of the Commission's work in this area, it seems that the situation may be summed up broadly by distinguishing four questions of varying importance and considering them one after the other:

(1) The question of principle: whether to revise or adapt the provisions of the Vienna Convention;

(2) Third parties: vocabulary and question of substance;

²⁷ *Ibid.*, p. 203, paras. 5-6.

²⁸ *Ibid.*, p. 205, para. 25.

²⁹ *Ibid.*, p. 207, para. 48.

³⁰ *Ibid.*, pp. 209-210, 1243rd meeting, para. 17. In his comments, the Special Rapporteur did not fully reply to the observation of Mr. Ushakov. The collateral agreement will indeed come within the purview of the future draft articles (provided it may be considered as taking the form of a written agreement), but the treaty between States and its effects will continue to be governed by the Vienna Convention in general; however, its effects on an international organization are not covered by article 34 of the Convention, which concerns only the absence of effects on third States. There are therefore logical reasons for including this question in the draft articles. See para. 41 below.

- (3) Treaties of an organization and its member States,;
- (4) Marginal questions: representation and assignment of new functions to an organization.

1. *The question of principle: whether to revise or adapt the provisions of the Vienna Convention*

25. The answer to the question of principle is simple and quite unambiguous: there can be no revision, but only adaptation, of the principles embodied in articles 34 to 38 of the Vienna Convention. As has been seen, these principles, concerning which no objections or reservations were expressed at the United Nations Conference on the Law of Treaties, simply reflect the notion of consensus that prevails with respect to conventions in international relations as in private relations. At most, two points might be borne in mind: certain secondary aspects of the articles of the Vienna Convention derive from the fact that the effects in question are to operate with respect to *sovereign* subjects of law, namely, States, whose sovereignty must be carefully respected, whereas in the draft articles consideration must also be given to the effects that would operate with respect not to sovereign States but to subjects of law that are wholly at the service of a *function* that has been internationally defined in relation to States.

26. This position of principle has important consequences as regards method. The effects of treaty instruments whose régime is the subject of the draft articles are likely to operate with respect to both States and international organizations, and a distinction must be made between the two cases. With respect to the effects on States, there is, generally speaking, no sound *a priori* reason for departing from the solutions set forth in the articles of the Vienna Convention, but the same is not true of the effects on international organizations; in the latter case, the question arises whether different procedures are required. On the other hand, there is no *a priori* substantive reason for distinguishing between the effects of treaties between States and international organizations, and the effects of treaties between two or more international organizations. Both types of treaties may be required to produce certain effects for both international organizations and States. The only reason for distinguishing between the two types would be for drafting purposes.

2. *Third parties: vocabulary and question of substance*

27. The relevant articles of the Vienna Convention make abundant use of the term "third State". But if it is considered that article 2, paragraph 1 (g) and (h), defines "party" and "third State" simply by taking one term as the negation of the other ("third State" means a State not a party to the treaty"), it is clear that there is nothing original about the term "third State" as used in a treaty. However, its use in, or at least its transposition to, the draft articles gives rise to two difficulties, one linguistic and the other substantive.

28. As regards the linguistic difficulty, the use in French of the term "third organization" is possible, although it would cause some astonishment, and the same would seem to apply to other languages. This is not simply

because the term is not commonly used, but also because "third" normally qualifies a subject of law solely within a group formed of subjects of like nature: a third State is distinguished in a group of States from States that are bound by a given convention. In relation to organizations that are bound to each other by an agreement, an organization that is not a party to that agreement indeed appears to be a third organization, but it would perhaps be somewhat unusual to say that this organization was a third party in relation to the parties to a treaty if such parties consisted of international organizations and States. No problem of vocabulary would arise if "third" were replaced by "non-party", since in the Vienna Convention "third" is strictly defined as one that is not a party.

29. In addition to the question of appropriate vocabulary, there is perhaps a substantive reason precluding use of the word "third". Admittedly, the Vienna Convention considered the terms "third" and "non-party" to be identical and was fully entitled to do so because every convention may select its own vocabulary. Nevertheless, the two terms are not wholly equivalent. No to be a party to a treaty is to be foreign to a conventional *legal instrument*, to be deprived of the powers inherent in the status of party with respect to the duration of the instrument when new parties emerge, in cases of amendment etc.³¹ It also means, but only inferentially, not to be bound, or at least not to be directly bound, by obligations arising from the instrument. However, it is possible, through various mechanisms, to derive rights from a treaty and to be bound by virtue of it to perform obligations without ever becoming a party to it, as, for example, the United Nations in relation to the Charter and to other inter-State agreements concerning it. Necessarily, the term "third" has a technically less precise, yet substantively more radical meaning: a "third party" is foreign to an instrument, its consequences and all the rules deriving therefrom.

30. It was as a result of similar reflections that the Special Rapporteur earlier felt authorized to propose such formulas as the following:

One would be tempted to say that the States members of an organization may be "more or less" third States in relation to the treaties concluded by the organization ...³²

Other authors dealing with the same case have considered member States as "false third parties".³³ This argument has been questioned, as has the one advanced by the Special Rapporteur, to the effect that it was indeed

³¹ It is sometimes said that a body is either a party to a treaty or it is not, which is true. However, that does not mean that it is not possible to determine in each treaty that certain subjects of law will enjoy a particular status of "party" under its provisions and have only some of the rights of a "party". It means only that, *generally speaking*, only two types of status can be determined, namely, party and non-party, and that it is in relation to one or other of these two types of status that, in doubtful cases, the rights and obligations of any subject of law enjoying a particular status in relation to a treaty will be considered.

³² *Yearbook... 1972*, vol. II, p. 197, document A/CN.4/258, para. 85); elsewhere (*ibid.*, p. 194, foot-note 178) he examined the case of organizations that were "more or less parties" to a treaty.

³³ H. J. Geiser, *Les effets des accords conclus par les organisations internationales* [thesis] (Berne, Lang, 1977), p. 139.

difficult to say that an international organization was a third party in relation to its constituent charter.³⁴ However, in another context, as has also been recalled, the Secretary-General of the United Nations has consistently maintained that the United Nations is a party to the 1946 Convention on the Privileges and Immunities of the United Nations,³⁵ thus going even further than saying that it is not a third party.

31. These analyses certainly demonstrate that it is the basic definitions that diverge and that explain the differences of opinion. It seems advisable in the circumstances no longer to use the term "third party" in relation to a treaty and instead merely to differentiate between parties and non-parties. All "non-parties" to a treaty remain foreign to the mechanisms of the conventional legal instrument as regards the development and modification of conventional ties (for example, amendment); nearly always, although not quite always, the effects of the treaty are not operative for "non-parties" without the latter's assent. The appearance of international organizations on the scene of international legal relations gives rise to some exceptions to this relative effect of treaties. Such exceptions as have been indicated do not challenge the validity of the principle itself but derive basically from the structure and limits of the legal person itself.

32. In concluding the examination of this point, the Special Rapporteur wishes to observe that, if the Commission agrees with him and avoids the term "third party", it will be unnecessary to insert in the draft articles a provision parallel to article 2, paragraph 1 (*h*), of the Vienna Convention, which defines the term "third State".

3. *Treaties of an organization and its member States*

33. The wealth of commentaries and expositions presented on this subject clearly show that a fundamental practical problem is at issue. It can certainly be argued that, logically, the problem should not exist. Indeed, it is pertinent to ask whether, in a specific case, a given organization has the right to negotiate; but if it is recognized that it has such a right, the organization commits itself alone, and its partners deal with it alone. This is indeed one of the more indisputable consequences of legal personality. It in no way prejudices the obligations that member States may incur under the constituent charter of the organization; it will be prudent to provide in that constituent charter not only that States must assist the organization in the performance of all its functions but also that they will be bound by all the agreements it concludes. Such rules, when inserted in the constituent charters, bind member States among themselves and in relation to the organization. Do they, however, bind entities, other States or other organizations with which the organization concludes a treaty?

³⁴ P. Cahier, *op. cit.*, p. 698. The author seems to adhere strictly to the definitions of the Vienna Convention and attributes the direct effect of the constituent charter on the organization that it creates to the lack of sovereignty of the organization. In reality, in any legal system a legal person created by an agreement is not a third party in relation to that agreement.

³⁵ See *Yearbook... 1973*, vol. II, p. 80, document A/CN.4/271, paras. 30-31.

As far as these partners are concerned, are they *res inter alios acta*? If the answer is no, the problem has no legal substance.

34. The Special Rapporteur has consistently recognized the validity of this analysis, which he submitted four years ago³⁶ and which was approved by some members of the Commission. He considers only that it fails to deal with all the problems that arise in practice and that consequently, although it provides the essence of the solution, it must be supplemented, at least briefly.

35. The premise on which the whole argument is based, namely, the affirmation of the legal personality of the organization, must be modified by factual considerations. There is no need to dwell once again on the fact that a number of Governments waited a long time before recognizing the international capacity of at least some international organizations; it will suffice to indicate the weaknesses of such capacity when it exists. The competence of an international organization to conclude treaties is often uncertain, extending only to elementary matters or, if covering more important subjects, extremely ill-defined compared with the competence of its member States; in addition, more often than not, the organization lacks the financial and human resources to ensure the effective performance of its own obligations. In the circumstances, it is fairly natural that both the partners of the organization and the member States should want member States to be associated with the obligations of the organization.

36. There are technical mechanisms for obtaining this result. The simplest is the mechanism whereby the organization and its member States act side by side as parties to a treaty. The formula was established in the association agreements of EEC and was later extended to other agreements relating to customs relations, economic co-operation and other matters. Even the agreements worked out within the Council of Europe have been adapted to this formula, although it has its disadvantages, which there is no point in expounding and discussing here.³⁷ Other less elaborate solutions may show even greater flexibility.³⁸

³⁶ *Ibid.*, p. 92, document A/CN.4/271, para. 102.

³⁷ This type of agreement has entered into general practice with regard to all economic issues involving the European Communities and all international organizations, from the UNCTAD commodity agreements to the OECD agreements. In the Council of Europe, the formula was employed for the European Convention on the Protection of Animals kept for Farming Purposes of 10 March 1976 and the Additional Protocol to the European Agreement on the Exchange of Tissue-typing Reagents of 24 June 1976. See R. Kovar, "La participation des Communautés européennes aux conventions multilatérales", *Annuaire français de droit international*, 1975, vol. XXI (Paris, 1976), p. 903; also J.-P. Jacqué, "La participation de la Communauté économique européenne aux organisations internationales universelles", *ibid.*, p. 924.

³⁸ According to the translation given by *International Affairs*, No. 10 (Moscow, October 1973), p. 122, the treaty concluded between CMEA and Finland in May 1973, although signed and ratified by CMEA, had received the prior approval of the States members of CMEA, and its provisions concerning the regulations applying to the organs entrusted with economic co-operation refer throughout to the member States as responsible for performing the obligations, although formally they are not parties to the treaty with Finland.

37. Although it might be interesting to point out some of the general problems raised for example by mixed agreements, the Special Rapporteur does not consider that it is part of his task to analyse this subject, much less to attempt to embody certain practices in draft articles. However, having noted the need arising in practice to associate member States with agreements concluded by international organizations, the question arises as to how far it is possible to go in taking that into account while at the same time remaining faithful to the fundamental principle of the relative effect of treaty undertakings as viewed in the light of the distinctive legal personality of international organizations. An examination for this purpose of the technical machinery created by articles 35 and 36 shows that the Vienna Convention succeeded in introducing a measure of flexibility into the fundamental principle set out in article 34 by specifying the form the consent of the third State must take if the treaty is to produce certain effects in relation to that State. In addition to *written* consent, there is non-explicit consent, that is, not only *express* but also *tacit* or *implicit* consent; beyond that still, there is *presumed* consent. Nothing prevents recourse to a form of consent that is not only tacit but also presumed in defining the effects of treaties concluded by international organizations in respect of their member States.

38. The Special Rapporteur is therefore proposing to the Commission a new article 36*bis*, which appears below. While remaining within the basic framework of consensus and of the relativism characterizing it, the new article envisages two cases. In the first case, it is assumed that the States parties to a treaty that is the constituent instrument of an organization have included in the treaty a provision to the effect that any treaties concluded by the organization will give rise to obligations and rights as between the treaty partners of the international organization and the latter's member States. Such a provision will produce effects as soon as the organization and a co-contractor conclude a treaty; the treaty will automatically produce effects in relation to the organization's member States. The singular feature of this mechanism is that the foundation for a collateral agreement has in part been laid even before the conclusion of the main agreement. The main agreement is indeed concluded between the organization and various co-contractors, but the collateral agreement results from a conjunction of will on the part of the organization and its treaty partners on the one hand, and of the member States on the other hand, and in that agreement the will of the organization and of its member States is partly predetermined by the constituent instrument of the organization.

39. In the second case, a certain assumption is made. Some treaties deal with matters that fall in some respects within the competence of an international organization and in others within that of the organization's member States. It is reasonable to assume that, when an organization concludes a treaty dealing with such matters, the treaty also gives rise to rights and obligations on the part of the organization's member States. The consent of the member States is presumed to exist, but evidence to the contrary may be adduced.

40. The various considerations relating to these cases will be examined further in connexion with these propositions. For the moment, it is sufficient to note that they remain in conformity with the general principles embodied in the Vienna Convention. It is only through discussion in the Commission that the merits of these propositions can be thoroughly assessed.

4. *Marginal questions: representation and assignment of new functions to the organization*

41. It is unnecessary to deal further with certain marginal questions that have previously been considered at length and will therefore not be the subject of a draft article. One of these is the question of representation, which has already been commented upon.³⁹ The same applies to two other questions that have been referred to several times namely, the position of an international organization in relation to a treaty whereby it was established,⁴⁰ and the broadening of an organization's functions under a treaty between States other than one that amends its constituent instrument.⁴¹ In the latter case, the primary legal instrument is a treaty between States and only the collateral instrument of acceptance constitutes an agreement to which the organization is a party. However, it may be asked whether it is really useful to endorse a practice whereby international organizations often implicitly accept new functions entrusted to them by treaties between States that are often binding on only some of their member States.⁴² In the former case, concerning the organization's legal status in relation to its constituent instrument or other similar instrument (e.g. treaties on immunities), it will also be argued with some validity that the treaty is covered by the Vienna Convention, that the relationship between an organization and its constituent instrument has never given rise to any practical problems (and is of deep concern only to theoreticians) and, finally, that the relations between an organization and treaties between States concerning its privileges and immunities have been regulated in practice without any difficulty.⁴³ It has accordingly seemed advisable to leave these questions aside completely for the present.

³⁹ See para. 16 above.

⁴⁰ See paras. 29 and 30 above.

⁴¹ See paras. 18, 20 and 23 above.

⁴² The financial aspects of this question in particular, deserve more careful study by organizations. Some organizations require all member States to pay the costs of implementing a convention (while at the same levying an assessment for the purpose on non-member States parties); in other cases, a separate budget is created for purposes of the implementation of conventions, but the same organization will sometimes assess only States parties and sometimes all members of the organization for that purpose.

⁴³ The procedure provided for in article X of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (United Nations, *Treaty Series*, vol. 33, p. 261) has long been taken as a model (see *Yearbook... 1972*, vol. II, p. 192, A/CN.4/258, para. 68). The recent Convention on the Representation of States in their Relations with International Organizations of a Universal Character (*Official Records 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. 223), adopted a similar solution in its article 90:

After the entry into force of the present Convention, the competent organ of an international organization of a universal

Article 34. General rule regarding non-party States or international organizations⁴⁴

A treaty does not create either obligations or rights for a State or organization not party to the treaty without its consent.

Commentary

An effort has been made to follow the concise wording of the Vienna Convention as closely as possible. The word "third" has been replaced by "not party" for the formal and substantive reasons indicated above.⁴⁵

Article 35. Treaties providing for obligations for non-party States or international organizations⁴⁶

1. Without prejudice to article 36bis, an obligation arises for a State not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the non-party State expressly accepts that obligation in writing.

2. An obligation arises for an organization not party to the treaty from a provision of that treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the non-party organization accepts that obligation in an unambiguous manner and in accordance with the relevant rules of the organization.

Commentary

(1) The reservation concerning article 36bis, which is a new article dealing with the particular case of the effects of treaties concluded by international organizations on States *members* of such organizations, is essen-

character may adopt a decision to implement the relevant provisions of the Convention. The Organization shall communicate the decision to the host State and to the depositary of the Convention.

Quite apart from the persistent tendency to deny international organizations access (as parties) to multilateral conventions, it will be noted that a curious device is employed here. The international treaty between States, considered in isolation, is intended solely as an offer, and it is the decision of an international organization that in effect implies consent to the conclusion of a second treaty between the organization, on the one hand, and the States parties to the first treaty, on the other hand. This second, "collateral", treaty is the one that actually gives effect to the first treaty, which is merely preparatory to the second. It is not customary that *all* the provisions of treaties creating rights and obligations for third parties should depend for their validity on acceptance by a third party. In the face of an example like this one, it may be wondered whether such associations of two conventional instruments do not give rise to many problems other than those envisaged in the Vienna Convention; it will be noted that the treaties that have been referred to as "trilateral" came about precisely by joining in a single instrument two conventions that could have been kept separate while remaining closely interlinked (see *Yearbook... 1972*, vol. II, p. 190, document A/CN.4/258, para. 61).

⁴⁴ Corresponding provision of the Vienna Convention:

"Article 34. General rule regarding third States

"A treaty does not create either obligations or rights for a third State without its consent."

⁴⁵ See paras. 27 *et seq.* above.

⁴⁶ Corresponding provision of the Vienna Convention:

"Article 35. Treaties providing for obligations for third States

"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

tial. This is because article 36*bis* provides that, in such cases, the consent of member States may be given under much less rigorous conditions, even when the effect is to impose an obligation on them.

(2) It seemed essential to distinguish between cases involving States and those involving international organizations and to deal with them in separate paragraphs. In the case of consent by States, there is no reason—except in the special case of States members of an organization, which is dealt with in article 36*bis*—to depart from the rules designed to protect their independence, which have been formulated by the Commission in respect of treaties between States and further strengthened by the Conference on the Law of Treaties. Apart from the reservation concerning article 36*bis*, paragraph 1 of the draft article thus reproduces the wording of article 35 of the Vienna Convention.

(3) On the other hand, as the need to protect State sovereignty does not arise with respect to international organizations, the latter are dealt with in a separate paragraph. The paragraph could have referred simply to the “consent” of the organization without otherwise specifying the nature of such consent. One reflection, however, it seemed reasonable to state explicitly that the consent must be given in an “unambiguous” manner. It also seemed useful, however self-evident it might appear, to provide that the consent must be given “in accordance with the relevant rules of the organization”, for the ultimate impact of the organization’s consent will fall on its member States, and it is proper to point out that the latter enjoy this guarantee. Reference is made in draft article 35 to “the relevant rules of the organization” rather than to the constituent instrument of the organization because this phrase is used throughout the draft articles, and particularly in article 6 (Capacity of international organizations to conclude treaties),⁴⁷ to designate the entire body of rules constituting the statute of the organization. It should also be noted that such consent will very often have financial implications for the organization; from that standpoint as well, therefore, it is desirable that all the relevant rules of the organization should be complied with.

Article 36. Treaties providing for rights for non-party States or international organizations⁴⁸

1. Without prejudice to article 36*bis*, a right arises for a State not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to

⁴⁷ For the text of the articles thus far adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 171 *et seq.*, document A/10010/Rev.1, chap. V, sect. B, subsect. 1.

⁴⁸ Corresponding provision of the Vienna Convention:

“Article 36. *Treaties providing for rights for third States*

“1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

“2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

accord that right either to the non-party State or to a group of States to which it belongs, or to all States, and the non-party State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for an international organization not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to accord that right to the organization and the organization assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

3. A State or an organization exercising a right in accordance with the preceding paragraphs shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Commentary

(1) Unlike the régime governing the establishment of obligations set out in draft article 35, the proposed régime governing rights conferred by a treaty on entities that are not parties to that treaty is the same whether the entity is a State or an organization and is the one provided for in the Vienna Convention in respect of States. This régime is a liberal one; it is hard to see how it could be made more liberal and there is no reason to distinguish between the régime provided for in respect of organizations and that provided for in respect of States. It would therefore have been possible to keep the same structure in the draft article as in the Vienna Convention and to deal with both States and organizations in the same paragraph 1.

(2) For minor considerations only, particularly drafting considerations, it seemed preferable to devote a separate paragraph to each case. The reservation in article 36*bis* applies only to States, and it appeared difficult to transpose the reference to a group of States, or to all States, so as to make it applicable to international organizations. With the possible exception of the question of privileges and immunities, in connexion with which the group of international organizations of a universal character has now been identified (Convention on the Representation of States in Their Relations with International Organizations of a Universal Character),⁴⁹ the characteristics of an international organization vary from one organization to another and are hardly a matter for generalization. In any event, for reasons of stylistic elegance alone, it is preferable to devote two sentences, and thus two separate paragraphs, to the matter.

Article 36 bis. Effects of a treaty to which an international organization is party with respect to States members of that organization⁵⁰

1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effects to the treaty.

⁴⁹ For reference, see foot-note 43 above.

⁵⁰ New article in relation to the Vienna Convention.

2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of the areas of competence involved in that subject-matter between the organization and its member States, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member State to:

- (i) rights which the member State is presumed to accept, in the absence of any indication of intention to the contrary;
- (ii) obligations when the member State accepts them, even implicitly.

Commentary

(1) Paragraph 1 of article 36*bis* deals with the case where the constituent instrument of an international organization contains provisions concerning the effects of treaties concluded by an organization in respect of the States members of that organization. There is at least one known example of such a situation, that of EEC.⁵¹ It is undeniable that an article of the constituent instrument of an international organization may bind member States *with regard to the organization itself*. This means that States are bound in their relations with the organization to respect those treaties, that those treaties form an integral part of the organization's own legal order and, at least in the case of organizations that have integrated their legal order and the national legal orders of member States, that treaties concluded by organizations are binding on States in their internal order.⁵² However, an altogether different question is being considered here, which the two paragraphs of article 36*bis* attempt to resolve, namely, can the parties to a treaty concluded by an organization directly demand of States members of the organization that their actions respect the treaty concluded by the organization? Can

⁵¹ Article 228, para. 2, of the Treaty establishing EEC (United Nations, *Treaty Series*, vol. 298, p. 11):

"Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States."

Article 5 of the same Treaty:

"Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

"They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty."

⁵² It is not the intention in this report to express any opinion on the exact scope to be attributed to the texts cited in the preceding note with regard to EEC. The importance of the problem has been highlighted by P. Pescatore, "Les Communautés en tant que personnes de droit international" (in W. J. Ganshof van der Meersch, *Droit des Communautés européennes* (Brussels, Larcier, 1969), pp. 118 *et seq.*). Attention may be drawn to the author's argument that the term "community" applies both to the institutions and to the States members (*ibid.*, p. 119). In a recent commentary on the articles of the Treaty (H. Smit and P. Herzog, *The Law of the European Economic Community—a Commentary on the EEC Treaty* (New York, Bender, 1976), vol. 5, part VI, p. 232), the problem is again clearly stated. Moreover, setting aside the textual argument concerning article 228 of the Treaty, attention may also be drawn to the considerations that will be examined in connexion with paragraph 2 of draft article 36*bis*, which will be discussed later (see para. (12) below).

States members take advantage directly of the provisions of a treaty concluded by the organization in their dealings with the parties to that treaty?

(2) To these questions, the provision in paragraph 1 of article 36*bis* gives an affirmative reply in cases where a provision of the constituent instrument itself clearly gives such a reply. Nothing in this solution derogates from the rules of consensus; to establish a consensus, the problem must be considered from the standpoint both of States members of the organization and of the organization's co-contractors. First, as regards member States, they are parties by definition to the constituent instrument of the organization and, by the relevant provisions of that instrument, they express consent to having the effects of agreements concluded by the organization extended to them. Thus they consent in advance to the extension of the effects of those agreements—and it is hard to see under what legal principle they could fail to do so. The question whether such advance consent entails risks for them is a political question, and it is up to them to determine, in the light of the organization's institutions and powers, whether or not they wish to run that risk. The situation of the organization's co-contractors is a little less simple; there would be no difficulty if the treaty concluded by the organization also stated *expressis verbis* that, although member States were not formally parties to the treaty, the effects of the treaty would also extend to member States, thus giving rise to rights and obligations on their part. In such a case the treaty would give rise to effects with regard to non-party States, but with their advance agreement.

(3) The case of a treaty with the organization that does not state *expressis verbis* that its effects also extend to member States remains to be discussed. In this case, the proposed text of paragraph 1 of article 36*bis* gives an equally affirmative reply. The idea on which that solution is based is that an international organization's co-contractors must be regarded as being cognizant of the organization's constituent instrument and thus fully aware of the conditions under which a given international organization may enter into international commitments. In the opinion of the Special Rapporteur, this affirmation itself is based on the essential fact that no general rule exists in the matter of the capacity of international organizations; the Commission has admitted as much by stating in article 6 of the draft articles⁵³ that "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization". Since these rules vary from one organization to another, it is essential that the parties contracting with an organization should be fully cognizant of its capacity, and this presupposes full knowledge of its constituent charter. The situation is thus radically different from that of States, whose capacity is uniform because it is unlimited. There is therefore justification for stipulating in principle that States (or organizations) that are to conclude a treaty with an organization should be cognizant of the latter's constituent instrument, and should know that the treaty binding them to the organization will also

⁵³ See foot-note 47 above.

confer rights on them in relation to States members of the organization and impose obligations on them in respect of such States. If they have been alerted to this situation, their acceptance of the consequences results from their consent to be bound by the treaty they conclude with the organization.⁵⁴

(4) From a purely technical point of view, the originality of this mechanism lies in the timing and the manner in which the consent required for a treaty to produce effects with regard to those that are not parties to it is obtained. As regards States members of the organization, their acceptance of the effects of treaties concluded by the organization is given *en bloc* and in advance by the relevant clause of the constituent instrument of the organization. As regards the parties that contract with the organization, their acceptance is given by the very fact that they conclude a treaty with the organization. In the case of the former, acceptance is given in two stages separated by intervals of varying length: the over-all acceptance in principle of the constituent charter, and the specific implementation of the effects of that charter through the conclusion of a treaty by the organization. In the case of the latter, acceptance is given by a single act, namely, the conclusion of a treaty with the organization, but even in this case the primary source of the effects that are to be applied to them is the constituent instrument of the international organization.

(5) From a practical point of view, the solution proposed is of great importance: it safeguards the general principles, in particular that of the relativity of the effects of treaties, and it gives States outside the organization and other organizations greater security in their commitments. States members of the organization are bound, just as the organization itself is bound, without reason to fear uncertainties regarding the assignment of areas of competence between the organization and its members, the slenderness of the means available to the organization at any given time, or any unforeseen developments that might arise. All these advantages, which will be discussed later, are obtained without recourse to the much more cumbersome technique of mixed agreements. Not only are the negotiations leading to the latter type of agreement much more arduous, but the need to obtain ratifications from all States that are also parties to the agreement delays its entry into force, sometimes to a dangerous extent.

(6) The question therefore remains whether paragraph 1 of article 36*bis* is technically necessary, in other

⁵⁴ It might be observed that it would be simpler to stipulate in a treaty concluded by the organization that the treaty produces effects with regard to States members of the organization. It is in fact possible to do so, but in that case the States members of the organization are subject to the conditions of ordinary law provided for in draft articles 35 and 36, which means that member States will be expressly required to give their consent in writing in the case of obligations, and that they may waive the rights that they would enjoy under the treaty. Accordingly, the treaty concluded by the organization would have effects that might vary from one State to another. This consequence may be accepted in certain cases; however, there are, or may be, situations in which States members of an organization wish the effects of the organization's agreements to extend to each of them under identical conditions, and it is to cover this case that paragraph 1 of draft article 36*bis* is proposed.

words whether the result it seeks to achieve could not be obtained without the inclusion of any such provision. Let it be supposed, then, that the Commission does not endorse this proposal by the Special Rapporteur, but that it accepts draft articles 35 and 36. In the treaty concluded by the organization, it would then be necessary not only to refer to the article of the organization's constituent instrument relating to the effects of treaties concluded by the organization, but also expressly to stipulate that the co-contractors accept the benefits and, above all, the obligations deriving from that article of the organization's constituent instrument. With a stipulation of this kind, the desired result would undoubtedly be obtained. Is this not an argument against the adoption of paragraph 1? Would it not be sufficient to mention in the commentary the case covered by paragraph 1? The Special Rapporteur thinks not. It is possible that, if the foregoing remarks are correct, the proposition made by this provision may result in the general inclusion of a specific conventional provision in the agreements concluded, but the affirmation of a general rule is nevertheless useful because it is based on an important principle, namely, that the co-contractors of an international organization are assumed to know and accept the provisions of its constituent instrument concerning its international commitments. In addition, it must be recognized that most of the provisions in the Vienna Convention are purely *suppletive*, that is, they are valid only in the absence of an explicit provision in the treaties to which they apply, and it has never been proposed that these provisions should be eliminated on the ground that it is the responsibility of the parties to settle by special provisions in each treaty any questions that may arise in connexion with a treaty.

(7) One last remark must be made. If paragraph 1 is accepted, it may be said that it is too narrow in scope since it refers only to the constituent instrument and not, as is the case in the Vienna Convention and in the earlier articles of this draft, to the "relevant rules of the organization". This means that it would be necessary to take into account not only the explicit provisions of the constituent instrument but also all the rules derived from established practice. It would, of course, be possible to take this viewpoint into account and to broaden the scope of paragraph 1. A broader wording, however, might dispose too liberally of the right of States, whether they are States members of the organization or co-contracting States of the organization. Should not the rules of the organization be of a somewhat formal nature (that of the organization's constituent instrument), if they are to be invoked against third parties? In addition, paragraph 2 of article 36*bis* goes further than paragraph 1 and it was thought that it might cover some of the situations not resolved by paragraph 1 in its existing wording.

(8) In paragraph 2 of the article, the starting-point of the legal construction is quite different from that of paragraph 1. In the latter paragraph, the conventional instrument that is at the origin of the effects with regard to non-party States or organizations is the constituent instrument of an organization; in paragraph 2 this instrument is the treaty concluded by the organization. Moreover, whereas paragraph 1 concerns exclusively

conventional instruments concluded by only certain organizations, namely, those whose constituent charters contain a clause providing that treaties concluded by the organization should have certain specific effects, paragraph 2—or at least the terms thereof—relates to all organizations. On the other hand, paragraph 2 concerns only certain specific treaties. There is another difference between paragraphs 1 and 2: the former provides for an effect that is automatic, whereas the latter has conditional effects and simply states an assumption with regard to rights and the possibility of implicit acceptance in the case of an obligation.

(9) If the rule stated in paragraph 2 is to be applicable, the treaty concluded by the organization must have certain characteristics that justify the assumption that the parties thereto wanted the treaty to have certain effects with regard to the States members of the organization and wanted those States to enjoy certain rights and incur certain obligations. What criteria should be adopted in this connexion? The proposed criterion refers to the subject-matter of the treaty; more specifically, although still in general terms, certain aspects of this subject-matter must relate to an area of competence of the organization and certain others to an area of competence of the member States.

(10) It may be useful at this stage to give certain examples. To start with, the case may be considered of an international organization that borrows a sum of money from a State under a treaty. This treaty does not involve its member States;⁵⁵ the loan will run its entire course without committing the member States at any time. It is true that the member States may have an obligation vis-à-vis the organization to provide it with resources to enable it to execute its budget and thus meet its obligations, but there is no direct legal tie between the organization's creditors and the member States. Next, the case of a customs union administered by an international organization may be considered. This organization has the power (exclusive of its member States) to conclude treaties on customs matters; it has not, however, assumed responsibility for establishing the authorities that impose and collect customs duties, since this duty is still left to the member States. A dispute may arise at the initiative of a State A, which has concluded a tariff agreement with the customs union, if one of its nationals has had to pay customs duties, assessed and collected by the authorities of a State B, which is a member of the organization responsible for the customs union, State A may submit a complaint to the customs union organization if it believes that the tariff agreement has been violated. But it may also—or at least it would be able to do so under paragraph 2 of draft article 36*bis*—submit a complaint to State B, whose authorities assessed and collected the duties. It may have a considerable interest in proceeding in this manner in exercise of diplomatic protection, if for example it is bound by an agreement with State B that provides

⁵⁵ This is the assumption that is made. It is true in many cases when the organization has its own resources (IBRD, ECSC) or when its credit is good; if this is not the case, cautious creditors require a joint undertaking by the member States.

for arbitration or recourse to the International Court of Justice, whereas its tariff agreement with the customs union does not contain such a provision. Can it seriously be imagined that the accused State B could dismiss a request of this kind by simply maintaining that the basis of the complaint was a violation of an agreement to which it was not a party and that it had never accepted, explicitly and in writing, the obligations allegedly created for it by the agreement?⁵⁶

(11) In the last example, the respective areas of competence of the organization and the member State are distributed according to a pattern that might be encountered quite frequently: the organization retains the legislative function (here mainly in the form of treaties) and leaves the responsibility for material performance to the member States. Yet the two cannot be separated: material performance must respect the rules applicable to it, and the rules are enacted in order to be materially applied. It is therefore clear that for a treaty such as the one just mentioned (tariff agreement), which is quite a common type, it is inconceivable that the respective areas of competence of the member State and of the organization should operate independently of each other. It is therefore normal to assume that, when the organization concludes a treaty with such an object, the intention of the organization and of its co-contractors is to give rise directly to effects in respect of the member States. This intention is a natural one, deriving from the very principle of good faith, since treaties are concluded not in order to provide material for academic dissertations but to be conveniently applied. It is normal that the organization should have such an intention, but such will also be the intention of the organization's co-contractors. Their aim is to conclude a treaty that will be applied; the question whether the competence to do so is vested in the organization or in the member States or in both is not essential, provided that the member States can also guarantee performance. It is even likely that the organization's co-contractors wish as far as possible to remain aloof from this question of the distribution of areas of competence,⁵⁷ but it is quite usual to assume in a case of

⁵⁶ The exercise of diplomatic protection in situations created by the development of international organizations possessing real powers, for example in economic matters, poses many problems, which have so far been given only scant attention (see, however, J. P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, 1962, vol. VIII (Paris, 1963), p. 467). For example, the extension of the competence of EEC to questions concerning the 200-mile exclusive fishing zone will undoubtedly result in the conclusion of international treaties. However, such treaties are not likely in the near future to preclude intervention by member States in matters involving primarily questions of registration, boarding, inspection and supervision of the shipping of foreign countries.

⁵⁷ This desire of the organization's co-contractors to escape the consequences of the sharing of competence between the organization and the member States is apparent in various arrangements evolved in practice. For example, in anticipation of participation by EEC in the draft European Convention for the Protection of International Watercourses against Pollution, it was agreed between the competent bodies of the Council of Europe and of the European Communities that the adoption of the amended text of the draft Convention should be accompanied by a declaration to the effect that, with regard to the signature of the European Economic Community, the Committee of Ministers took note of the fact that,

(Continued on next page.)

this kind that their intention in concluding a treaty with the organization is that this treaty should extend its effects to the member States.

(12) Is it possible to establish a more precise criterion for determining the treaties affected by the presumption laid down in article 36bis, paragraph 2? The Special Rapporteur considers that it is neither possible (except, of course, from a drafting point of view) nor necessary.⁵⁸ The criterion of distribution of competence is definitely correct. When an international organization concludes a treaty on a subject that is indisputably within its competence, and when the full implementation of that treaty depends on the deployment of the organization's powers, the treaty should have no particular effect on member States. On the other hand, if the competence of member States is sure to be involved, or if there is simply a possibility that it might be, it is usually assumed that the parties to the treaty intend that the treaty's effects be extended to member States. This idea of possible extension calls for some explanation. It involves two aspects of the competence of international organizations, one static and the other dynamic. First, at any given moment the distribution of competence between member States and the organization of which they are members is often uncertain.⁵⁹ Such is already the case with federations,

(Foot-note 57 continued.)

in the European Economic Community, the competence necessary for the implementation of the European Convention for the Protection of International Watercourses against Pollution might, depending on the circumstances, be vested either in its member States or in the said Community, which was responsible for deciding on the distribution of such competence in accordance with its internal procedures. Even more typical are the arrangements evolved in practice for the resolution of disputes in cases where the organization and its member States are separate parties to a multilateral convention (see, for example, the new paragraph 3 added to annex A of the above-mentioned draft convention). That paragraph stated that, in the event of a dispute between two contracting parties, one of which was a State member of the European Economic Community, which was itself a Contracting Party, the other Party should address the petition both to that member State and to the Community and the two should jointly inform it, within two months following receipt of the petition, whether the member State or the Community or the member State and the Community jointly were a party to the dispute. Failing such notification within the prescribed period, the member State and the Community were considered to be one and the same party to the dispute for the purpose of the application of the provisions of the said annex. They were also so considered when the member State and the Community were jointly party to the dispute.

Numerous examples could be given in this connexion, although certain conventions prefer to take no account of these difficulties, which are nevertheless very real (for example, the Convention for the Prevention of Marine Pollution from Land-based Sources of 4 June 1974 (*Official Journal of the European Communities*, vol. 18, No. L 194 (Luxembourg, 25 July 1975), p. 6).

⁵⁸ The Rapporteur examined this problem from an academic point of view several years ago. At the time he was satisfied with an even vaguer criterion: the existence of "real and substantial corporate relations" between the organization and its member States (P. Reuter, *Introduction au droit des traités* (Paris, Colin, 1972), pp. 124 and 125, para. 183).

⁵⁹ This question, or at least its general principles, is almost ignored in the treaties establishing the European Communities, but since then attempts to establish some order have been made in the writings of jurists. Governments, for their part, do not seem to have a very clear understanding of the matter, and one of the advantages of mixed agreements is precisely that they apparently dispose of the problem, both the Community and its member

particularly with respect to economic questions. It is therefore not surprising, and it must be recognized, that third parties need protection against such uncertainty. Moreover, in addition to the original uncertainty, it must be emphasized that this distribution of competence is subject to change, particularly when the question is submitted to a court of justice for its consideration; this is also the case with federal States. It will be pointed out, certainly, that such decisions generally have a highly centralizing effect and therefore tend to eliminate difficulties through the progressive extension of the organization's competence. This is correct, but legal decisions may change and, in any case, leave situations that are often highly confused.⁶⁰

States being parties to them; however, the way such agreements are written clearly shows that Governments are themselves somewhat uncertain. An example may be found in the agreement of 14 May 1973 between the States members of ECSC and ECSC on the one hand and Norway on the other, and in the agreement of 5 October 1973 between the same member States and ECSC and Finland, both relating to ECSC products (*Official Journal of the European Communities*, vol. 17, No. L 348 (Luxembourg, 27 December 1974), pp. 17 and 1 respectively). In a declaration annexed to the Final Act, the signatories recognize that, in the agreement to which the States members are also parties, the term "contracting parties" includes, where appropriate and apart from Norway (or Finland), the member States of ECSC, the Community, or both the Community and its member States—the only guideline for choosing among these three interpretations is the agreement itself and the treaty establishing ECSC.

⁶⁰ In a case that aroused considerable interest at the time (case 22/70, "European Agreement concerning road transport" [AETR], judgment of 31 March 1971 [Court of Justice of the European Communities, *Reports of Cases before the Court, 1971, Part I* (Luxembourg), p. 263], the Court laid down the principle of parallelism between the Community's external and internal competence and accepted that States remained competent in so far as, internally, the Community had not exercised its competence in any specific way. Since, in the case in point, negotiations with third countries had begun before the competence of the Community became effective, in the opinion of the Court it had to be accepted that the States had "acted and continued to act ... on behalf of the Community" and that, seen in this light, their position became lawful. Accepting the implications of this decision in a proposal presented to the Council for a regulation concerning implementation of the AETR agreement (*Official Journal of the European Communities*, vol. 18, No. C 123 (Luxembourg, 3 June 1975), p. 2), the Commission devised a procedure that would accommodate the Court's decision while accepting the fact that in the final analysis the treaty was concluded by States: a final date would be set for the ratification of the agreement by States; the instruments of ratification of the States would be transmitted to the Council of Ministers (a community organ), and the State whose representative was presiding over the Council would register the instruments of ratification jointly and on behalf of the Community. The Community has applied this decision on several occasions in connexion with the extension of its competence, particularly with respect to maritime transport and the agreement prepared by UNCTAD. Then, in a judgment of 14 July 1976 (Joined cases 3, 4 and 6/76, "Cornelis Kramer and others" (Court of Justice of the European Communities, *Reports of Cases before the Court, 1976-6* (Luxembourg), p. 1279), the Court applied the legal precedent of case 22/70 to the protection of marine biological resources by making of it an absolutely general theory: it permitted States to exercise their competence for a transitional period, full competence ending with the expiry of certain time-limits within which the Community must take internal measures. As the activities of the States concerned were themselves taking place in the context of a North-East Atlantic Fisheries Convention of 24 January 1959, the question can in fact be resolved only through the participation of the Community in this Commission. On this point, the Court confined itself to stating that "the Community institutions ... and the member States will be under a duty to use all the political and legal means at their disposal in order to ensure

(13) It therefore seems possible to retain a relatively flexible criterion for determining those treaties of the organization that are subject to the régime set out in draft article 36*bis*, paragraph 2. This conclusion is further justified if the effects of the presumption of intention thus established are considered. This presumption has only relative effects. In the case of both rights and obligations, the member State can remove the basis for this presumption by demonstrating its opposition to it. There is, however, a difference, or rather a nuance, between rights and obligations. In the case of a right, it is presumed that the member State accepts, and nothing has to be proved. In the case of an obligation, on the other hand, acceptance by the member State is necessary; this acceptance can be deduced, if need be, from actions or silence, but in principle the acceptance must be established. The spirit of the provisions of the Vienna Convention is thus maintained even in this draft article.

(14) The solution proposed in draft article 36*bis*, paragraph 2, must therefore be regarded as extremely moderate; ⁶¹ it does not depart from the fundamental principles of the relative effect of treaties, and it respects State sovereignty. It is merely an attempt to accommodate certain facts peculiar to the development of international organizations. No doubt the most typical examples are those involving ECSC and EEC. However, if it is considered that these facts originate, essentially, in the still uncertain contours of the personality of international organizations, in the shaky distinction between the powers exercised by States and those proper to the organization itself, and in the fact that an organization and member States often see their legally distinct spheres of competence severally and even sometimes jointly involved, it must be recognized that it is already possible

the participation of the Community in the Convention and in other similar agreements". However, in this new decision, while stating that States have an obligation to act in accordance with certain Community rules, the Court seems to have avoided describing the activities of these States in terms that would imply that the States are acting "on behalf" of the Community or in any other way that would give the Community a legal role *with respect to third States*.

⁶¹ Comparing the proposed solutions and the successive positions taken on this subject within the Institute of International Law, it will be noted that the Special Rapporteur on this subject initially proposed the following formula (*Annuaire de l'Institut de droit international*, vol. 55 (Basel, 1973), p. 316):

"An agreement legally concluded by an international organization legally binds all its members."

In order to take account of certain objections (*ibid.*, p. 382), he then adopted the following formula:

"1. Unless the provisions of its legal statute provide otherwise, an agreement concluded by an organization cannot, without the consent of its member States, impose on those member States obligations which could not be imposed upon them in the organization's regular exercise of its competence.

"2. The conclusion of an agreement by an international organization normally prohibits its member States from taking any action the aim or result of which would be to prevent the implementation of the agreement."

Finally, after lengthy discussions and after accepting that an agreement concluded by an organization bound the organization as such, the Institute confined itself to pointing out: "This applies without prejudice to any obligation that may arise from such agreement for member States either under the relevant rules of the organization or under any general rule of international law" [*ibid.*, p. 798]. It would be difficult for the Commission not to attempt to clarify this last formula.

to distinguish some of these characteristics elsewhere than in Western Europe. ⁶² This situation will probably last a long time, and the Special Rapporteur did not think it possible to ignore it. The over-all aim of article 36*bis* as proposed is to take some account of the situation as it exists without sacrificing principles.

Article 37. Revocation or modification of obligations or rights of non-party States or international organizations ⁶³

1. When an obligation has arisen for a State not a party to a treaty in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the non-party State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for an international organization not a party to a treaty in conformity with article 35, the obligation may be revoked or modified with the consent of the parties to the treaty, except if it is established that the obligation was intended not to be revocable or subject to modification without the consent of the organization.

3. When a right has arisen for a State not a party to a treaty in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the State not a party to the treaty.

4. When a right has arisen for an international organization not a party to a treaty in conformity with article 36, the right may be revoked or modified by the parties except if it is established that the right was intended not to be revocable or subject to modification without the consent of the international organization.

⁶² Reference has already been made to the treaty concluded between CMEA and Finland (see foot-note 38 above) which, although it was formally concluded only by CMEA, was approved by the member States and is concerned mainly with rules affecting those States. Article 3 of the 1968 Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries states:

"The provisions of this agreement shall not be deemed to affect those of the Agreement of the Organization of Petroleum Exporting Countries (OPEC), and especially in so far as the rights and obligations of OPEC members in respect of that organization are concerned.

"The parties to this agreement shall be bound by the ratified resolutions of OPEC, and shall abide by them even if they are not members of OPEC."

This provision gives rise to some delicate problems. For the purposes of this report, it will be enough to note that member States of OPEC are therefore bound by certain resolutions of OPEC without the above-mentioned article 3 stating that OPEC itself is so bound.

⁶³ Corresponding provision of the Vienna Convention:

"Article 37. *Revocation or modification of obligations or rights of third States*

"1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

"2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State."

5. An obligation or a right which has arisen for States members of an international organization under the conditions laid down in paragraph 1 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty unless the constituent instrument of the organization provides otherwise or unless it is established that the parties to the treaty had agreed otherwise.

6. An obligation or a right which has arisen for member States of an international organization under the conditions laid down in paragraph 2 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty and of the member State of the organization, unless it is established that they had agreed otherwise.

Commentary

(1) Whereas article 37 of the Vienna Convention has only two paragraphs, draft article 37 has six. First, it was necessary to devote two paragraphs to obligations and two paragraphs to rights depending on whether the treaty was to produce effects in respect of a State or in respect of an organization. Second, it was necessary to devote two separate provisions to the cases covered in the two paragraphs of article 36*bis*.

(2) Paragraph 1 of the draft article therefore concerns cases where a treaty gives rise to an obligation for a State that is not a party; such cases are covered in draft article 35. For the revocation or modification of the obligation, there is no reason for not retaining the rules laid down in article 37, paragraph 1, of the Vienna Convention. The latter text has therefore been adapted, by means of drafting charges, to the specific purposes of the draft article.

(3) On the other hand, paragraph 2 of the draft article, concerning the creation of an obligation for an international organization, endorses the idea that an international organization is not subject to what might be called "acquired effects". For the obligation to be incumbent on the organization, the latter must have accepted it (draft article 35, paragraph 2), but its acceptance is not binding on the parties to the treaty. The parties may revoke or even modify the obligation without the consent of the organization, it being understood that such modification can only diminish the obligation of the organization; otherwise the modification would in fact impose a new obligation. The organization cannot, without an express stipulation, oppose the elimination or diminution of its obligations by the parties to the main treaty. The justification for this solution is that, unlike States, international organizations have only *functional* powers; they cannot create for themselves acquired rights to exercise a function that has been assigned to them by a treaty. It is for the parties to that treaty, which in principle are States, to maintain or diminish its functions. This is a matter on which considerable emphasis was laid in the introduction to this report,⁶⁴ and on which it is not necessary to dwell further.

(4) Paragraph 3 concerns the creation of rights in favour of a non-party State. It therefore relates to the situation governed by article 37, paragraph 2, of the Vienna Con-

vention, and differs from the latter text only in respect of drafting.

(5) Paragraph 4 concerns the creation of rights for an international organization. The solution it proposes for the revocation or modification of these rights is in fact the same as that adopted for the creation of rights for States, but expressed differently, since the proposed text lays down clearly *as a principle* that the consent of the organization is not required for the modification or revocation of its rights, while admitting the possibility of a contrary solution if the parties have so agreed. The wording of the rule proposed in this paragraph is different from that adopted in the previous paragraph because it is necessary to recall the aforementioned principle that international organizations are not entitled to attempt to maintain powers against the collective will of the States that entrusted the organization with such powers.

(6) Paragraphs 5 and 6 are devoted to the special cases covered in paragraphs 1 and 2 of draft article 36*bis*. Paragraph 5 deals with the case envisaged in paragraph 1 of that draft article. In this case, the effect of the treaty concluded by the organization depends, first, on the constituent instrument of the organization and, second, on the fact that the co-contractors of the organization have taken cognizance of and accepted that constituent instrument by virtue of the treaty concluded with the organization. It is therefore logical to decide that neither the obligations nor the rights of member States can be modified or revoked except to the extent that provision therefor is made in the constituent instrument of the organization, or in the treaty to which the organization is a party, or in any other agreement between the same parties.

(7) Finally, paragraph 6 of draft article 37 covers the case evoked in paragraph 2 of draft article 36*bis*, which establishes for the rights of member States a presumption and for their obligations a mechanism of acceptance, possibly implicit. This means that, if the rights and obligations have effectively arisen, the member State has accepted them; consequently, these rights and obligations are based on consensus. Furthermore, the practical considerations justifying the solution proposed in paragraph 2 of article 36*bis* also give rise to the rule that, in this particular case, both rights and obligations are revocable only by agreement between the parties to the treaty on the one hand and member States on the other. These are protective provisions whose legal validity postulates stability.

Article 38. Rules in a treaty becoming binding on non-party States or international organizations through international custom⁶⁵

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a State or an organ-

⁶⁵ Corresponding provision of the Vienna Convention:

"Article 38. Rules in a treaty becoming binding on third States through international custom

"Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

⁶⁴ See paras. 18, 20, 22, 23 and 41 above.

ization not a party to that treaty as a customary rule of international law, recognized as such.

Commentary

The indisputable rule set forth in article 38 of the Vienna Convention is adapted with purely formal changes to the specific subject of the draft article. Attention may however be drawn to the practical importance of draft article 38. Since international organizations are generally excluded from multilateral treaties, they do not partici-

pate as parties in these treaties and particularly in treaties of codification, which play an important role in the evolution and development of international custom. International organizations have to apply the rules contained in such treaties, and among the technical mechanisms that may explain that organizations are not third parties with respect to such rules, a mechanism that maintains, in spite of conventional codifications, the existence of a customary rule is particularly useful in the light of the problems raised by the existence of international organizations.

PROPOSALS ON THE ELABORATION OF A PROTOCOL CONCERNING THE STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER (PARAGRAPH 4 OF GENERAL ASSEMBLY RESOLUTION 31/76)

[Agenda item 5]

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Note by the Secretariat

[Original: English]
[31 March 1977]

1. In 1976, at its thirty-first session, the General Assembly decided to include in its agenda of that session an item entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: report of the Secretary-General" and to allocate it to the Sixth Committee. The item was considered by the Sixth Committee at its 65th, 66th and 68th meetings, held from 7 to 9 December 1976, which had before it a report by the Secretary-General,¹ containing comments and observations submitted by 15 Member States, pursuant to General Assembly resolution 3501 (XXX) of 15 December 1975. The Sixth Committee recommended to the General Assembly a draft resolution on the item,² which was subsequently adopted by the latter at its 97th plenary meeting on 13 December 1976 as resolution 31/76.

2. After recognizing in its preamble "the advisability of studying the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", General Assembly resolution 31/76 provides in its operative paragraphs 3, 4, 5 and 6 the following:

3. *Invites* Member States to submit or to supplement their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and on the desirability of elaborating provisions concerning the status of the diplomatic courier in accordance with paragraph 4 of General Assembly resolution 3501 (XXX), with due regard also to the question of the status of the diplomatic bag not accompanied by diplomatic courier;³

4. *Requests* the International Law Commission at the appropriate time to study, in the light of the information contained in the report of the Secretary-General on the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and other information on this question to be

received from Member States through the Secretary-General, the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961;

5. *Requests* the Secretary-General to submit to the General Assembly at its thirty-third session an analytical report on ways and means to ensure the implementation of the Vienna Convention on Diplomatic Relations of 1961 on the basis of comments and observations on this question received from Member States and also taking into account the results, if available and ready, of the study by the International Law Commission of the proposals on the elaboration of the above-mentioned protocol;

6. *Decides* to include in the provisional agenda of its thirty-third session the item entitled 'Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: report of the Secretary-General'.

3. The question of the implementation by States of the provisions of the 1961 Vienna Convention originated in a letter dated 11 November 1974 from the Permanent Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General whereby the Government of the Soviet Union requested the inclusion on the agenda of the twenty-ninth session of the General Assembly of an item entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and measures to increase the number of parties to the Convention". The item was included in the agenda of that session of the General Assembly and allocated to the Sixth Committee, but its consideration was postponed to the thirtieth session because of the lack of time.⁴

4. In 1975, the General Assembly included the item in the agenda of its thirtieth session and allocated it again to the Sixth Committee. The Sixth Committee considered the item and adopted a draft resolution,⁵ which was approved by the General Assembly on 15 December 1975

¹ A/31/145 and Add.1.

² See *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 112, document A/31/403, para. 9.

³ In pursuance of paragraph 3 of resolution 31/76, the Secretary-General by a note verbale dated 19 January 1977, invited Member States to submit or to supplement their comments and observations on the matter.

⁴ See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 112.

⁵ *Ibid.*, *Thirtieth Session, Annexes*, agenda item 115, document A/10464, para. 7.

as resolution 3501 (XXX). By paragraph 4 of that resolution, the General Assembly invited Member States "to submit to the Secretary-General their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention on Diplomatic Relations of 1961 as well as on the desirability of elaborating provisions concerning the status of the diplomatic courier". Furthermore, the Secretary-Gen-

eral, by paragraph 5, was requested to submit a report to the General Assembly at its thirty-first session containing the comments and observations received from Member States. Pursuant to that request, the Secretary-General circulated, at the thirty-first session of the General Assembly, the report referred to above.⁶

⁶ See para. 1 above.

LONG-TERM PROGRAMME OF WORK

[Agenda item 8]

ORGANIZATION OF FUTURE WORK

[Agenda item 9]

DOCUMENT A/CN.4/304

Preliminary report on the second part of the topic of relations between States and international organizations,
by Mr. Abdullah El-Erian, Special Rapporteur

[Original: English]
[24 June 1977]

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ABBREVIATIONS

EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
IDA	International Development Association
IFC	International Finance Corporation
ILO	International Labour Organisation
IMCO	Intergovernmental Maritime Consultative Organization
IMF	International Monetary Fund
ITU	International Telecommunication Union
OAU	Organization of African Unity
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UPU	Universal Postal Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization

CHAPTER I

The basis of the present report

1. In its report on the work of its twenty-eighth session, the International Law Commission included the following paragraph:

The Commission also approved the recommendations of the [Planning] 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 1971 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. 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, their officials, experts and other persons engaged in their activities who are not representatives of States.¹

2. By its resolution 1289 (XIII) of 5 December 1958, the General Assembly invited the Commission to consider the question of relations between States and inter-governmental international organizations "at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly".

3. In 1963, the Special Rapporteur presented to the Commission a first report,² and a working paper,³ on relations between States and intergovernmental organizations, in which he made a preliminary study with a view to defining the scope of the subject and determining the order of future work on it. In 1964, he submitted a working paper⁴ as a basis of discussion for the definition of the scope and mode of treatment of his topic.

4. This working paper contained a list of questions, some of which related to:

(a) The scope of the subject [interpretation of General Assembly resolution 1289 (XIII)];

(b) The approach to the subject (either as an independent subject or as collateral to the treatment of other topics);

(c) The mode of treatment (whether priority should be given to "diplomatic law" in its application to relations between States and international organizations).

5. The conclusion which the Commission reached on the scope and mode of treatment of the topic, after discussing the preliminary study and list of questions mentioned above, was recorded in its report on the work of its sixteenth session in the following terms:

At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority.⁵

6. At its 757th meeting, held on 2 July 1964, the Special Rapporteur indicated to the Commission his intention to contact the Office of Legal Affairs of the United Nations. Consultations at that stage of the work centred

on the manner in which the legal advisers of the United Nations and the specialized agencies could best assist the Special Rapporteur in furnishing to him the necessary data and legal opinions on the problems which arose in practice concerning his topic. Pursuant to those consultations, two questionnaires were prepared and addressed by the Legal Counsel of the United Nations to the legal advisers of the specialized agencies and IAEA. The first questionnaire related to the "status, privileges and immunities of representatives of Member States to specialized agencies and IAEA" and the second to the "status, privileges and immunities of the specialized agencies and of IAEA other than those relating to representatives". The questionnaires were carefully prepared so to be as comprehensive as possible with a view to eliciting all information that would be useful to the Commission. The agencies to which the questionnaires were addressed were reminded, however, that the questions might not be exhaustive of the subject. They were therefore requested to describe in their replies any problems not covered by the questionnaire which might have arisen in their organizations and which they thought should be brought to the attention of the Special Rapporteur. The agencies were further reminded that, as the questionnaire was designed for all the specialized agencies, its terminology might not be completely adapted to a particular organization, which should in such case endeavour to apply the question to its special position. After receiving replies from the organizations concerned, the Secretariat of the United Nations issued in 1967 a study entitled: "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".⁶

7. At its 886th meeting, held on 8 July 1966, the Special Rapporteur suggested to the Commission that it should divide the subject into two parts and should concentrate its work first on the status, privileges and immunities of representatives of States to international organizations and that the second part of the subject, namely, the status, privileges and immunities of international organizations, should be deferred to a later stage. The Special Rapporteur stated that:

With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the topic had been discussed in 1963 and 1964; those apprehensions related to the position of the General Conventions on the privileges and immunities of the United Nations and the specialized agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect.⁷

8. The suggestion by the Special Rapporteur was accepted by the Commission and the work on the subject of relations between States and international organizations proceeded in the manner indicated.⁸

9. The present report is intended as a preliminary study

¹ *Yearbook... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.

² *Yearbook... 1963*, vol. II, p. 159, document A/CN.4/161 and Add.1.

³ *Ibid.*, p. 186, document A/CN.4/L.103.

⁴ A/CN.4/L.104. For the substance of this paper, see *Yearbook... 1964*, vol. II, p. 226-227, document A/5809, para. 41.

⁵ *Ibid.*, para. 42.

⁶ *Yearbook... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1-2.

⁷ *Yearbook... 1966*, vol. I (Part Two), p. 279, 886th meeting, para. 8.

⁸ See para. 1 above.

of the scope of and the approach to the second part of the topic of relations between States and international organizations, namely, the legal status, privileges and immunities of international organizations. Its purpose is to: (a) trace the evolution of legal norms which govern that branch of international law; (b) point out some

recent developments in other related subjects which have their bearing on the subject-matter of this study; and (c) examine a number of general questions of a preliminary character with a view to defining and identifying the course of action and method of work to be submitted to the Commission for its consideration.

CHAPTER II

Evolution of the international law relating to the legal status and immunities of international organizations

10. Long before the appearance of general international organizations (the League of Nations and the United Nations), constitutional instruments establishing international river commissions and the administrative unions in the second half of the nineteenth century contained treaty stipulations to which the origin of immunities and privileges of international bodies can be traced.⁹ Examples are to be found in the treaties establishing the European Commission for the Control of the Danube, the International Commission for the Navigation of the Congo, as well as the Permanent Court of Arbitration, the proposed International Prize Court and the Judicial Arbitration Court provided for by the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.¹⁰

11. However, as stated by an authority on international immunities:

Historically, the present content of international immunities derives from the experience of the League of Nations as developed by the International Labour Organisation when submitted to the test of wartime conditions, reformulated in certain respects in the ILO-Canadian wartime arrangements, and subsequently reviewed by the General Assembly of the United Nations at its First Session in 1946.¹¹

A. The League of Nations

1. CONSTITUTIONAL PROVISIONS

12. Article 7, paragraph 4, of the Covenant of the League of Nations provided that:

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

⁹ J. Secretan, "The independence granted to agents of the international community in their relations with national public authorities", *The British Year Book of International Law*, 1935 (London), vol. 16, pp. 59-65.

¹⁰ In 1922, the French Government informed the Central Commission of the Navigation of the Rhine "qu'en raison du caractère international de celle-ci, les représentants à cette commission, ainsi que ses agents, voyageant pour son service, bénéficieraient à l'avenir des mêmes facilités que s'ils jouissaient des immunités diplomatiques". (G. Weissberg, *The International Status of the United Nations* (New York, Oceana, 1961), p. 143, also F. Ray, "Les immunités des fonctionnaires internationaux", *Revue de droit international privé* (Paris), vol. 23, No. 3 (1928), p. 266.)

¹¹ C. W. Jenks, *International Immunities* (London, Stevens, 1961), p. 12.

Paragraph 5 provided that:

The buildings and other property occupied by the League or its officials or by representatives attending its meetings shall be inviolable.

13. Article 19 of the Statute of the Permanent Courts of International Justice provided that:

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

2. TREATY PROVISIONS

14. Detailed arrangements concerning the privileges and immunities of the League of Nations were worked out in agreements between the Secretary-General of the League and the Swiss Government. The "Modus Vivendi" of 1921, as supplemented by the "Modus Vivendi" of 1926,¹² granted the League immunity from suit before Swiss courts except with its express consent, recognized the inviolability of the archives of the League and of the premises in which the services of the League were installed, granted exemption from customs to League property and complete fiscal exemption to bank assets and securities, and accorded to officials of the League personal inviolability and immunity from civil and penal jurisdiction which varied according to different categories of officials.

15. At the suggestion of the Council of the League of Nations, the Permanent Court of International Justice entered into negotiations with the Netherlands Government, which resulted in the Agreement of 1928, whereby effect was given to Article 19 of the Statute of the Court. The Agreement, which was given the title of "General Principles and Rules of Application Regulating the External Status of the Members of the Permanent Court of International Justice", was approved by the Council

¹² The *Modus Vivendi* of 1921 (United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No. 61.V.3), p. 127) was embodied in a letter of 19 July 1921 from the Head of the Federal Political Department of the Swiss Government to the Secretary-General of the League of Nations on behalf of the Secretary of the League and also of the International Labour Office. The *Modus Vivendi* of 1926 (*ibid.*, p. 134) was submitted to the Council of the League for approval.

For an account of the negotiations which led to the conclusion of these two Agreements, see M. Hill, *Immunities and Privileges of International Officials—The Experience of the League of Nations* (Washington, D.C., Carnegie Endowment for International Peace, 1947), pp. 14-23.

of the League on 5 June 1928.¹³ The Agreement confirmed the assimilation of members of the Court and the registrar to heads of diplomatic missions, all enjoying not only the diplomatic privileges and immunities but also the “special facilities” granted to heads of missions. A distinction was made, however, between the judges and the registrar, the former alone being granted the “prerogatives which the Netherlands authorities grant, in general, to heads of missions”.¹⁴

3. THE LEAGUE OF NATIONS COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

16. This Committee was established by a decision of the Council of the League of Nations on 11 December 1924 “to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment ...”.¹⁵

17. The list as finally drawn up by the Committee at its third session in 1927 included the subject of diplomatic privileges and immunities, for which a sub-committee was appointed, which consisted of Mr. Diena, who acted as Rapporteur, and Mr. Mastny. On the basis of a report by Mr. Diena,¹⁶ which stressed the difference between League officials and diplomatic agents, the Committee expressed the view that

it is not certain that an absolute identity of privileges and immunities should be established between diplomats proper and the categories just mentioned. It seems possible that the difference of circumstances ought to lead to some difference in the measures to be adopted.¹⁷

18. The whole subject of diplomatic privileges and immunities, including those of League officials, was, however, not included in the three subjects which the Assembly of the League decided at its eighth session in 1927 to retain as possible topics for codification at the first Conference for the Codification of International Law.¹⁸

4. STATUS OF THE INTERNATIONAL LABOUR OFFICE IN CANADA DURING THE SECOND WORLD WAR

19. When a nucleus of the staff of the International Labour Office was transferred from Geneva to Montreal in 1940, an arrangement defining in certain respects the status of the Office and its staff in Canada had to be worked out. This arrangement was embodied in a Canadian Order in Council of 14 August 1941. The Order recognizes that “by Article 7 of the Covenant of the

¹³ League of Nations, *Official Journal*, 9th year, No. 7 (July 1928), pp. 985-987.

¹⁴ *Ibid.*, p. 985.

¹⁵ This decision was taken in pursuance of a resolution adopted by the Assembly of the League on 22 September 1924. See League of Nations, Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation* (C.196.M.70.1927.V), p. 75.

¹⁶ *Ibid.*, pp. 78-85.

¹⁷ *Ibid.*, p. 77.

¹⁸ These three topics were: nationality, the responsibility of States and territorial waters.

League of Nations and Article 6 of the Constitution of the International Labour Organisation, the International Labour Office as part of the organization of the League enjoys diplomatic privileges and immunities”. It grants to “members of the international administrative staff” of the Office immunity from civil and criminal jurisdiction, subject to waiver by the Director. Other members of the staff enjoy this immunity “in respect of acts performed by them in their official capacity and within the limits of their functions”, likewise subject to waiver by the Director. These other members are expressly made subject to the jurisdiction of the Canadian courts in respect of acts performed in their private capacity. Salaries paid by the Office to the permanent members of its staff are exempted from “all direct taxes imposed by the Parliament or Government of Canada, such as income tax and National Defence Tax”.¹⁹

B. The United Nations and the specialized agencies

1. CONSTITUTIONAL PROVISIONS

20. Article 105 of the United Nations Charter provides that:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

21. Article 19 of the Statute of the International Court of Justice provides that:

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 32, paragraph 8, provides that the salaries, allowances and compensations (received by the members of the Court, the President, the Vice-President, the judges chosen *ad hoc* under Article 31) shall be free of all taxation.

22. Constitutional instruments of the specialized agencies usually contain stipulations which provide in general terms that the organization will enjoy such privileges and immunities as are necessary for the fulfilment of its purposes, that representatives of members and officials of the organization will enjoy such privileges and immunities as are necessary for the independent exercise of their functions. These constitutions usually provide also that such privileges and immunities will be defined in greater detail by later agreements (Article 40 of the Constitution of the International Labour Organisation, Article XVI of the Constitution of the Food and Agriculture Organization of the United Nations, Article XII of the Constitution of the United Nations Educational, Scientific and Cultural Organization, Articles 66-68

¹⁹ Hill, *op. cit.*, p. 93. For text of the Canadian Order in Council of 1941, see *ibid.*, pp. 203-204, annex IV.

of the Constitution of the World Health Organization, Article 27 of the Convention of the World Meteorological Organization, Article 47 of the Convention on International Civil Aviation, Article 50 of the Convention on the Intergovernmental Maritime Consultative Organization, Article XV of the Statute of the International Atomic Energy Agency).²⁰ However, the constitutions of some specialized agencies themselves define in some detail the scope of the privileges and immunities of the organization (the Articles of Agreement of the International Monetary Fund, the International Bank for Reconstruction and Development and the International Finance Corporation).²¹

2. THE PREPARATORY COMMISSION OF THE UNITED NATIONS

23. In June 1945, this Commission instructed the Executive Secretary to invite the attention of the Members of the United Nations to the fact that, under Article 105 of the Charter, the obligation of all Members to accord to the United Nations, its officials and the representatives of its members all privileges and immunities necessary for the accomplishment of its purposes, operated from the coming into force of the Charter and was therefore applicable even before the General Assembly made the recommendations or proposed the conventions referred to in paragraph 3 of Article 105.²²

24. It recommended that "the General Assembly, at its First Session, should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the Charter, or propose conventions to the Members of the United Nations for this purpose". It transmitted for the consideration of the General Assembly a study on privileges and immunities, and, as "working papers", a draft convention on privileges and immunities and a draft treaty to be concluded by the United Nations with the United States of America, the country in which the headquarters of the Organization were to be located. It considered that the details of the prerogatives to be accorded to members of the International Court of Justice should be determined after the Court had been consulted, and that until further action had been taken "the rules applicable to the members of the Permanent Court of International Justice should be followed". It recommended that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered and negotiations opened "for their co-ordination in the light of any convention ultimately adopted by the United Nations".²³

25. The documents of the Preparatory Commission were studied by the Sixth Committee of the General Assembly at the first part of its first session in January-February 1946. The following resolutions, concerning the privi-

leges and immunities of the United Nations, were adopted by the General Assembly on 13 February 1946:

(a) A resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, and text of the Convention;

(b) A resolution relating to negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, and text of a draft convention to be transmitted as a basis of discussion for these negotiations;

(c) A resolution on the privileges and immunities of the International Court of Justice;

(d) A resolution on the co-ordination of the privileges and immunities of the United Nations and the specialized agencies.²⁴

3. TREATY PROVISIONS

(a) *General conventions*

26. A Convention on the Privileges and Immunities of the United Nations (hereafter referred to as the 1946 Convention) was approved by General Assembly resolution 22 A (I) on 13 February 1946²⁵ and was in force on 31 December 1976 for 112 States.²⁶ In accordance with the provisions of this Convention, the United Nations and its property and assets enjoy immunity from every form of legal process, the premises of the United Nations are inviolable and the property and assets of the United Nations are immune from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action. The United Nations is also exempt from all direct taxes and customs duties and its publications are exempt from prohibitions and restrictions on imports and exports. The Convention accords to representatives of Member States privileges and immunities generally enjoyed by diplomatic envoys, such as immunity from legal process, inviolability of all papers and documents, exemption from immigration restrictions and alien registration and the right to use codes for their communications. Officials of the United Nations are immune from legal process in respect of acts performed by them in their official capacity, and are exempt from taxation on the salaries and emoluments paid to them by the United Nations. They are immune from national service obligations as well as from immigration restrictions and alien registration. The Convention also accords certain immunities for "experts on missions for the United Nations".²⁷

²⁴ Resolutions 22 A (I), 22 B (I), 22 C (I) and 22 D (I), respectively.

²⁵ United Nations, *Treaty Series*, vol. 1, p. 15.

²⁶ *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions—List of Signatures, Ratifications, Accessions, etc., as at 31 December 1967* (United Nations publication, Sales No. E.77.V.7), pp. 35-37.

²⁷ For a summary of the provisions of this Convention, see *Repertory of Practice of United Nations Organs*, vol. V (United Nations publication, Sales No. 1955.V.2 (vol. V)), Articles 104-105, paras. 50-166.

²⁰ For these texts, see United Nations Legislative Series. *Legislative texts and Treaty Provisions ...*, vol. II (*op. cit.*).

²¹ *Ibid.*

²² Report of the Preparatory Commission of the United Nations (PC/20), chap. VII, sect. 1, para. 1.

²³ *Ibid.*, pp. 60-74.

27. A Convention on the Privileges and Immunities of the Specialized Agencies²⁸ (hereafter referred to as the 1947 Convention) was approved by General Assembly resolution 179 (II) on 21 November 1947 and was in force on 31 December 1976 for 81 States.²⁹ This Convention follows closely the terms of the 1946 Convention, with a small number of significant variations.³⁰ The 1947 Convention is applicable, subject to variations set forth in a special annex for each agency, the final form of which is determined by the agency concerned, to nine designated specialized agencies, namely, the ILO, FAO, UNESCO, ICAO, IMF, IBRD, WHO, UPU and ITU, and any further agency subsequently brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.³¹ Accordingly, the Convention has been applied to WMO, IMCO, IFC and IDA. An Agreement on the Privileges and Immunities of the International Atomic Energy Agency was approved by the Board of Governors of the Agency on 1 July 1959, which "in general follows the Convention on the Privileges and Immunities of the Specialized Agencies".³²

(b) *Headquarters agreements*

28. The general conventions are supplemented by headquarters agreements between the United Nations and specialized agencies on the one hand and the States in whose territory they maintain headquarters on the other hand. Headquarters agreements have been concluded by the United Nations with the United States and Switzerland, by ICAO with Canada, by UNESCO with France, by FAO with Italy, by IAEA with Austria, and by the ILO, WHO, WMO, ITU, UPU and WIPO with Switzerland.³³

(c) *Special agreements*

29. The *Repertory of Practice of United Nations Organs* contains in its section on Articles 104 and 105 of the Charter a synoptic survey of special agreements on privileges and immunities of the United Nations, classifying them in the following categories:³⁴

- (a) Agreements with non-member States.
- (b) Agreements with Member States:
 - (i) Agreements complementary or supplementary to the 1946 Convention;

²⁸ United Nations, *Treaty Series*, vol. 33, p. 261.

²⁹ *Multilateral treaties...* (*op. cit.*), pp. 40-46.

³⁰ Jenks, *op. cit.*, p. 5.

³¹ See F. Wolf, "Le droit aux privilèges et immunités des institutions spécialisées reliées aux Nations Unies", thesis, University of Montreal, 1948, cited in Jenks, *op. cit.*, p. 5, foot-note 34.

³² United Nations, *Treaty Series*, vol. 374, p. 148.

³³ United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. I (United Nations publication, Sales No. 60.V.2), and vol. II (*op. cit.*), and WIPO document WO/CC/II/3.

³⁴ *Repertory of Practice of United Nations Organs*, vol. V (*op. cit.*). See also *ibid.*, Supplement No. 1, vol. II (United Nations publication, Sales No. 1957.V.4 (Supp. 1) (Vol. II)), Supplement No. 2, vol. III (Sales No. 63.V.7) and Supplement No. 3, vol. IV (Sales No. E.73.V.2).

- (ii) Agreements applying the provisions of the 1946 Convention in cases where Members have not yet acceded to the Convention;
- (iii) Agreements specifying the nature of privileges and immunities to be enjoyed by certain United Nations organs in host countries.
- (c) Agreements concluded with Member or non-member States by United Nations principal or subsidiary organs within their competence:
 - (i) Agreements on the operation of the relief programme for Palestine refugees;
 - (ii) Agreements concerning the activities of UNICEF in Member or non-member States;
 - (iii) Agreements concerning technical assistance;
 - (iv) Trusteeship agreements.

30. Jenks gives a detailed enumeration of these special agreements, classifying them in the following categories:³⁵

(a) Host agreements (e.g. agreements concluded by WHO for its regional offices with Egypt, France and Peru, and by the ILO for its field offices with Mexico, Peru, Turkey and Nigeria);

(b) Agreements relating to special political tasks (e.g. agreement concluded by the United Nations with Korea on 21 September 1951, agreement concluded by the United Nations with Egypt on 8 January 1957 concerning the United Nations Emergency Forces);

(c) Technical assistance and supply agreements;

(d) Agreements concerning particular meetings (e.g., the agreement of 17 August 1951 between the United Nations and France relating to the holding in Paris of the sixth session of the General Assembly).

C. REGIONAL ORGANIZATIONS

31. The constitutional instruments of regional organizations also usually contain provisions relating to the privileges and immunities of the organization. Examples:

(a) Article 14 of the Pact of the League of Arab States, signed at Cairo on 22 March 1945;³⁶

(b) Articles 103-106 of the Charter of the Organization of American States, signed at Bogotá on 30 April 1948;³⁷

(c) Article 40 of the Statute of the Council of Europe, signed at London on 5 May 1949;³⁸

(d) Article 76 of the Treaty instituting the European Coal and Steel Community, signed at Paris on 18 April 1951;³⁹

(e) Article 218 of the Treaty establishing the European Economic Community, done at Rome on 25 March 1957;⁴⁰

(f) Article XIII of the Charter of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959;⁴¹

³⁵ Jenks, *op. cit.*, pp. 7-11.

³⁶ United Nations, *Treaty Series*, vol. 70, p. 256.

³⁷ *Ibid.*, vol. 119, pp. 88 and 90.

³⁸ *Ibid.*, vol. 87, p. 124.

³⁹ *Ibid.*, vol. 261, p. 215.

⁴⁰ *Ibid.*, vol. 298, p. 87.

⁴¹ *Ibid.*, vol. 368, p. 280.

(g) Article 35 of the Convention establishing the European Free Trade Association, signed at Stockholm on 4 January 1960;⁴²

(h) Article XXXI of the Charter of the Organization of African Unity, done at Addis Abeba on 25 May 1963.⁴³ 32. These constitutional provisions have been implemented by general conventions on privileges and immunities, which were largely inspired by the 1946 Convention and the specialized agencies conventions. Examples:

(a) Convention on the Privileges and Immunities of the League of Arab States, approved by the Council of the League on 10 May 1953;⁴⁴

(b) Agreement on Privileges and Immunities of the Organization of American States, opened for signature on 15 May 1949;⁴⁵

(c) General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949; (and additional Protocols);⁴⁶

⁴² *Ibid.*, vol. 370, p. 24.

⁴³ *Ibid.*, vol. 479, p. 86.

⁴⁴ *Legislative Texts and Treaty Provisions ...*, vol. II (*op. cit.*), p. 414.

⁴⁵ *Ibid.*, p. 377.

⁴⁶ United Nations, *Treaty Series*, vol. 250, pp. 12 and 32, and *ibid.*, vol. 261, p. 410.

(d) Protocol on the privileges and immunities of the [European Coal and Steel] Community, signed at Paris on 18 April 1951;⁴⁷

(e) Protocol on the Privileges and Immunities of the European Economic Community, done at Brussels on 17 April 1957;⁴⁸

(f) Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959;⁴⁹

(g) Protocol on the legal capacity, privileges and immunities of the European Free Trade Association, signed at Geneva on 28 July 1960;⁵⁰

(h) General Convention on the Privileges and Immunities of the Organization of African Unity, adopted by the Assembly of Heads of State and Government of OAU at Accra on 25 October 1965.⁵¹

A number of headquarters and host agreements were also concluded by regional organizations with States in whose territory they maintain headquarters of other offices.

⁴⁷ *Ibid.*, p. 239.

⁴⁸ *Ibid.*, vol. 298, p. 140.

⁴⁹ *Ibid.*, vol. 368, p. 242.

⁵⁰ *Ibid.*, vol. 394, p. 37.

⁵¹ L. B. Sohn, ed., *Basic Documents of African Regional Organizations* (Dobbs Ferry, N.Y., Oceana, 1971), vol. 1, p. 117.

CHAPTER III

Recent developments in the field of relations between States and international organizations

33. At its twenty-third session in 1971, the Commission completed its work on the first part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of representatives of States to international organizations. It adopted at that session the final text of its draft articles, with commentaries, on the representation of States in their relations with international organizations and the annex thereto.⁵² The Commission decided also, in conformity with article 23, paragraph 1 (d), of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study those draft articles and to conclude a convention on the subject.⁵³ The above-mentioned draft articles were divided into four parts; part I (Introduction) concerned the introductory provisions, which were intended to apply to the draft articles as a whole; part II (Missions to international organizations) contained provisions dealing specifically with the rules on permanent missions and permanent observer missions; part III (Delegations to organs and to conferences) contained provisions dealing specifically with delegations to organs of international organizations and delegations to conferences convened by or under the auspices of international organizations; part IV (General provisions) contained those further provisions which were generally applicable to missions to international organizations and to delegations to

organs and to conferences. The draft articles contained also a set of provisions on observer delegations to organs and conferences, which were presented in the form of an annex.

34. In formulating the above-mentioned draft articles, the Commission sought to produce a comprehensive regulation of the legal status of permanent missions sent by States members of an international organization to the organization, permanent observer missions sent by non-member States of an international organization to the organization, delegations to organs of international organizations and to conferences convened by or under the auspices of international organizations and observer delegations to such organs and conferences. The draft treated, *inter alia*, the following questions: the establishment, functions and composition of those missions and delegations; the appointment and accreditation of their members; and the facilities, privileges and immunities accorded to missions and delegations and their members respectively. The draft also contained general rules relating to respect of the laws and regulations of the host State, entry into the territory of the host State, non-discrimination and consultations and conciliation.

35. Since the adoption of the above-mentioned draft articles by the Commission at its twenty-third session in 1971, two important developments have occurred which have a bearing on the subject of the present study. First, the Commission redefined a number of points concerning relations between States and international organizations in the course of its work on the question of treaties

⁵² *Yearbook... 1971*, vol. II (Part One), p. 281, document A/8410/Rev.1, para. 39, and p. 284, chap. II, sect. D.

⁵³ *Ibid.*, p. 284, para. 57.

concluded between States and international organizations or between two or more international organizations. Second, the United Nations Conference on the Representation of States in Their Relations with International Organizations introduced a number of refinements and precisions into the draft articles prepared by the Commission which were referred to that Conference by the General Assembly of the United Nations as the basic proposal for its consideration.

A. The work of the Commission on the topic "Question of treaties concluded between States and international organizations or between two or more international organizations"

36. In the course of preparing its draft articles on the law of treaties, the Commission decided to limit their scope to treaties concluded between States to the exclusion of treaties between States and other subjects of international law and treaties between such other subjects of international law.⁵⁴ Article 1 of the draft articles, adopted by the Commission at its eighteenth session in 1966,⁵⁵ which is entitled "The scope of the present articles", provides that

The present articles relate to treaties concluded between States.

37. The United Nations Conference on the Law of Treaties, adopted at its second session in 1969 a resolution in which it:

Recommends to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations.⁵⁶

38. It was on this basis that the General Assembly adopted at its twenty-fourth session, a resolution to the same end, namely, resolution 2501 (XXIV) of 12 November 1969.⁵⁷ Pursuant to that resolution, the Commission decided, at its twenty-second session in 1970, to include the question in its programme of work and to set up a Sub-Committee to consider preliminary problems involved in the study of this new topic. After considering and adopting at its twenty-second session a report by this Sub-Committee,⁵⁸ the Commission, at its twenty-third session, took note of a working paper, prepared by the Secretary-General at the Commission's request, which contained a short bibliography, a historical survey of the question, and a preliminary list of the relevant treaties

⁵⁴ *Yearbook... 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para. 28.

⁵⁵ *Ibid.*, p. 177.

⁵⁶ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex, resolution relating to Article 1 of the Vienna Convention on the Law of Treaties.

⁵⁷ See also *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 118.

⁵⁸ *Yearbook... 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

published in the United Nations *Treaty Series*.⁵⁹ During the same session, the Sub-Committee submitted to the Commission a report which contained general trends to serve to guide the work of the Commission on this topic and its Special Rapporteur, Mr. Reuter.⁶⁰ The Sub-Committee report was adopted by the Commission. The General Assembly approved the approach suggested by the Commission and recommended, in its resolution 2780 (XXVI) of 3 December 1971,⁶¹ that the Commission

Continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations.⁶²

39. As in the case of its study of the first part of the topic of relations between States and international organizations, i.e. the status, privileges and immunities of representatives of States to international organizations, the Commission had of necessity, in the course of its work on the question of treaties concluded between States and international organizations or between two or more international organizations, to take a position on a number of questions of a general character such as the scope of the draft, the notion of an international organization and the relationship between the rules embodied in the draft and the internal rules of each organization concerned. It would be, therefore, useful to refer briefly to the position taken by the Commission on such preliminary notions in its work on the question of treaties concluded between States and international organizations or between two or more international organizations, in as much as the Commission will also have to define its position on these notions in order to chart its future work on the second part of the topic of relations between States and international organizations, i.e. the legal status, privileges and immunities of the organizations, their officials, experts and persons engaged in their service other than representatives of States, which is the subject of the present study.

1. SCOPE OF THE DRAFT

40. Article 1 of the provisional draft articles on treaties concluded between States and international organizations or between international organizations, which was adopted by the Commission at its twenty-sixth session in 1974, provides that:

The present articles apply to:

- (a) treaties concluded between one or more States and one or more international organizations, and
- (b) treaties concluded between international organizations.⁶³

⁵⁹ A/CN.4/L.161 and Add.1-2.

⁶⁰ *Yearbook... 1971*, vol. II (Part One), p. 348, document A/8410/Rev.1, chap. IV, annex.

⁶¹ See also *Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 168.

⁶² For a summary of the background of the work of the Commission on the topic "Question of treaties concluded between States and international organizations or between two or more international organizations", see *Yearbook... 1972*, vol. II, pp. 176-185, document A/CN.4/258, paras. 18-48.

⁶³ *Yearbook... 1974*, vol. II (Part One), pp. 294-299, document A/9610/Rev.1, chap. IV, sect. B.

41. In defining the scope of these draft articles, the Commission adopted an approach different from the one it took in its draft articles on representation of States in their relations with international organizations.⁶⁴ Article 2, paragraph 1, of the latter provides that:

The present articles apply to the representation of States in their relations with international organizations of *universal*⁶⁵ character and to their representation at conferences convened by or under the auspices of such organizations.

The expression "international organization of universal character" is defined in article 1, paragraph 1 (2), as "an organization whose membership and responsibilities are on a world-wide scale".

42. The reasons for the different approach taken by the Commission are laid down in the commentary to article 2 of the draft articles on treaties concluded between States and international organizations or between international organizations:

(10) ... The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

(11) Here the present draft differs profoundly from another text prepared by the Commission, namely the draft articles on the representation of States in their relations with international organizations, which cover basically international organizations of universal character.

(12) The difference stems from the very purpose of the two drafts. The draft articles on the representation of States in their relations with international organizations are concerned with the law of international organizations and their purpose is to unify, within a limited area, the specific rules of certain organizations. Consequently, if the draft is limited to certain organizations possessing similar characteristics, namely universal character, there is no good reason why each organization should be endowed, in that particular area, with a régime of its own. The present draft articles, however, deal not with the law of international organizations but with the law of treaties; the legal force and the régimes of the treaties considered therein derive their substance, not from the rules of each organization—that is to say, rules which would have to be unified—but from general international law. Hence the rules that govern a treaty between the United Nations and the ILO should be the same as those that govern a treaty between the ILO and the Council of Europe, for both sets of rules derive from the same principles.

(13) The inference from this basic legal analysis is that the scope of the present draft should include treaties to which all international organizations are parties. Historical and practical considerations point to the same conclusion. This was certainly what the United Nations Conference on the Law of Treaties and the General Assembly had in mind when they requested the Commission to undertake this study. Since the Conference did not have time to adopt the provisions required in order to settle in a single convention the position with regard both to treaties between States and to treaties between States and international organizations or between international organizations, the whole topic should at least be confined to no more than two instruments. The very aim of codification, which is a matter of unity, clarity and simplicity,

⁶⁴ *Yearbook... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

⁶⁵ Emphasis added by the Special Rapporteur.

would be jeopardized if, beyond the scope of two texts, a large area of treaty relations between States and organizations, or between organizations, had still to be left in doubt.⁶⁶

2. NOTION OF AN INTERNATIONAL ORGANIZATION

43. Article 2, paragraph 1 (i) of the draft articles on treaties concluded between States and international organizations or between international organizations gives to the term "international organization" a definition identical with that in the Vienna Convention on the Law of Treaties. It simply identifies an international organization as an intergovernmental organization. In the commentary to article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties, the Commission stated that:

The term "international organization" is here defined as an *intergovernmental* organization in order to make it clear that the rules of non-governmental organizations are excluded.⁶⁷

44. The Commission also pointed out in the commentary to article 2, paragraph 1 (i) of its draft articles on treaties concluded between States and international organizations or between international organizations the following:

(7) ... This definition should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of States, and in some cases having associate members which are not yet States or which may even be other international organizations; some special situations have been mentioned in this connexion, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.

(8) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(9) In the present draft, this very elastic definition is not meant to prejudice the régime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise no attempt has been made to prejudice the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is—and we shall revert to this point in the commentary to article 6—that the main purpose of the present draft is to regulate, not the status of international organizations, but the régime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.⁶⁸

3. CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES

45. Article 6 of the draft articles on treaties concluded between States and international organizations or between international organizations provides that:

⁶⁶ *Yearbook... 1974*, vol. II (Part One), p. 296, document A/9610/Rev.1, chap. IV, sect. B, article 2, paras. (10)-(13) of the commentary.

⁶⁷ *Yearbook... 1966*, vol. II, p. 190, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties with commentaries, article 2, para. (14) of the commentary.

⁶⁸ *Yearbook... 1974*, vol. II, pp. 295-296, document A/9610/Rev.1, chap. IV, sect. B, article 2, paras. (7)-(9) of the commentary.

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.⁶⁹

46. This formulation was adopted by the Commission as a compromise text in view of the divergence of opinion on this question. After reviewing the efforts of the Commission to include in its draft articles on the law of treaties a provision on the capacity of international organizations to conclude treaties and the Commission's decision to abandon such an attempt, the Special Rapporteur, Mr. Reuter, was inclined at first not to recommend to the Commission the insertion of an article or series of articles concerning the capacity of international organizations.⁷⁰ However, the Special Rapporteur, taking into account the views expressed in the Commission as well as in the Sixth Committee of the General Assembly, presented to the Commission two alternative proposals.

47. One alternative was worded as follows:

The extent of the capacity of international organizations to conclude treaties, a capacity acknowledged in principle by international law, is determined by the relevant rules of each organization.⁷¹

48. The other was worded as follows:

In the case of international organizations, capacity to conclude treaties is determined by the relevant rules of each organization.⁷² This alternative provided the basis for the text adopted by the Commission which states:

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

The commentary to article 6 of its draft articles on treaties concluded between States and international organizations, explain why the Commission opted for this formulation:

(2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations at international law; that question remains open, and the proposed wording is compatible both with the conception of general international law as the basis of international organizations' capacity and with the opposite conception. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the régime of treaties to which international organizations are parties, by what rules their capacity to conclude treaties should be assessed. Some members of the Commission, however, took

⁶⁹ *Ibid.*, p. 298, article 6. The corresponding provision (article 6) of the Vienna Convention on the Law of Treaties reads: "Every State possesses capacity to conclude treaties."

⁷⁰ *Yearbook... 1973*, vol. II, pp. 81-83, document A/CN.4/271, paras. 38-52.

⁷¹ *Yearbook... 1974*, vol. II (Part One), p. 150, document A/CN.4/279, article 6, para. (20) of the commentary. Cf. the formula submitted by Professor R. J. Dupuy to the Institute of International Law in his provisional report of 1972, which is entitled "L'application des règles de droit international général des traités aux accords conclus par les organisations internationales". Article 4 of this report provides that:

"Unless the constituent instrument provides otherwise, every international organization has the capacity to conclude agreements in the exercise of its functions and for the achievement of its objectives. (*Annuaire de l'Institut de droit international*, 1973 (Basel), vol. 55, p. 314.) [translation from French].

⁷² *Yearbook... 1974*, vol. II (Part One), p. 145, document A/CN.4/279, article 6.

the view that draft article 6, as at present worded, would not suffice to solve all the problems which the Commission would encounter in its further work on the draft articles, for example when it had to draw up, for application to international organizations, rules to match those laid down for States in articles 27 and 46 of the Vienna Convention.

(3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the fundamental notion of "rules of any international organization" already laid down in article 2, paragraph 2, of the present draft and developed in the commentary to that provision. The addition, in article 6, of the adjective "relevant" to the expression "rules that organization" is due simply to the fact that, while article 2, paragraph 2, relates to the "rules of any organization" as a whole, article 6 concerns only some of those rules, namely those which are relevant in settling the question of the organization's capacity.⁷³

B. The work of the United Nations Conference on the Representation of States in Their Relations with International Organizations

1. NOTION OF AN INTERNATIONAL ORGANIZATION

49. The identification of an international organization as "an intergovernmental organization" in article 1, paragraph 1 (1) in the draft articles on the representation of States in their relations with international organizations, adopted by the Commission in 1971,⁷⁴ was approved by the United Nations Conference on the Representation of States in Their Relations with International Organizations (hereafter referred to as "the Conference") as article 1 of paragraph 1 (1) of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (hereafter referred to as "the Convention").⁷⁵

50. In his third report, submitted to the Commission in 1968, the Special Rapporteur on the topic of relations between States and intergovernmental organizations had proposed the following definition:

An international organization is an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member States.⁷⁶

The Commission thought, however, that such an elaborate definition was not necessary for the time being since it was not dealing at that stage of its work with the status of the international organizations themselves, but only with the legal position of representatives of States to the organizations.

51. Some delegations at the Conference expressed themselves in favour of the adoption of an elaborate definition

⁷³ *Ibid.*, p. 299, document A/9610/Rev.1, chap. IV, sect. B, article 6, paras. (2)-(3) of the commentary.

⁷⁴ For reference, see foot-note 64.

⁷⁵ *Official Records 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. 209.

⁷⁶ *Yearbook... 1968*, vol. II, p. 124, document A/CN.4/203 and Add.1-5, chap. II, article 1 (a).

of the term of international organization which would lay down the constituent elements of the concept. An amendment was presented to article 1 (Use of terms) with a view to including a definition similar to the one proposed in 1968 by the Special Rapporteur. However, following a brief discussion and an explanation by the Expert Consultant of the Conference on the reasons which led the Commission not to adopt such a definition, that amendment was withdrawn.⁷⁷

2. SCOPE OF THE CONVENTION

52. Article 2 of the Convention, which is entitled "Scope of the present Convention", provides that:

1. The present Convention applies to the representation of States in their relations with any international organization of a universal character, and to their representation at conferences convened by or under the auspices of such an organization, when the Convention has been accepted by the host State and the Organization has completed the procedure envisaged by article 90.

2. The fact that the present Convention does not apply to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.

3. The fact that the present Convention does not apply to other conferences is without prejudice to the application to the representation of States at such other conference of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.

4. Nothing in the present Convention shall preclude the conclusion of agreements between States or between States and international organizations making the Convention applicable in whole or in part to international organizations or conferences other than those referred to in paragraph 1 of this article.

53. The wording of this article is based on, and corresponds to, the formulation adopted by the Commission in defining the scope of its draft articles submitted to the Conference (articles 2 and 3 of the Commission's draft articles). In the commentary, the Commission stated:

(2) One method of determining the international organizations which, in addition to the United Nations, come within the scope of the draft articles might be the method adopted by the Convention on the Privileges and Immunities of the Specialized Agencies. That Convention lists in article 1 a certain number of specialized agencies and adds that the expression "specialized agencies" also applies to "any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter". That method of determining the scope of the Convention leaves aside such organizations as IAEA which is not considered, strictly speaking, a specialized agency as defined in the Convention in view of the circumstances of its creation and the nature of its relationship with the United Nations. It also leaves aside other organizations of universal character which are outside what has become known as the United Nations "system" or "family" or the United Nations and its "related" or "kindred" agencies. Examples of such organizations are the Bank for International Settlements, the International Institute for the Unification of Private

⁷⁷ See *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.75.V.II), pp. 328-329, 44th meeting of the Committee of the Whole, paras. 55-59; and *ibid.*, vol. II (*op. cit.*), pp. 165-166, document A/CONF.67/17, paras. 846 and 849.

Law, the International Wheat Council and the Central Office for International Railway Transport. The wording of paragraph 1 of article 2 is designed to be comprehensive, embracing all international organizations of universal character.⁷⁸

54. It is noteworthy, however, that the Conference introduced some precisions to the criteria for identifying an international organization of universal character as well as the machinery for determining it. While, according to article 1, paragraph 1 (2), of the Commission's draft,

"international organization of a universal character" means an organization whose membership and responsibilities are on a world-wide scale,

the corresponding text in the Convention reads:

"international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale.

Furthermore, article 2 of the Convention injected the acceptance by the host State and the organization into the determination of the "universal character" of the organization. Thus paragraph 1 of that article provides:

The present Convention applies to the representation of States in their relations with any international organization of a universal character, and to their representation at conferences convened by or under the auspices of such an organization, *when the Convention has been accepted by the host State and the Organization has completed the procedure envisaged by article 90.*⁷⁹

Article 90 of the Convention, referred to in paragraph 1 of article 2, is entitled "Implementation by organizations" and reads:

After the entry into force of the present Convention, the competent organ of an international organization of a universal character may adopt a decision to implement the relevant provisions of the Convention. The Organization shall communicate the decision to the host State and to the depositary of the Convention.⁸⁰

3. RESOLUTION RELATING TO DELEGATIONS OF NATIONAL LIBERATION MOVEMENTS

55. The draft articles adopted by the Commission in 1971 did not contain provisions concerning representatives of entities other than States (e.g. representatives of national liberation movements and petitioners) who might participate in the work of organs or conferences of international organizations. In its report on the work of its twenty-third session in 1971, the Commission, after referring to these categories of representatives, stated:

The Commission considers that such categories can be more appropriately dealt with under the subject of representatives of

⁷⁸ *Yearbook... 1971*, vol. II (Part One), p. 287, document A/8410/Rev.1, chap. II, sect. D, article 2, para. (2) of the commentary.

⁷⁹ Emphasis added by the Special Rapporteur.

⁸⁰ For an analysis of this compound formula, which was adopted as a compromise solution between two positions, one favouring the extension of the scope of the Convention to apply to all international organizations, both universal and regional, and the other advocating its limitations to the United Nations family, see A. El-Erian, "La Conférence et la Convention sur la Représentation des Etats dans leurs relations avec les organisations internationales (Un aperçu général)", *Annuaire français de droit international*, 1975 (Paris, 1976), vol. XXI, pp. 468-469.

international organizations and their officials and in conjunction with experts and other persons who may be engaged in the official service of international organizations.⁸¹

56. The Convention adopted by the Conference in 1975 also did not contain provisions relating to representatives of entities other than States. However, the Conference adopted the following resolution:

RESOLUTION RELATING TO THE OBSERVER STATUS OF NATIONAL LIBERATION MOVEMENTS RECOGNIZED BY THE ORGANIZATION OF AFRICAN UNITY AND/OR BY THE LEAGUE OF ARAB STATES

The United Nations Conference on the Representation of States in Their Relations with International Organizations,

Recalling that, by its resolution 3072 (XXVIII) of 30 November 1973, the General Assembly referred to the Conference the draft articles on the representation of States in their relations with international organizations adopted by the International Law Commission at its twenty-third session,

Noting that the draft articles adopted by the Commission deal only with the representation of States in their relations with international organizations,

Recalling further that, by its resolution 3247 (XXIX) of 29 November 1974, the General Assembly decided to invite the national liberation movements recognized by the Organization of Africa Unity and/or by the League of Arab States in their respective regions to participate in the Conference as observers, in accordance with the practice of the United Nations,

⁸¹ *Yearbook... 1971*, vol. II (Part One), p. 283, document A/8410/Rev.1, para. 54.

Noting the current practice of inviting the above-mentioned national liberation movements to participate as observers in the sessions and work of the General Assembly of the United Nations, in conferences held under the auspices of the General Assembly or under the auspices of other United Nations organs, and in meetings of the specialized agencies and other organizations of the United Nations family,

Convinced that the participation of the above-mentioned national liberation movements in the work of international organizations helps to strengthen international peace and co-operation,

Desirous of ensuring the effective participation of the above-mentioned movements as observers in the work of international organizations and of regulating, to that end, their status and the facilities, privileges and immunities necessary for the performance of their tasks,

1. Requests the General Assembly of the United Nations at its thirtieth regular session to examine this question without delay;

2. Recommends in the meantime, the States concerned to accord to delegations of national liberation movements which are recognized by the Organization of African Unity and/or by the League of Arab States in their respective regions and which have been granted observer status by the international organization concerned, the facilities, privileges and immunities necessary for the performance of their tasks and to be guided therein by the pertinent provisions of the Convention adopted by this Conference;

3. Decides to include the present resolution in the Final Act of the Conference.⁸²

⁸² *Official Records of the United Nations Conference ...*, vol. II (*op. cit.*), pp. 204-205, document A/CONF.67/15, annex.

CHAPTER IV

General questions

A. The place of custom in the law of international immunities

57. Some writers state that international immunities, in contrast to the immunities of inter-State diplomatic agents, are almost exclusively created by treaty law, and that international custom has not yet made any appreciable contribution to this branch of law.

58. Several writers acknowledge, however, that "A customary law appears to be in the process of formation, by virtue of which certain organizations endowed with international personality may claim diplomatic standing for their agents as of right",⁸³ and speak of "l'existence d'une véritable coutume internationale ... ou en tout cas d'un commencement de coutume".⁸⁴ One writer has summed up the position, as it has developed since the creation of the League of Nations, as follows:

En voie de création est une règle coutumière qui assure aux organisations internationales et à leurs fonctionnaires supérieurs les

⁸³ L. Preuss, "Diplomatic privileges and immunities of agents invested with functions of an international interest", *American Journal of International Law* (Washington, D.C.), vol. 25, No. 4 (October 1931), p. 696.

⁸⁴ J.-F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours de l'Académie de droit international de La Haye (1953-III)* (Leyde, Sijthoff, 1955), vol. 84, pp. 304-305.

mêmes privilèges et immunités diplomatiques qu'au personnel diplomatique. Les étapes de ce développement sont constituées par les arrangements conclus entre la Suisse et la Société des Nations en 1921 et en 1926, ainsi que par ceux qui sont intervenus entre la Suisse, d'une part, les Nations Unies et l'Organisation internationale du Travail d'autre part, en 1946.

*Le fait que certaines conventions internationales ont des contenus identiques, ce qui est particulièrement caractéristique pour les traités d'établissement, de consulat et d'extradition, n'entraîne pas en soi la formation d'une règle coutumière.*⁸⁵

59. A parallel development of concepts can be found in practice. In a diplomatic note by the United States Government, dated 16 October 1933, it was stated that:

... under customary international law, diplomatic privileges and immunities are only conferred upon a well-defined class of persons, namely, those who are sent by one state to another on diplomatic missions. Officials of the League of Nations are not as such considered by this Government to be entitled while in the United States to such privileges and immunities under generally accepted principles of international law, but only under special provisions of the Covenant of the League which have no force in countries not members of the League.⁸⁶

⁸⁵ P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, pp. 51-52.

⁸⁶ G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1942), vol. IV, pp. 422-423.

When, however, at the end of 1944 the British Diplomatic Privileges (Extension) Act, which provided for immunities, privileges and capacities of the international organizations, their staff, and the representatives of member Governments, was introduced in Parliament, the Minister of State explained that, where a number of Governments joined together to create an international organization to fulfil some public purpose, the organization should have the same status, immunities and privileges as the foreign Government members thereof enjoyed under the ordinary law. He elaborated that, in principle, they were entitled to it as a matter of international law which the English courts would regard as being part of the common law. However, legislation was regarded as desirable in order to put the legal position beyond dispute and to define with precision the extent of the prerogatives.

60. The Swiss Federal Council stated in a message dated 28 July 1955 to the Federal Assembly:

... Une organisation internationale, fondée sur un traité entre États, jouit d'après le droit international d'un certain nombre de privilèges dans l'État où elle a fixé son siège ...

... Nous étions donc en présence d'un droit coutumier auquel notre pays ne pouvait pas se soustraire ...⁸⁷

61. The Supreme Court of Mexico, in its decision of 28 April 1954, declared that ECLA could enjoy immunities recognized by international law.

62. Reference may also be made in this respect to article III, section 3 of the Agreement between Egypt and WHO, which provides:

The Organization and its principal or subsidiary organs shall have in Egypt the independence and freedom of action belonging to an international organization according to international practice.⁸⁸

B. Differences between inter-State diplomatic relations and relations between States and international organizations

63. International intercourse within the framework of international organizations resembles in certain respects diplomatic relations between States. The evolution of conference diplomacy took a path analogous to bilateral diplomacy. The latter has passed through two clearly distinct periods: the period of non-permanent and *ad hoc* embassies, covering antiquity and the Middle Ages, and the period of permanent legations, beginning in Italy in the fifteenth century. Similarly, multilateral diplomacy developed from the stage of *ad hoc* temporary conferences, which are convened for a specific purpose and which come to an end once the subject-matter is agreed upon and embodied in an international agreement, to the stage of permanent international organizations with organs that function permanently and meet periodically.

⁸⁷ Quoted in P. Cahier, *Le Droit diplomatique contemporain* (Geneva, Droz, 1962), pp. 47-48. The author rightly points out an important practical aspect of the question of the place of custom in the diplomatic law of international organizations by observing that "L'existence d'une coutume peut permettre aussi de combler les lacunes que l'on rencontre parfois dans les accords de siège. C'est ainsi que par exemple l'accord du 28 mai 1946 conclu entre la Suisse et l'OIT ne mentionne pas les privilèges des experts."

⁸⁸ United Nations, *Treaty Series*, vol. 223, p. 90.

64. A number of differences exist, however, between bilateral and conference diplomacy, which stem from a basic difference in the legal relationships involved in the two types of diplomacy. In traditional inter-State diplomacy, the relationship is a bipartite one between the sending State and the receiving State. However, in diplomacy within an international organization, the relationship is a tripartite legal position which involves the sending State, the international organization and the host State in whose territory the representative of the sending State or the international organization and its personnel enjoy the legal status conceded to them. Unlike its corresponding provision in the League Covenant, Article 105 of the United Nations Charter did not use the words "diplomatic privileges and immunities", but employed instead the words "privileges and immunities as are necessary for the fulfilment of its purposes". The report of the Rapporteur of Committee IV/2, which was adopted by the United Nations Conference on International Organization (1945), includes the following comment on this Article:

In order to determine the nature of the privileges and immunities, the Committee has seen fit to avoid the term "diplomatic" and has preferred to substitute a more appropriate standard, based, for the purpose of the Organization, on the necessity of realizing its purposes and, in the case of the representatives of its members and the officials of the Organization, on providing for the independent exercise of their functions.⁸⁹

The theoretical basis of the immunities of inter-State diplomatic agents has varied from age to age. In its general comments on the relevant provision of its draft articles on diplomatic intercourse and immunities, contained in the report on its tenth session (1958),⁹⁰ the Commission, while recognizing the role played by the fiction of "extritoriality", stated that it took as a theoretical basis the "functional necessity theory" supplemented by the "representative character theory". Since international organizations do not have territorial jurisdiction, no reliance could be placed on the fiction of extritoriality, nor do they have the sovereign character possessed by States, from which the "representative character theory" emanates. International immunities, therefore, can only be based on the "functional necessity theory".

C. Legal capacity of international organizations

65. Article 104 of the United Nations Charter obligates each Member of the United Nations to accord to the Organization within its territory "such legal capacity as may be necessary for the exercise of its functions".

66. The 1946 Convention elaborated on the meaning of Article 104 as follows in article 1:

The United Nations shall possess juridical personality. It shall have the capacity:

(a) To contract;

⁸⁹ *United Nations Conference on International Organization*, IV/2/42(2).

⁹⁰ *Yearbook... 1958*, vol. II, pp. 94-95, document A/3859, chap. III, section II, general comments on section II of the draft articles.

(b) To acquire and dispose of immovable and movable property;

(c) To institute legal proceedings.

67. The constitutional instruments and conventions on the privileges and immunities of the specialized agencies and of a number of regional organizations contain provisions regarding the legal capacity of these organizations which vary as to phraseology but are similar in meaning.

68. By the International Organizations Immunities Act of 29 December 1945, the United States recognized international organizations coming within the terms of the Act, and to the extent consistent with the instrument creating them as possessing the capacity "(a) to contract; (b) to acquire and dispose of real and personal property; and (c) to institute legal proceedings".⁹¹ By the "Interim Arrangement on Privileges and Immunities of the United Nations" between the United Nations and the Swiss Federal Council of 11 June and 1 July 1946, the Swiss Government "recognizes the international personality and legal capacity of the United Nations".⁹²

69. The precise extent of the legal capacity of international organizations and, in particular, their capacity to conclude treaties has proved a controversial matter. Some writers adhere to the restrictive theory of "less delegated powers" according to which the capacity of international organizations is confined to such acts or rights as are specified in their constitutions. Others advocate the theory of "implied or inherent rights". The International Court of Justice has taken cognizance of the fact that the capacities of the United Nations are not confined to those specified in its constitution. Thus, in the Advisory Opinion of 11 April 1949 on "Reparation for injuries suffered in the service of the United Nations", the Court stated:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁹³

Similarly, in its Advisory Opinion of 13 July 1954 on "Effects of awards of compensation made by the United Nations Administrative Tribunal", the Court pointed out that the Charter contains "no express provision for the establishment of judicial bodies or organs and no indication to the contrary", but held that capacity to establish a tribunal to do justice as between the Organization and the staff members "arises by necessary intendment out of the Charter".⁹⁴

D. Scope of privileges and immunities

1. THE ORGANIZATION

70. Besides the contractual capacity possessed by international organizations mentioned above (capacity to

⁹¹ See L. Preuss, "The International Organizations Immunities Act", *American Journal of International Law* (Washington, D.C.), vol. 40, No. 2 (April 1946), pp. 332-345.

⁹² United Nations, *Treaty Series*, vol. 1, p. 164.

⁹³ *I.C.J. Reports*, 1949, p. 182.

⁹⁴ *I.C.J. Reports*, 1954, pp. 56-57.

contract, acquire and dispose of immovable and movable property and to institute legal proceedings), the United Nations and the specialized agencies enjoy certain privileges and immunities laid down in the General Conventions and headquarters agreements and other supplementary instruments. They include, *inter alia*:

(a) Immunity from legal process;

(b) Inviolability of their premises and the exercise of control by them over their premises;

(c) Immunity of their property and assets from search and from any other form of interference;

(d) Inviolability of their archives and documents;

(e) Privileges relating to taxes, customs duties and currency controls; and

(f) Privileges and immunities in respect of communication facilities (e.g. use of codes and dispatch of correspondence by courier or in bags).

2. PRIVILEGES AND IMMUNITIES OF OFFICIALS

71. These include:

(a) Immunity in respect of official acts;

(b) Exemption from taxation of salaries and emoluments;

(c) Immunity from national service obligations;

(d) Immunity from immigration restrictions and alien registration;

(e) Diplomatic privileges and immunities of executive and other senior officials; and

(f) Repatriation facilities in times of international crisis.

3. PRIVILEGES AND IMMUNITIES OF EXPERTS ON MISSION FOR, AND OF PERSONS HAVING OFFICIAL BUSINESS WITH, THE ORGANIZATION

72. Under article VI of the 1946 Convention, certain immunities, broadly similar to those accorded to officials, are granted to "Experts ... performing missions for the United Nations...". The 1947 Convention does not contain an equivalent article; the only reference to "experts" in the text of that Convention is in article VIII, section 29, whereby States parties are asked to grant travel facilities to "experts and other persons" who are travelling "on the business of a specialized agency". However, the provisions of article VI of the 1946 Convention are contained in the annexes to the 1947 Convention in respect of FAO, ICAO, UNESCO and WHO.

73. In addition to United Nations and specialized agencies "experts on missions", a remaining category of persons (other than representatives of Member States) who may enjoy certain privileges and immunities are those having official business with the United Nations and the specialized agencies. A number of headquarters agreements and supplemental accords contain provisions expressly granting such persons rights of transit to United Nations and specialized agencies premises (e.g. article IV of the Headquarters Agreement between the United

Nations and the United States,⁹⁵ article 9 of the Headquarters Agreement between UNESCO and France,⁹⁶ and article V of the Headquarters Agreement between ICAO and Canada.⁹⁷

4. UNIFORMITY OR ADAPTATION OF INTERNATIONAL IMMUNITIES

74. The régime of international immunities is based at present on a large number of instruments whose diversity

⁹⁵ United Nations, *Treaty Series*, vol. 11, p. 20.

⁹⁶ *Ibid.*, vol. 357, p. 8.

⁹⁷ *Ibid.*, vol. 96, p. 172.

causes practical difficulties to States as well as to international organizations. It is of great practical importance to all national authorities concerned with customs, emigration etc. that the provisions are the same for all or most international officials:

From the standpoint of an international organisation conducting operations all over the world there is a similar advantage in being entitled to uniform standards of treatment in different countries.⁹⁸

However, many writers qualify their enthusiasm for the objective of uniformity by pointing out the need for adaptation of immunity to function in particular cases.

⁹⁸ Jenks, *op. cit.*, p. 149.

CHAPTER V

Conclusions

75. In the light of the foregoing survey of the evolution of the international law relating to the legal status and immunities of international organizations, it would appear that there exists a substantial body of legal norms in this field. It consists of an elaborate and varied network of treaty law, which requires concretization, as well as a wealth of practice, which needs consolidation. An undertaking by the Commission aimed at the codification and development of this branch of diplomatic law would complete the *corpus juris* of diplomatic law achieved through the work of the Commission and embodied in the 1961 Vienna Convention on Diplomatic Relations,⁹⁹ the 1963 Vienna Convention on Consular Relations,¹⁰⁰ the 1969 Convention on Special Missions¹⁰¹ and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.¹⁰²

76. Furthermore, in the light of the foregoing survey of the work of the Commission on the first part of the topic "Relations between States and international organizations", namely, the status, privileges and immunities of representatives of States to international organizations, as well as on the topic "Question of treaties between States and international organizations or between two or more international organizations", it would appear that the Commission inclines to pursue an empirical method and a pragmatic approach. The Commission does not favour the course of engaging itself in such theoretical notions as the concept of an international organization, its juridical personality or its treaty-making capacity. It prefers instead to deal with the practical aspects and concrete issues of the rules which govern the relations between States and international organizations. The Commission takes great care to safeguard the position of internal law and the relevant rules of each organization and, in particular, the general conventions on the privileges and immunities of the United Nations and of the specialized agencies and the headquarters agreements of these

organizations. Thus, paragraph 7 of the preamble of the 1975 Vienna Convention reads;

Taking account of the Convention on the Privileges and Immunities of the United Nations of 1946, the Convention on the Privileges and Immunities of the Specialized Agencies of 1947 and other agreements in force between States and international organizations.

The implications of this statement are explicitly and elaborately laid down and defined in its articles 3 and 4:

Article 3. Relationship between the present Convention and the relevant rules of international organizations or conferences

The provisions of the present Convention are without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference.

Article 4. Relationship between the present Convention and other international agreements

The provisions of the present Convention

(a) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character, and

(b) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of a universal character of their representation at conferences convened by or under the auspices of such organizations.

77. Articles 3 and 4 are of significant importance.¹⁰³ Given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the Convention is designed to establish a common denominator and to provide general rules to regulate the diplomatic law of relations between States and international organizations in the absence of regulations on any particular point by an individual international organization. Their purpose is twofold. First, they are intended to reserve the position of existing international agreements regulating the same subject-matter. Thus, while intended to provide a uniform régime, the rules of the Convention are without prejudice to different rules which may be laid down in such agreements. Second,

⁹⁹ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁰⁰ *Ibid.*, vol. 596, p. 261.

¹⁰¹ General Assembly resolution 2530 (XXIV), annex.

¹⁰² For reference, see foot-note 75 above.

¹⁰³ For a fuller account of the purposes of these two articles, see *Yearbook... 1971*, vol. II (Part One), pp. 287-288, document A/8410/Rev.1, chapter II, sect. D, commentaries to articles 3 and 4.

it is recognized that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to that organization. The rules of the Convention are not intended in any way to preclude any further development of the law in this area.

78. Bearing in mind that many years have elapsed since the preparation of the replies by the United Nations and the specialized agencies to the questionnaire addressed to them by the Legal Counsel of the United Nations,¹⁰⁴

¹⁰⁴ See para. 6 above.

the Special Rapporteur believes that it would be useful if the United Nations and the specialized agencies were requested to provide the Special Rapporteur with any additional information on the practice in the years following the preparation of their replies. Such information would be particularly helpful in the area of the category of experts on missions for, and of persons having official business with, the organization. Another area in which information is needed is that relating to resident representatives and observers who may be sent by one international organization to another international organization or represent that organization.

**CHECK LIST OF DOCUMENTS OF THE TWENTY-NINTH SESSION
NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/297/Rev.1	Provisional agenda	Mimeographed. For the agenda as adopted, see A/32/10, para. 11 (vol. II (Part Two), p. 5).
A/CN.4/299/Add.1 and 2	Filling of casual vacancies.—Addenda to the note by the Secretariat: list of candidates and curricula vitae	Mimeographed.
A/CN.4/305	Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76): report of the Working Group	Mimeographed. For the conclusions of the Working Group, see A/32/10, para. 83 (vol. II (Part Two), p. 125).
A/CN.4/L.253	Draft articles on treaties concluded between States and international organizations or between international organizations: articles 19-23 proposed by Mr. Ushakov	Texts reproduced in A/32/10, foot-notes 464, 478, 480, 482 and 485 (vol. II (Part Two), pp. 109, 113, 114, 115 and 116).
A/CN.4/L.254	Draft articles on succession of States in respect of matters other than treaties: article on newly independent States proposed by Mr. Ushakov	<i>Idem</i> , foot-note 428 (vol. II (Part Two), p. 94).
A/CN.4/L.255 and Add.1, Add.2 and Corr.1 and Add.3	Draft articles on treaties concluded between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: articles 19, 19 <i>bis</i> , 19 <i>ter</i> , 20, 20 <i>bis</i> , 21-23, 23 <i>bis</i> , 24, 24 <i>bis</i> , 25, 25 <i>bis</i> , 26-27 (and art. 2, para. 1 (<i>j</i>)), 28-34, and titles of corresponding parts and sections of the draft	Texts reproduced in the summary records of the 1446th, 1451st, 1458th and 1459th meetings (vol. I).
A/CN.4/L.256 and Add.1	Draft articles on succession of States in respect of matters other than treaties. Texts adopted by the Drafting Committee: articles 17-22 and titles of the corresponding part and sections of the draft.	<i>Idem</i> , 1447th and 1449th meetings (vol. I).
A/CN.4/L.256/Add.2	<i>Idem</i> : revised text of article 20	<i>Idem</i> , 1450th meeting (vol. I).
A/CN.4/L.257	Draft articles on succession of States in respect of matters other than treaties: article 22 proposed by Mr Schwebel	Text reproduced in A/32/10, foot-note 427 (vol. II (Part Two), p. 94).
A/CN.4/L.258	Draft report of the International Law Commission on the work of its twenty-ninth session: chap. I	Mimeographed. For the final text, see A/32/10 (vol. II (Part Two), p. 1).
A/CN.4/L.259 and Add.1-4	<i>Idem</i> : chap. II	<i>Idem</i> .
A/CN.4/L.260 and Add.1-3	<i>Idem</i> : chap. III	<i>Idem</i> .
A/CN.4/L.261 and Corr.1 and Add.1-2	<i>Idem</i> : chap. IV	<i>Idem</i> .
A/CN.4/L.262 and Add.1-3	<i>Idem</i> : chap. V	<i>Idem</i> .
A/CN.4/L.263	Draft articles on State responsibility: text of article 20 adopted by the Drafting Committee	Text reproduced in the summary record of the 1462nd meeting (vol. I).
A/CN.4/L.263/Add.1	<i>Idem</i> . Texts adopted by the Drafting Committee: revised text of article 20 and articles 21-22	<i>Idem</i> , 1469th meeting.
A/CN.4/SR.1414-SR.1473	Provisional summary records of the 1414th to 1473rd meetings of the International Law Commission	Mimeographed. For the final text, see vol. I.

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