

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1979

Volume II
Part Two

*Report of the Commission
to the General Assembly
on the work
of its thirty-first session*

UNITED NATIONS



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New York, 1980



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 ellipsis points and the year (e.g. *Yearbook . . . 1975*) indicates a reference to the *Yearbook of the International Law Commission*.

Part One of volume II contains the reports of Special Rapporteurs that were examined at the session, as well as certain other documents. The report of the Commission to the General Assembly forms the subject of Part Two of this volume.

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ABBREVIATIONS

C.N.R.	Consiglio Nazionale delle Ricerche (Italy)
C.N.R.S.	Centre national de la recherche scientifique (France)
IBRD	International Bank for Reconstruction and Development
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>
ILA	International Law Association
IMCO	Intergovernmental Maritime Consultative Organization
IMF	International Monetary Fund
OECD	Organisation for Economic Co-operation and Development
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 [to 1930]</i>
<i>P.C.I.J., Series B</i>	<i>P.C.I.J., Collection of Advisory Opinions [to 1930]</i>
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions [from 1931]</i>
<i>P.C.I.J., Series C</i>	
Nos. 1–19	<i>P.C.I.J., Acts and Documents relating to Judgments and Advisory Opinions [to 1930]</i>
Nos. 52–88	<i>P.C.I.J., Pleadings, Oral Statements and Documents [from 1931]</i>
S.I.O.I.	Società Italiana per l'Organizzazione Internazionale (Italy)
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research

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* * *

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute (annexed thereto, as subsequently amended), held its thirty-first session at its permanent seat at the United Nations Office at Geneva from 14 May to 3 August 1979. The session was opened by Mr. Eric Suy, Under-Secretary-General, the Legal Counsel.

2. The Commission's work during that session is described in the present report. Chapter II of the report, on succession of States in respect of matters other than treaties, contains a description of the Commission's work on that topic, together with the 25 draft articles and commentaries thereto provisionally adopted by the Commission. Chapter III, on State responsibility, contains a description of the Commission's work on that topic, together with the 32 draft articles provisionally adopted so far and commentaries to the five of those articles provisionally adopted at the thirty-first session. Chapter IV, on the question of treaties concluded between States and international organizations or between two or more international organizations, contains a description of the Commission's work on that topic, together with the 66 draft articles provisionally adopted so far and commentaries to the 22 of those articles provisionally adopted at the thirty-first session. Chapters V, VI, VII and VIII relate respectively to the Commission's work, during its thirty-first session, on the law of the non-navigational uses of international watercourses, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, jurisdictional immunities of States and their property, and review of the multilateral treaty-making process. Finally, chapter IX deals with the appointment of Special Rapporteurs, the programme and methods of work of the Commission, and a number of administrative and other questions.

A. Membership and attendance

3. The membership of the Commission is as follows:

Mr. Julio BARBOZA (Argentina);
Mr. Mohammed BEDJAOUI (Algeria);
Mr. Juan José CALLE y CALLE (Peru);
Mr. Jorge CASTEÑEDA (Mexico);
Mr. Emmanuel Kodjoe DADZIE (Ghana);
Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela);
Mr. Jens EVENSEN (Norway);
Mr. Laurel B. FRANCIS (Jamaica);
Mr. Boutros Boutros GHALI (Egypt);
Mr. S. P. JAGOTA (India);
Mr. Frank X. J. C. NJENGA (Kenya);
Mr. C. W. PINTO (Sri Lanka);
Mr. Robert Q. QUENTIN-BAXTER (New Zealand);
Mr. Paul REUTER (France);

Mr. Willem RIPHAGEN (Netherlands);
Mr. Milan ŠAHOVIĆ (Yugoslavia);
Mr. Stephen M. SCHWEBEL (United States of America);
Mr. Sompong SUCHARITKUL (Thailand);
Mr. Abdul Hakim TABIBI (Afghanistan);
Mr. Doudou THIAM (Senegal);
Mr. Senjin TSURUOKA (Japan);
Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics);
Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);
Mr. Stephan VEROSTA (Austria);
Mr. Alexander YANKOV (Bulgaria).

4. On 29 May 1979, the Commission elected Mr. Jens Evensen (Norway), Mr. Boutros Boutros Ghali (Egypt) and Mr. Julio Barboza (Argentina) to fill the vacancies caused by the resignations of Mr. Robert Ago, Mr. Abdullah El-Erian and Mr. José Sette Câmara on their election to the International Court of Justice.

5. All members attended meetings during the thirty-first session of the Commission. Some members were not able to attend all the meetings of the Commission.¹

B. Officers

6. At its 1530th meeting, on 14 May 1979, the Commission elected the following officers:

Chairman: Mr. Milan Šahović
First Vice-Chairman: Mr. C. W. Pinto
Second Vice-Chairman: Mr. Leonardo Díaz González
Chairman of the Drafting Committee: Mr. Willem Riphagen
Rapporteur: Mr. Emmanuel Kodjoe Dadzie

7. At the thirty-first session of the Commission, the Enlarged Bureau was composed of the officers, former Chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the present session. On the recommendation of the Enlarged Bureau, the Commission at its 1549th meeting, held on 11 June 1979, established a Planning Group for the current session to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. C. W. Pinto (Chairman), Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Frank X. J. C. Njenga, Mr. Paul Reuter, Mr. Stephen M. Schwebel, Mr. Abdul Hakim Tabibi, Mr. Doudou Thiam, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov, Sir Francis Vallat and Mr. Alexander Yankov.

¹ On the question of attendance, see para. 209 below.

C. Drafting Committee

8. At its 1543rd meeting, on 31 May 1979, the Commission appointed a Drafting Committee composed of the following members: Mr. Julio Barboza, Mr. Laurel B. Francis, Mr. Frank X. J. C. Njenga, Mr. Robert Q. Quentin-Baxter, Mr. Paul Reuter, Mr. Stephen M. Schwebel, Mr. Sompong Sucharitkul, Mr. Senjin Tsuruoka, Mr. Nikolai A. Ushakov, Mr. Stephan Verosta and Mr. Alexander Yankov. Mr. Willem Riphagen was elected by the Commission to serve as Chairman of the Drafting Committee. Mr. Emmanuel Kodjoe Dadzie also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

9. At its 1546th meeting, on 6 June 1979, the Commission again established a Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier to study that subject, as requested in paragraph 5 of section I of General Assembly resolution 33/139 of 19 December 1978, and to report thereon to the Commission. The composition of the Working Group was as follows: Mr. Alexander Yankov (Chairman), Mr. Emmanuel Kodjoe Dadzie, Mr. Leonardo Díaz González, Mr. Jens Evensen, Mr. Laurel B. Francis, Mr. Willem Riphagen, Mr. Sompong Sucharitkul, Mr. Abdul Hakim Tabibi, Mr. Doudou Thiam and Mr. Nikolai Ushakov.

E. Working Group on review of the multilateral treaty-making process

10. At its 1546th meeting, on 6 June 1979, the Commission reconstituted the Working Group set up in 1978 to study the item entitled "Review of the multilateral treaty-making process", on which the Commission had been invited to submit its observations by paragraph 2 of General Assembly resolution 32/48 of 8 December 1977. It also enlarged the membership of the Group and requested it to present a final report to the Commission. The Working Group was composed as follows: Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Frank X. J. C. Njenga, Mr. C. W. Pinto, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov, Sir Francis Vallat and Mr. Alexander Yankov.

F. Juridical status of the members of the Commission at the place of its permanent seat

11. In the report on the work of its thirtieth session, the Commission referred to a need for a better definition of "its juridical status at the place of its permanent seat, including the immunities, privileges and facilities to which it and its members are entitled", and requested the Secretary-General to study the matter and to "take appropriate measures in consultation with the Swiss authorities".²

12. At the 1532nd meeting, on 16 May 1979, the Under-Secretary-General, the Legal Counsel of the United Nations, made a statement regarding the measures that had been taken in pursuance of the above request and reported that he had been informed by the Swiss authorities of the decision taken on that question by the Swiss Federal Council on 9 May 1979. The text of the decision, as contained in a communiqué addressed to the Secretary-General, read as follows:

On the proposal of the Federal Political Department the Federal Council decided on 9 May 1979 to accord, by analogy, to the members of the International Law Commission, for the duration of the Commission's sessions at Geneva, the privileges and immunities to which the Judges of the International Court of Justice are entitled while present in Switzerland. These are the privileges and immunities enjoyed by the heads of mission accredited to the international organizations at Geneva. The members of the International Law Commission will be entitled to a special red identity card.

13. On 21 May 1979, the Chairman of the International Law Commission, on behalf of the Commission and its members, expressed to the Swiss Federal Council and the Federal Political Department in an appropriate letter the Commission's appreciation of the above-mentioned decision, which would facilitate the members' performance of their functions during the sessions at Geneva.

G. Secretariat

14. Mr. Erik Suy, Under-Secretary-General, the Legal Counsel, represented the Secretary-General at the session. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Santiago Torres-Bernárdez, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. Eduardo Valencia-Ospina, Senior Legal Officer, acted as Senior Assistant Secretary and Mr. Moritaka Hayashi and Mr. Larry D. Johnson, Legal Officers, served as Assistant Secretaries to the Commission.

H. Agenda

15. At its 1530th meeting, on 14 May 1979, the Commission adopted an agenda for its thirty-first session consisting of the following items:

1. Filling of casual vacancies in the Commission (art. 11 of the Statute).
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. The law of the non-navigational uses of international watercourses.
6. Review of the multilateral treaty-making process (General Assembly resolution 32/48, para. 2).
7. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (General Assembly resolution 33/139, section 1, para. 5; General Assembly resolution 33/140, para. 5).
8. Relations between States and international organizations (second part of the topic).
9. International liability for injurious consequences arising out of acts not prohibited by international law.
10. Jurisdictional immunities of States and their property.
11. Long-term programme of work.
12. Organization of future work.
13. Co-operation with other bodies.
14. Date and place of the thirty-second session.
15. Other business.

² *Yearbook of the International Law Commission, 1978*, vol. II (Part Two), p. 156, doc. A/33/10, para. 199.

16. The Commission considered all the items on its agenda with the exception of items 8 (Relations between States and international organizations (second part of the topic) and 9 (International liability for injurious consequences arising out of acts not prohibited by international law), which were considered only from the point of view of organization.³ In the course of the session

the Commission held 54 public meetings (1530th to 1583rd) and two private meetings (on 29 May and 30 July 1979). In addition, the Drafting Committee held 21 meetings, the Enlarged Bureau of the Commission five meetings and the Planning Group four meetings. The Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier held three meetings and the Working Group on review of the multilateral treaty-making process five meetings.

³ See paras. 196 and 206 below.

Chapter II

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

17. At its nineteenth session, in 1967, the Commission made new arrangements for dealing with the topic "Succession of States and Governments",⁴ which was among the topics it had selected for codification in 1949.⁵ It decided to divide the topic among more than one special rapporteur, the basis for the division being the three main headings of the broad outline of the subject laid down in the report submitted in 1963 by its Sub-Committee on Succession of States and Governments.⁶ Those three headings were as follows:

- (a) Succession in respect of treaties;
- (b) Succession in respect of rights and duties resulting from sources other than treaties; and
- (c) Succession in respect of membership of international organizations.

18. In 1967, the Commission also appointed Sir Humphrey Waldock to be Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui to be Special Rapporteur for succession in respect of rights and duties resulting from sources other than treaties. It decided to leave aside for the time being the third heading, namely, succession in respect of membership of international organizations.⁷

19. In 1974, on the basis of the provisional draft articles which it had adopted earlier and in the light of the observations received thereon from Governments of Member States, the Commission adopted a final set of 39 articles on succession of States in respect of treaties.⁸ The General Assembly, by its resolution 3496 (XXX) of 15 December 1975, decided to convene a conference of plenipotentiaries in 1977 to consider those draft articles and "to embody the results of its work in an international convention and such other instruments as it may deem appropriate". Pursuant to General Assembly resolution 31/18 of 24 November 1976, the United Nations Conference on Succession of States in Respect of Treaties met in Vienna from 4 April to 6 May 1977. The Conference approved a report recommending that the General Assembly decide to reconvene the Conference in

the first half of 1978, for a final session of four weeks.⁹ Upon its consideration of that report, the General Assembly, by its resolution 32/47 of 8 December 1977, approved the convening of the resumed session of the Conference at Vienna for a period of three weeks, or if necessary four, starting 31 July 1978. At the resumed session, held at Vienna from 31 July to 23 August 1978, the Conference concluded the consideration of the draft articles and adopted, on 23 August 1978, the text of the Vienna Convention on Succession of States in Respect of Treaties.¹⁰

20. Following his appointment as Special Rapporteur, Mr. Bedjaoui submitted to the Commission, at its twentieth session, in 1968, a first report on succession of States in respect of rights and duties resulting from sources other than treaties.¹¹ In that report he considered, *inter alia*, the scope of the subject that had been entrusted to him and, accordingly, the appropriate title for the subject, as well as the various aspects into which it could be divided. Following the discussion of that report, the Commission, in the same year, took several decisions, one of which concerned the scope and title of the topic and another the priority to be given to one particular aspect of succession of States.

21. Endorsing the recommendations contained in the first report by the Special Rapporteur, the Commission considered that the criterion for demarcation between the topic entrusted to him and that concerning succession in respect of treaties should be "the subject-matter of succession", i.e. the content of succession and not its modalities. It decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to sources, in order to avoid any ambiguity regarding its delimitation. The Commission accordingly changed the title of the topic and replaced the original title, "Succession in respect of rights and duties resulting from sources other than treaties", by the title "Succession in respect of matters other than treaties".¹²

22. That decision was confirmed by the General Assembly in paragraph 4 (b) of its resolution 2634 (XXV)

⁴ For a detailed account of the historical background of the topic, see *Yearbook . . . 1968*, vol. II, pp. 213 *et seq.*, document A/7209/Rev.1, paras. 29–42, and *Yearbook . . . 1969*, vol. II, pp. 222 *et seq.*, document A/7610/Rev.1, paras. 20–34.

⁵ See *Yearbook . . . 1949*, p. 281, document A/925, para. 16.

⁶ *Yearbook . . . 1963*, vol. II, p. 260, document A/5509, annex II.

⁷ *Yearbook . . . 1967*, vol. II, p. 368, document A/6709/Rev.1, paras. 38–41.

⁸ *Yearbook . . . 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, Sect. D.

⁹ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations Publication, Sales No. E.79.V.10), p. 140, document A/CONF.80/15, para. 26. See also *Official Records of the General Assembly, Thirty-second Session, Supplement No. 32 (A/32/32)*, p. 57.

¹⁰ For the text of the Convention (hereinafter referred to as "1978 Vienna Convention"), see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference (op. cit.)*, pp. 185 *et seq.* The Convention is open for signature by all States until 31 August 1979 at United Nations Headquarters in New York. It is subject to ratification and remains open for accession by any State.

¹¹ *Yearbook . . . 1968*, vol. II, p. 94, document A/CN.4/204.

¹² *Ibid.*, p. 216, document A/7209/Rev. 1, para. 46. See also paras 47–48 below.

of 12 November 1970, which recommended that the Commission should continue its work with a view to making "progress in the consideration of succession of States in respect of matters other than treaties". The absence of any reference to "succession of Governments" in that recommendation by the General Assembly reflected the decision taken by the Commission at its twentieth session to give priority to State succession and to consider succession of Governments for the time being "only to the extent necessary to supplement the study on State succession".¹³

23. As mentioned above,¹⁴ the first report by the Special Rapporteur reviewed various aspects of the topic of succession of States in respect of matters other than treaties. The report of the Commission on the work of its twentieth session notes that, during the debate, some members of the Commission referred to certain particular aspects of the topic (public property; public debts; legal régime of the predecessor State; territorial problems; status of the inhabitants; acquired rights) and made a few preliminary comments on them.

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

the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later.¹⁵

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

At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources so as to cover problems of succession in respect of the different economic resources (interests and rights), including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next [twenty-first] session.¹⁶

24. The second report by the Special Rapporteur,¹⁷ submitted at the twenty-first session of the Commission (1969), was entitled "Economic and financial acquired rights and State succession". The report of the Commission on the work of that session notes that, during the discussion on the subject, most of the members were of the opinion that the topic of acquired rights was extremely controversial and that its study at a premature stage could only delay the Commission's work on the topic as a whole, and therefore considered that "an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts".¹⁸ The report notes that the Commission "requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters". It further records that "the Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts".¹⁹

25. Between 1970 and 1972, at the Commission's twenty-second to twenty-fourth sessions, the Special Rapporteur submitted three reports to the Commission: his third report²⁰ in 1970, his fourth²¹ in 1971 and his fifth²² in 1972. Each of those reports dealt with succession of States to public property and contained draft articles on the subject. Being occupied with other tasks, the Commission was unable to consider any of those reports during its twenty-second (1970), twenty-third (1971) or twenty-fourth (1972) sessions. However, it included a summary of the third and fourth reports in its report on the work of its twenty-third session²³ and an outline of the fifth report in its report on the work of its twenty-fourth session.²⁴

26. At the twenty-fifth (1970), twenty-sixth (1971) and twenty-seventh (1972) sessions of the General Assembly, during the Sixth Committee's consideration of the report of the Commission, several representatives expressed the wish that progress should be made in the study on succession of States in respect of matters other than treaties.²⁵ On 12 November 1970, the General Assembly adopted resolution 2634 (XXV), in paragraph 4 (b) of which it recommended that the Commission should continue its work on succession of States with a view to making progress in the consideration of the subject. On 3 December 1971, in paragraph 4 (a) of part I of its resolution 2780 (XXVI), the General Assembly again recommended that the Commission should make progress in the consideration of the topic. Lastly, on 28 November 1972, in paragraph 3 (c) of part I of its resolution 2926 (XXVII), the General Assembly recommended that the Commission should "continue its work on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly."

27. In 1973, at the twenty-fifth session of the Commission, the Special Rapporteur submitted a sixth report,²⁶ dealing, like his three previous reports, with succession of States to public property. The sixth report revised and supplemented the draft articles submitted earlier in the light, *inter alia*, of the provisional draft on succession of States in respect of treaties adopted by the Commission in 1972.²⁷ It contained a series of draft articles relating to public property in general. The articles divided public property into the following three categories: property of the State; property of territorial authorities other than States or of public enterprises or public bodies; and property of the territory affected by the State succession.

²⁰ *Yearbook . . . 1970*, vol. II, p. 131, document A/CN.4/226.

²¹ *Yearbook . . . 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

²² *Yearbook . . . 1972*, vol. II, p. 61, document A/CN.4/259.

²³ *Yearbook . . . 1971*, vol. II (Part One), pp. 341 *et seq.*, document A/8410/Rev.1, paras. 77-98.

²⁴ *Yearbook . . . 1972*, vol. II, p. 323, document A/8710/Rev.1, para. 71.

²⁵ See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 72; *ibid.*, *Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 135; *ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 194.

²⁶ *Yearbook . . . 1973*, vol. II, pp. 3 *et seq.*, document A/CN.4/267.

²⁷ *Yearbook . . . 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, sect. C.

¹³ *Yearbook . . . 1963*, vol. II, p. 224, document A/5509, para. 57.

¹⁴ Para. 20.

¹⁵ *Yearbook . . . 1968*, vol. II, pp. 220-221, document A/7209/Rev.1, paras. 73 and 78.

¹⁶ *Ibid.*, p. 221, para. 79.

¹⁷ *Yearbook . . . 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

¹⁸ *Ibid.*, p. 228, document A/7610/Rev.1, para. 61.

¹⁹ *Ibid.*, pp. 228-229, para. 62.

28. The Special Rapporteur's sixth report was considered by the Commission at its twenty-fifth session, in 1973. In view of the complexity of the subject, the Commission decided, after full discussion and on the proposal of the Special Rapporteur, to limit its study for the time being to only one of the three categories of public property dealt with by the Special Rapporteur, namely, property of the State.²⁸ In the same year, it adopted on first reading the first eight draft articles, the text of which, as reviewed at the present session, is reproduced below.²⁹

29. The General Assembly, in paragraph 3 (d) of its resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission should "proceed with the preparation of draft articles on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

30. In 1974, at the twenty-sixth session of the Commission, the Special Rapporteur submitted a seventh report, dealing exclusively with succession of States to State property.³⁰ The report contained 22 draft articles, together with commentaries, forming a sequel to the eight draft articles adopted in 1973. The Commission was unable to consider that report at its twenty-sixth session since, pursuant to paragraph 3 (a) and (b) of General Assembly resolution 3071 (XXVIII), it had to devote most of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.³¹

31. In the same year the General Assembly, in section I, paragraph 4 (b), of its resolution 3315 (XXIX) of 14 December 1974, recommended that the Commission "proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties". Subsequently, the General Assembly made the same recommendation in paragraph 4 (c) of resolution 3495 (XXX) of 15 December 1975, paragraph 4 (c) (i) of resolution 31/97 of 15 December 1976 and paragraph 4 (c) (i) of resolution 32/151 of 19 December 1977. In the last mentioned resolution, the General Assembly added that the Commission should so proceed "in an endeavour to complete the first reading of the set of articles concerning State property and State debts".

32. At its twenty-seventh session, in 1975, the Commission considered draft articles 9 to 15 and X, Y and Z contained in the Special Rapporteur's seventh report and referred them to the Drafting Committee, with the exception of article 10, relating to rights in respect of the authority to grant concessions,³² on which it reserved

its position. Having examined the provisions referred to it (with the exception, for lack of time, of articles 12 to 15), the Drafting Committee submitted texts to the Commission for articles 9 and 11 and, on the basis of articles X, Y and Z, texts for article X and for subparagraph (e) of article 3. The Commission adopted on first reading all the texts submitted by the Committee, subject to a few amendments.³³

33. At the twenty-eighth session of the Commission, in 1976, the Special Rapporteur submitted an eighth report,³⁴ dealing with succession of States in respect of State property and containing six additional draft articles (articles 12 to 17) with commentaries. The Commission, at that session, considered the eighth report and adopted on first reading texts for subparagraphs (f) of article 3 and for articles 12 to 16. The text of these articles, as reviewed at the present session, is reproduced below.³⁵

34. At the twenty-ninth session of the Commission, in 1977, the Special Rapporteur submitted a ninth report,³⁶ dealing with succession of States to State debts and containing 20 draft articles, with commentaries. At the same session the Commission considered those draft articles, except one (article W), together with two new draft articles submitted by the Special Rapporteur during the session, and adopted on first reading the texts for articles 17 to 22. Those texts, as reviewed at the present session, are also reproduced below.³⁷

35. At the thirtieth session of the Commission, in 1978, the Special Rapporteur submitted a tenth report,³⁸ in which he continued his examination of succession of States to State debts and proposed two additional articles relating, respectively, to the passing of State debts in the case of separation of part or parts of the territory of a State (article 24) and the devolution of State debts in the case of dissolution of a State (article 25).

36. The Commission considered articles 24 and 25, as

or another State, the management of a public service or the exploitation of a natural resource.

"2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

"3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory."

²⁸ For the texts of subpara. (e) of article 3 and of articles 9, 11 and X and the commentaries thereto as adopted by the Commission at its twenty-seventh session, see *Yearbook . . . 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B, 2. Articles 9 and 11, as adopted at the twenty-seventh session, were deleted during the review at the present session for purposes of completing the first reading of the draft (see para. 43 below). For the text of all the articles adopted by the Commission, see sect. B below.

²⁹ *Yearbook . . . 1976*, vol. II (Part One), p. 55, document A/CN.4/292.

³⁰ For the texts of subpara. (f) of article 3 and of articles 12 to 16 and the commentaries thereto as adopted by the Commission at its twenty-eighth session, see *Yearbook . . . 1976*, vol. II (Part Two), pp. 127 *et seq.*, document A/31/10, chap. IV, sect. B, 2. For the text of all the articles adopted by the Commission, see sect. B below.

³¹ *Yearbook . . . 1977*, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1.

³² For the texts of articles 17 to 22 and the commentaries thereto as adopted by the Commission at its twenty-ninth session, see *Yearbook . . . 1977*, vol. II (Part Two), pp. 59 *et seq.*, document A/32/10, chap. III, sect. B, 2. For the text of all the articles adopted by the Commission, see sect. B below.

³³ *Yearbook . . . 1978*, vol. II (Part One), document A/CN.4/313.

²⁸ *Yearbook . . . 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 87.

²⁹ For the text of articles 1 to 8 and the commentaries thereto adopted by the Commission at its twenty-fifth session, see *Yearbook . . . 1973*, vol. II, pp. 202 *et seq.*, document A/9010/Rev.1, chap. III, sect. B. For the text of all the articles adopted by the Commission, see sect. B below.

³⁰ *Yearbook . . . 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

³¹ *Ibid.*, p. 304, document A/9610/Rev.1, para. 160.

³² Draft article 10 read as follows:

"Article 10. Rights in respect of the authority to grant concessions.

"1. For the purpose of the present article, the term 'concession' means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law

well as article W contained in the Special Rapporteur's ninth report, and adopted texts for articles 23³⁹ (on the basis of article W), 24 and 25. These three articles completed section 2 (Provisions relating to each type of succession of States) of part II of the draft (Succession to State debts).⁴⁰

37. Also at the thirtieth session, the Commission received a volume of the United Nations Legislative Series entitled *Materials on succession of States in respect of matters other than treaties*,⁴¹ containing a selection of materials relating to the practice of States and international organizations regarding succession of States in respect of matters other than treaties. The publication, which was compiled by the Codification Division of the United Nations Office of Legal Affairs at the request of the Commission,⁴² contains materials provided by Governments of Member States and by international organizations, as well as materials collected through research work conducted by the Division.

38. The General Assembly, in Part I, paragraph 4 (b) of resolution 33/139, of 19 December 1978, recommended that the Commission "continue its work on succession of States in respect of matters other than treaties with the aim of completing, at its thirty-first session, the first reading of the draft articles on succession of States in respect of State property and State debts".

39. At the thirty-first session, the Special Rapporteur submitted an eleventh report (A/CN.4/322 and Corr.1 and Add.1 and 2), on succession to State archives, containing the texts of six additional articles (articles A, B, C, D, E and F).⁴³

40. The Commission considered the Special Rapporteur's eleventh report at its 1560th to 1565th meetings and referred to the Drafting Committee draft articles A and C contained therein. The Committee, having examined the two draft articles, submitted to the Commission texts for articles A and C. At its 1570th meeting, the Commission adopted on first reading, with changes, the texts recommended by the Drafting Committee for articles A and C and decided to append them to the draft, together with the corresponding commentaries, it being understood that in so doing the Commission intended that the question of their ultimate place in the draft should be decided in the light of comments by Governments. At its 1581st meeting, the Commission decided to change the designation of article C to article B.

41. Also at the thirty-first session the Commission, in the light of the General Assembly recommendation referred to above,⁴⁴ decided, at its 1560th meeting, that the Drafting Committee should review the first 25 articles of the draft. Those articles had been adopted during the

twenty-fifth and twenty-seventh to thirtieth sessions of the Commission in 1973 and from 1975 to 1978, on the understanding that the final contents of their provisions would depend to a considerable extent on the results achieved by the Commission in its further work on the topic. On the basis of that understanding, the Commission, at its twenty-fifth and twenty-seventh to thirtieth sessions, decided that "during the first reading of the draft it would reconsider the text of the articles adopted . . . with a view to making any amendments which might be found necessary".⁴⁵

42. The Drafting Committee reviewed the 25 articles provisionally adopted by the Commission at its twenty-fifth and twenty-seventh to thirtieth sessions and submitted to the Commission texts for articles 1 to 23, recommending the deletion of articles 9 and 11, provisionally adopted at the twenty-seventh session.⁴⁶ At its 1568th to 1570th meetings, the Commission adopted on first reading the texts recommended by the Drafting Committee for articles 1 to 23 and thereby endorsed the Committee's recommendations on certain pending matters relating to texts or parts thereof which had previously appeared in square brackets in former articles X, 14, 18 and 20, as explained below in the commentaries to the corresponding articles: 9, 12, 16 and 18, respectively.⁴⁷

43. Also on the recommendation of the Drafting Committee, the Commission decided that the former article 9, entitled "General principle of the passing of State property", had become unnecessary in view of the fact that in the part of the draft entitled "State property" the question of the passing of State property had been dealt with in detail, as regards both movable and immovable property, for each of the types of succession of States. Article 9, as provisionally adopted, had become insufficient and could have led to serious problems of interpretation in the light of the detailed categorized treatment of the passing of State property followed by the Commission after its provisional adoption of that article. The Commission therefore concluded that no useful purpose would now be served by attempting to re-draft the former article 9 in order to cover all the specific situations contemplated in the draft, and that it was appropriate to delete it. Having taken that decision, the Commission endorsed the Drafting Committee's recommendation not to retain former article 11, entitled "Passing of debts owed to the State", which had been placed in square brackets in view of the reservations expressed by several members of the Commission concerning the text and in order to draw attention to the questions they raised. As the Commission itself had indicated in paragraph (3) of its commentary to article 11, its main concern in including the article in the draft had been to make debts to a predecessor State an exception to the physical situation rule set forth in article 9.⁴⁸

44. As recommended in General Assembly resolution 33/139, the Commission completed at its thirty-first session the first reading of the draft articles on succession

³⁹ Subsequent to the adoption of article 23, one member of the Commission submitted a memorandum on the subject of para. 2 of that article (*ibid.*, document A/CN.4/L.282 and Corr. 1).

⁴⁰ For the text of articles 23 to 25 and the commentaries thereto as adopted by the Commission at its thirtieth session, see *Yearbook . . . 1978*, vol. II (Part Two), pp. 113 *et seq.*, document A/33/10, chap. IV, sect. B, 2. For the text of all the articles adopted by the Commission, see sect. B below.

⁴¹ United Nations publication, Sales No. E/F.77.V.9.

⁴² See *Yearbook . . . 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 90.

⁴³ Reproduced in *Yearbook . . . 1979*, vol. II (Part One). For an indication of the contents of that report, as well as for the texts of the articles proposed therein, see paras. 53-54 below.

⁴⁴ See para. 38 above.

⁴⁵ *Yearbook . . . 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 91. See also *Yearbook . . . 1978*, vol. II (Part Two), p. 110, document A/33/10, para. 123.

⁴⁶ See para. 43 below.

⁴⁷ For the recommendations made by the Drafting Committee in this connexion, see A/CN.4/L.299/Rev.1.

⁴⁸ *Yearbook . . . 1975*, vol. II, p. 112, document A/10010/Rev.1, chap. III, sect. B, 2.

of States in respect of State property and State debts. Those draft articles, with commentaries, as adopted at the twenty-fifth and twenty-seventh to thirty-first sessions and reviewed at the thirty-first session of the Commission, are reproduced below in section B of the present Chapter.

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

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

(a) *Form of the draft*

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

(b) *Scope of the draft*

47. As noted above,⁴⁹ the expression "matters other than treaties" did not appear in the titles of the three topics into which the question of succession of States and governments was divided in 1967, namely, (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than treaties; (c) succession in respect of membership of international organizations. In 1968, in a report submitted at the twentieth session of the Commission, Mr. Bedjaoui, the Special Rapporteur for the second topic, pointed out that if the title of that topic (succession in respect of rights and duties resulting from sources other than treaties) were compared with the title of the first topic (succession in respect of treaties), it would be found that the word "treaty" was considered, in the two titles, from two different points of view. In the first case the treaty was regarded as a subject-matter of the law of succession, and in the second as a source of succession. The Special Rapporteur pointed out that, in addition to its lack of homogeneity, such division of the question had the drawback of excluding from the second topic all matters that were the subject of treaty provisions. He noted that in many cases State succession was accompanied by the conclusion of a treaty regulating *inter alia* certain aspects of the succession, which were thereby excluded from the second topic as entitled in 1967. Since those aspects did not come under the first topic either, the Commission would have been obliged, had that title been retained, to leave aside a substantial part of the subject-matter in its study on State succession.⁵⁰

48. Consequently, the Special Rapporteur proposed taking the *subject-matter of succession* as the criterion for

the second topic and entitling it "Succession in respect of matters other than treaties".⁵¹ That proposal was adopted by the Commission, which stated in its report on the work of its twentieth session:

All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was 'the subject-matter of succession', i.e. the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to 'sources', since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession.⁵²

49. In the context of the first reading of the draft articles the Commission has found it appropriate to retain the title of the draft, which, like article I of the draft, refers to "succession of States in respect of matters other than treaties".⁵³ The Commission is, however, conscious that in the light of the decision to restrict the contents of the draft to succession of States in respect of State property and State debts and of the recommendation of the General Assembly in resolution 33/139 regarding the completion of the first reading of that draft, the title of the draft does not accurately reflect the scope of the present articles. Other formulae might be more appropriate in that regard, for example, "Succession of States in respect of certain matters other than treaties" or more specifically, "Succession of States in respect of State property, State debts and State archives". The Commission has deferred its decision on the matter in order to take account of the observations that Governments may wish to make on the subject.

(c) *Structure of the draft*

50. The 25 articles constituting the draft provisionally adopted up to the thirtieth session of the Commission were divided into two parts, preceded by articles 1 to 3: part I, entitled "Succession of States to State property", which comprised articles 4 to 16, and part II, entitled "Succession of States to State debts", which comprised articles 17 to 25. At its thirty-first session, the Commission decided, in order to maintain the correspondence between the structural division of the present draft and that of the 1978 Vienna Conventions on Succession of States in Respect of Treaties⁵⁴ and of the 1969 Vienna Convention on the Law of Treaties,⁵⁵ to restructure the provisional draft in three parts so as to cover the first three articles in a first part entitled "Introduction", as in the 1969 Vienna Convention. The former parts I and II were re-numbered accordingly. The introduction contains the provisions that apply to the draft as a whole, and each of the following parts contains those that apply exclusively to one or the other category of specific matters covered. As regards the titles of the last two parts, the Commission,

⁴⁹ For reference to the General Assembly's insertion of the words "of States" after the word "succession" in the title of the topic, see para. 22 above.

⁵⁰ *Yearbook . . . 1968*, vol. II, pp. 216-217, document A/7209/Rev.1, para. 46.

⁵¹ For an indication of a change in the French version of the title, see below sect. B, para. (3) of the commentary to article 1.

⁵² For reference, see foot-note 10 above.

⁵³ For the text of the Vienna Convention on the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention is hereinafter referred to as "1969 Vienna Convention".

⁴⁹ See paras. 17 and 21 above.

⁵⁰ *Yearbook . . . 1968*, vol. II, pp. 96-97, document A/CN.4/204, paras. 18-21.

in the circumstances outlined above,⁵⁶ and conscious of their different treatment in the various language versions as well as of the need to make them properly relate to the articles covered by each part, decided to have them read simply "State property" and "State debts" respectively. With regard to the present part I, and again, in order to maintain structural conformity with the corresponding parts of the 1969 and 1978 Vienna Conventions, the Commission decided to reverse the order of articles 2 and 3 as previously adopted so as to make the article on the "Use of terms" follow article 1, on the scope of the articles.

51. As described above,⁵⁷ the Commission, in the course of six sessions, adopted 25 articles: three in the introduction to the draft, eleven in part II, nine in part III and two, provisionally numbered, which are appended to the foregoing 23 articles. Parts II and III are each divided into two sections, entitled respectively "General provisions" (section 1) and "Provisions relating to each type of succession of States" (section 2). In part II, section 1 is formed of six articles (articles 4 to 9) and section 2 of five (articles 10 to 14). In part III, four articles (articles 15 to 18) form section 1, while five (articles 19 to 23) form section 2. To the extent possible, having in mind the characteristics proper to each category of specific matters dealt with in each part, the articles forming sections 1 and 2 of part III parallel those in the corresponding sections of part II. Thus section 1 of each part has an article determining the "Scope of the articles in the present Part" (articles 4 and 15); articles 5 and 16 respectively define the terms "State property" and "State debt"; and article 6 (Rights of the successor State to State property passing to it) parallels article 17 (Obligations of the successor State in respect of State debts passing to it). Likewise, section 2 of each part has an article on "Transfer of part of the territory of a State" (articles 10 and 19), an article on the "Newly independent State" (articles 11 and 20), an article on "Uniting of States" (articles 12 and 21), an article on "Separation of part or parts of the territory of a State" (articles 13 and 22), and an article on "Dissolution of a State" (articles 14 and 23). The text of each set of parallel articles has been drafted in such a manner as to maintain as close a correspondence between the language of the two provisions as the subject-matter of each allows.

52. With the adoption at its twenty-eighth session of articles 12 to 16, and subject to the adoption (which took place at the thirty-first session) of provisions specifically concerning archives, the Commission completed its study of succession of States to State property, forming part II. In the normal course of events, after ending that study the Commission might, after its twenty-eighth session, have considered succession to the other categories of public property. However, in view of the instructions given by the General Assembly in resolution 3315 (XXIX), the Special Rapporteur proceeded directly, in his ninth and tenth reports, to the examination of succession to public debts, confining this to succession to State debts. Having completed its study of succession of States to State debts in part III, the Commission, pursuant to General Assembly resolution 33/139, has completed the first reading of the draft articles on succession of States in respect of State property and State debts.

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

PART I

INTRODUCTION

Commentary

Part I, following the model of the 1969 Vienna Convention⁵⁸ and the 1978 Vienna Convention,⁵⁹ contains certain introductory provisions which relate to the present draft articles as a whole. Also, in order to maintain structural conformity with the corresponding parts of those Conventions, the order of articles 1 to 3 follows that of the articles dealing with the same subject-matter in those Conventions.

Article 1. Scope of the present articles

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

Commentary

(1) This article corresponds to article 1 of the 1978 Vienna Convention. Its purpose is to limit the scope of the present draft articles in two important respects.

(2) First, article 1 reflects the decision by the General Assembly that the topic under consideration should be entitled: "Succession of States in respect of matters other than treaties".⁶⁰ In incorporating this wording in article 1, the Commission intended to exclude from the field of application of the present draft articles the succession of Governments and the succession of subjects of international law other than States, an exclusion which also results from article 2, paragraph 1 (a). The Commission also intended to limit the field of application of the draft articles to "matters other than treaties".

(3) In view of General Assembly resolution 33/139, recommending that the Commission should aim at completing at its thirty-first session the first reading of "the draft articles on succession of States in respect of State property and State debts", the Commission considered the question of reviewing the words "matters other than treaties" to reflect that further limitation in scope. However, it has decided to do so at its second reading of the draft, so as to take into account observations of Governments and any decisions on the future programme of work on the topic. The Commission nevertheless decided, at the thirty-first session, to change the article "les" before "matières" to "des" in the French version of the title of the topic, and consequently of the title of the present draft articles, as well as the text of article 1, in order to align it with the other language versions.

(4) The second limitation is that of the field of application of the draft articles to the *effects* of succession of States in respect of matters other than treaties. Article 2, paragraph 1 (a), specifies that "succession of States means the replacement of one State by another in the responsibility for the international relations of territory". In using the term "effects" in article 1, the Commission wished to indicate that it intends to draft provisions

⁵⁶ Paras. 27 and 28.

⁵⁷ See paras. 28, 32-34, 36 and 40.

⁵⁸ See foot-note 55 above.

⁵⁹ See foot-note 10 above.

⁶⁰ See para. 22 above.

concerning not the replacement itself but its legal effects, i.e., the rights and obligations deriving from it.

Article 2. Use of terms

1. For the purposes of the present articles:

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

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

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

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

(e) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(f) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended to state the meaning with which terms are used in the draft articles.

(2) Paragraph 1 (a) of article 2 reproduces the definition of the term "succession of States" contained in article 2, paragraph 1 (b), of the 1978 Vienna Convention.

(3) The report of the Commission on its twenty-sixth session specified in the commentary to article 2 of the draft articles on succession of States in respect of treaties, on the basis of which article 2 of the 1978 Vienna Convention was adopted, that the definition of succession of States given in that article referred exclusively to the fact of the replacement of one State by another "in the responsibility for the international relations of territory", leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. It went on to say that the rights and obligations deriving from a succession of States were those specifically provided for in those draft articles. It further noted that the Commission had considered that the expression "in the responsibility for the international relations of territory" was preferable to other expressions such as "in the sovereignty in respect of territory" or "in the treaty-making competence in respect of territory", because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case, independently of the particular status of the territory in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The report specified that the word "responsibility" should be read in conjunction with the

words "for the international relations of territory" and was not intended to convey any notion of "State responsibility", a topic being studied separately by the Commission.⁶¹

(4) The Commission decided to include in the present draft articles the definition of "succession of States" contained in the 1978 Vienna Convention, considering it desirable that, where the Convention and the draft articles refer to one and the same phenomenon, they should, as far as possible, give identical definitions of it. Furthermore, article 1 supplements the definition of "succession of States" by specifying that the draft articles apply, not to the replacement of one State by another in the responsibility for the international relations of territory, but to the effects of that replacement.

(5) Sub-paragraphs (b), (c) and (d) of paragraph 1 reproduce the terms of paragraph 1, sub-paragraphs (c), (d) and (e) of article 2 of the 1978 Vienna Convention. The meaning that they attribute to the terms "predecessor State", "successor State" and "date of the succession of States" derives, in each case, from the meaning given to the term "succession of States" in paragraph 1 (a), and would not seem to call for any comment.

(6) Paragraph 1 (e) reproduces the text of article 2, paragraph 1 (f), of the 1978 Vienna Convention, which was based on article 2, paragraph 1 (f), of the draft articles adopted by the Commission in 1974. The part of the commentary to that article relating to the definition is equally applicable in the present case. As the Commission stated:

... the definition given in paragraph 1 (f) includes any case of emergence to independence of any former dependent territories, whatever its particular type may be [colonies, trusteeships, mandates, protectorates, etc.]. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case ... of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of a uniting of two or more existing States. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent State" has been chosen instead of the shorter expression "new State".⁶²

(7) The expression "third State" does not appear in article 2 of the 1978 Vienna Convention. This was because the expression "third State" was not available for use in that Convention, since it had already been made a technical term in the 1969 Vienna Convention to denote "a State not a party to the treaty". As regards the draft articles on succession of States in respect of matters other than treaties, however, the Commission took the view that the expression "third State" was the simplest and clearest way of designating any State other than the predecessor State or the successor State.⁶³

(8) Lastly, paragraph 2 corresponds to paragraph 2 of article 2 of the 1969 Vienna Convention as well as of the 1978 Vienna Convention, and is designed to safeguard in matters of terminology the position of States in regard to their internal law and usages.

⁶¹ *Yearbook* ... 1974, vol. II (Part One), pp. 175-176, document A/9610/Rev.1, chap. II, sect. D, paras (3) and (4) of the commentary to article 2.

⁶² *Ibid.*, para. (8) of the commentary.

⁶³ See *Yearbook* ... 1975, vol. II, p. 114, document A/10010/Rev.1, chap. III, sect. B, 2, article 3(e), commentary.

Article 3. Cases of succession of States covered by the present articles

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

Commentary

(1) This provision reproduces *mutatis mutandis* the terms of article 6 of the 1978 Vienna Convention, which is based on article 6 of the draft articles on the topic prepared by the Commission.

(2) As it stated in the report on its twenty-fourth session, the Commission, in preparing draft articles for the codification of general international law, normally assumes that these articles are to apply to facts occurring or situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Thus, when the Commission, at its twenty-fourth session, was preparing its draft articles on succession of States in respect of treaties, several members considered that it was unnecessary to specify in the draft that its provisions would apply only to the effects of a succession of States occurring in conformity with international law.⁶⁴

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

Since to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States, the Commission decided to include amongst the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly, article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law.⁶⁵

(4) At the twenty-fifth session the Commission decided to include in the introduction to the draft articles on succession of States in respect of matters other than treaties a provision identical with that of article 6 of the draft articles on succession of States in respect of treaties. It took the view that there was now an important argument to be added to those which had been put forward at the twenty-fourth session in favour of article 6: the absence from the draft articles on succession of States in respect of matters other than treaties of the provisions contained in article 6 of the draft articles on succession of

States in respect of treaties might give rise to doubts as to the applicability to the present draft of the general presumption that the texts prepared by the Commission relate to facts occurring or situations established in conformity with international law.⁶⁶

PART II

STATE PROPERTY

SECTION I. GENERAL PROVISIONS

Article 4. Scope of the articles in the present Part

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

Commentary

The purpose of this provision is simply to make it clear that the articles in Part II deal with only one category of the "matters other than treaties" referred to in article 1, namely, State property.

Article 5. State property

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

Commentary

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

(2) There are in practice quite a number of examples of treaty provisions which determine, in connexion with a succession of States, the State property of the predecessor State, sometimes in detail. They include article 10 of the Treaty of Utrecht of 11 April 1713;⁶⁷ article II of the Treaty of 30 April 1803 between France and the United States of America for the sale of Louisiana;⁶⁸ article 2 of the Treaty of 9 January 1895 by which King Leopold ceded the Congo to the Belgian State;⁶⁹ article II of the Treaty of Peace of Shimonoseki of 17 April 1895 between China and Japan,⁷⁰ and article I of the Convention of Retrocession of 8 November 1895 between the same States;⁷¹ article VIII of the Treaty of Peace of 10 December 1898 between Spain and the United States of

⁶⁴ *Yearbook* . . . 1972, vol. II, p. 236, document A/8710/Rev.1, chap. II, sect. C, paras. (1) and (2) of the commentary to article 6.

⁶⁵ *Ibid.*, para. (2) of the commentary.

⁶⁶ *Yearbook* . . . 1973, vol. II, pp. 203–204, document A/9010/Rev.1, chap. III, sect. B, article 2, para. (4) of the commentary.

⁶⁷ F. Israel, ed., *Major Peace Treaties of Modern History, 1648–1967* (New York, Chelsea House and McGraw-Hill, 1967), vol. I, pp. 207–208.

⁶⁸ G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1831), vol. VII, p. 709.

⁶⁹ de Martens, ed., *Nouveau recueil général de traités* (Göttingen, Dieterich, 1896), 2nd series, vol. XXI, p. 693.

⁷⁰ *British and Foreign State Papers*, vol. 86 (London, H.M. Stationery Office, 1900), p. 800.

⁷¹ *Ibid.*, p. 1195.

America;⁷² and the annexes to the Treaty of 16 August 1960 concerning the establishment of the Republic of Cyprus.⁷³

(3) An exact specification of the property to be transferred by the predecessor State to the successor State in two particular cases of succession of States is also to be found in two resolutions adopted by the General Assembly in pursuance of the provisions of the Treaty of Peace with Italy of 10 February 1947.⁷⁴ The first of these, resolution 388 (V), was adopted on 15 December 1950, with the title "Economic and financial provisions relating to Libya". The second, resolution 530 (VI), was adopted on 29 January 1952, with the title "Economic and financial provisions relating to Eritrea".

(4) No generally applicable criteria, however, can be deduced from the treaty provisions mentioned above, the content of which varied according to the circumstances of the case, or from the two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations. Moreover, as the Franco-Italian Conciliation Commission stated in an award of 26 September 1964, "customary international law has not established any autonomous criterion for determining what constitutes State property".⁷⁵

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

(6) The Commission notes, however, that there are several cases in diplomatic practice where the successor State has not taken the internal law of the predecessor State into consideration in characterizing State property. Some decisions by international courts have done the same in relation to the property in dispute.

(7) For example, in its Judgment of 15 December 1933 in the *Péter Pázmány University* case, the Permanent Court of International Justice took the view that it had "no need to rely upon"⁷⁶ the interpretation of the law of the predecessor State in order to decide whether the property in dispute was public property. It is true that the matter was governed by various provisions of the Treaty of Trianon,⁷⁷ which limited the Court's freedom of judgement. In another case, in which Italy was the predecessor State, the United Nations Tribunal in Libya ruled on 27 June 1955 that in deciding whether an institution was public or private, the Tribunal was not bound by Italian law and judicial decisions.⁷⁸ Here again,

the matter was governed by special provisions—in this case, those of resolution 388 (V), already mentioned,⁷⁹ which limited the Court's freedom of judgement.

(8) The Commission nevertheless considers that the most appropriate way of defining "State property" for the purposes of part II of the present draft articles is to refer the matter to the internal law of the predecessor State.

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

(10) The Commission wishes to stress that the expression "property, rights and interests" in article 5 refers only to rights and interests of a legal nature. This expression is to be found in many treaty provisions, such as article 297 of the Treaty of Versailles,⁸⁰ article 249 of the Treaty of Saint-Germain-en-Laye,⁸¹ article 177 of the Treaty of Neuilly-sur-Seine,⁸² article 232 of the Treaty of Trianon⁸³ and article 79 of the Treaty of Peace with Italy.⁸⁴

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

(12) In adopting article 5 at the first reading, the Commission wishes to note that the words "property, rights and interests" may eventually be reviewed in the light of the decision which might be taken in the future as to the exact relationship between State property and State archives.

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 articles in the present Part.

Commentary

(1) Article 6 makes it clear that a succession of States has a dual juridical effect on the respective rights of the predecessor State and the successor State as regards State property passing from the former to the latter. It entails, on the one hand, the extinction of the rights of the predecessor State to the property in question and, on the other hand and simultaneously, the arising of the rights of the successor State to that property. The purpose of article 6 is not to determine what State property passes to the successor State. Such determination will be done "in

⁷² de Martens, *Nouveau recueil* . . . (Leipzig, Dieterich, 1905), 2nd series, vol. XXXII, p. 76.

⁷³ United Nations, *Treaty Series*, vol. 382, p. 8.

⁷⁴ *Ibid.*, vol. 49, p. 3.

⁷⁵ Award in "Dispute regarding property belonging to the Order of St. Maurice and St. Lazarus", *Annuaire français de droit international*, 1965 (Paris), vol. XI, p. 323.

⁷⁶ *P.C.I.J.*, Series A/B, No. 61, p. 236.

⁷⁷ *British and Foreign State Papers*, 1920, vol. 113 (London, H.M. Stationery Office, 1923), p. 486.

⁷⁸ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 390.

⁷⁹ See para. (3) of this commentary, above.

⁸⁰ *British and Foreign State Papers*, 1919, vol. 112 (London, H.M. Stationery Office, 1922), p. 146.

⁸¹ *Ibid.*, p. 434.

⁸² *Ibid.*, p. 839.

⁸³ *Ibid.*, 1920, vol. 113 (1923), p. 839.

⁸⁴ United Nations, *Treaty Series*, vol. 49, p. 163.

accordance with the provisions of the articles in the present Part", and more specifically, of articles 9 to 14.

(2) Article 6 gives expression in a single provision to a consistent practice, and reflects the endeavour to translate, by a variety of formulae, the rule that a succession of States entails the extinction of the rights of the predecessor State and the arising of those of the successor State to State property passing to the successor State. The terminology used for this purpose has varied according to time and place. One of the first notions found in peace treaties is that of the renunciation by the predecessor State of all rights over the ceded territories, including those relating to State property. This notion already appears in the Treaty of the Pyrenees of 1659,⁸⁵ and found expression again in 1923 in the Treaty of Lausanne⁸⁶ and in 1951 in the Treaty of Peace with Japan.⁸⁷ The Treaty of Versailles expresses a similar idea concerning State property in a clause which stipulates that "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States".⁸⁸ A similar clause is found in the treaties of Saint-Germain-en-Laye,⁸⁹ Neuilly-sur-Seine⁹⁰ and Trianon.⁹¹ The notion of cession is also frequently used in several treaties.⁹² Despite the variety of formulae, the large majority of treaties relating to transfers of territory contain a consistent rule, namely, that of the extinction and simultaneous arising of rights to State property.

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

(4) In the first place, the successor State may create a certain element of continuity by maintaining provisionally in force the rules of the law of the predecessor State relating to the régime of State property. Such rules are certainly no longer applied on behalf of the prede-

cessor State, but rather on behalf of the successor State, which has received them into its own law by a decision taken in its capacity as a sovereign State. Although, however, at the moment of succession, it is another juridical order that is in question, the material content of the rules remains the same. Consequently, in the case envisaged, the effect of the succession of States is essentially to change the entitlement to the rights to the State property.

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

Article 7. Date of the passing of State property

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

Commentary

(1) Article 7 contains a residuary provision specifying that the date of the passing of State property is that of the succession of States. It should be read together with article 2, paragraph 1 (d), which states that "'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

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

(3) In fact, it sometimes occurs in practice that the States concerned agree to choose a date for the passing of State property other than that of the succession of States. It is that situation which is referred to by the term "agreed" in the above-mentioned opening clause. Some members of the Commission suggested that the words "between the predecessor State and the successor State" should be added. Others, however, opposed that suggestion on the grounds that for State property situated in the territory of a third State the date of passing might be laid down by a tripartite agreement concluded between the predecessor State, the successor State and the third State.

(4) There have also been cases where an international court has ruled on the question what was the date of the passing of certain State property from the predecessor State to the successor State.⁹³ The Commission therefore added the words "or decided" after the word "agreed" at the beginning of article 7. However, the Commission did not intend to specify from whom a decision might come.

⁸⁵ Article XLI (English text in Israel, ed., *op. cit.*, vol. I, p. 51).

⁸⁶ See in particular articles 15, 16 and 17 (League of Nations, *Treaty Series*, vol. XXVIII, p. 23).

⁸⁷ Article 2 (United Nations, *Treaty Series*, vol. 136, pp. 48 and 50).

⁸⁸ Article 256, (*British and Foreign State Papers, 1919*, vol. 112, p. 125).

⁸⁹ Article 208 (*ibid.*, pp. 412-414).

⁹⁰ Article 142 (*ibid.*, pp. 821-822).

⁹¹ Article 191 (*ibid.*, 1921, vol. 113, pp. 564-565).

⁹² See, for example, article 1 of the Convention of 4 August 1916 between the United States of America and Denmark concerning the cession of the Danish West Indies (in *Supplement to the American Journal of International Law* (New York, American Society of International Law, Oxford University Press, 1971), vol. II, p. 54; and article V of the Treaty of 2 February 1951 concerning the cession to India of the Free Town of Chandernagore (United Nations, *Treaty Series*, vol. 203, p. 158).

⁹³ See, for example, Judgment No. 7 handed down on 25 May 1926 by the Permanent Court of International Justice in the Case concerning certain German interests in Polish Upper Silesia (*P.C.I.J.*, Series A, No. 7), and its Advisory Opinion of 10 September 1923 on Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland (*ibid.*, Series B, No. 6, pp. 6-43).

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

(6) As for the main provision of article 7, which is contained in the second clause of the article, it was stated during the discussion in the Commission that the date of the passing of State property varied from one type of succession to another and could not be made the subject of a general provision. Moreover, it was argued, article 7 as it stood merely gave a definition of the date of the passing of State property and imposed no obligation on the States concerned. The right place for such a text, if the Commission decided that it should be retained, was in article 2, on use of terms.

Article 8. Passing of State property without compensation

Subject to the provisions of the articles in the present part and unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State shall take place without compensation.

Commentary

(1) Article 8 comprises a main provision and two subsidiary clauses. The main provision lays down the rule that the passing of State property from the predecessor State to the successor State in accordance with the provisions of the articles in the present part shall take place without compensation. It constitutes a necessary complement to article 6, but like that article—and for the same reasons⁹⁴—it is not intended to determine what State property passes to the successor State.

(2) With some exceptions,⁹⁵ practice confirms the rule set forth in the main provision of article 8. In many treaties concerning the transfer of territories, acceptance of this rule is implied by the fact that no obligation is imposed on the successor State to pay compensation for the cession by the predecessor State of public property, including State property. Other treaties state the rule expressly, stipulating that such cession shall be without compensation. These treaties contain phrases such as “without compensation”,⁹⁶ “in full Right”,⁹⁷ “without

⁹⁴ See para. (1) of the commentary to article 6, above.

⁹⁵ These exceptions are to be found, *inter alia*, in four of the peace treaties concluded after the First World War (see article 256 of the Treaty of Versailles (*British and Foreign State Papers*, 1919, vol. 112, p. 125); article 208 of the Treaty of Saint-Germain-en-Laye (*ibid.*, p. 413); article 142 of the Treaty of Neuilly-sur-Seine (*ibid.*, pp. 821–822); and article 191 of the Treaty of Trianon (*ibid.*, 1920, vol. 113, p. 494)). Under the terms of these treaties, the value of the State property ceded by the predecessor States to the successor States was deducted from the amount of the reparations due by the former to the latter. It should, however, be noted that in the case of some State property, the treaties in question provided for transfer without any *quid pro quo*. Thus, article 56 of the Treaty of Versailles (*ibid.*, 1919, vol. 112, p. 43) specified that “France shall enter into possession of all property and estate within the territories referred to in Article 51, which belong to the German Empire or German States [i.e. in Alsace-Lorraine], without any payment or credit on this account to any of the States ceding the territories”.

⁹⁶ Article III, para. 4 of the Agreement between the United States of America and Japan concerning the Amami Islands, signed at Tokyo on 24 December 1953 (*United Nations, Treaty Series*, vol. 222, p. 195).

⁹⁷ Article 10 of the Treaty of Utrecht of 11 April 1713 concerning the cession of the Bay and Straits of Hudson by France to Great Britain (*Israel, op. cit.*, p. 207).

payment” (“*sans paiement*”⁹⁸ or “*gratuitement*”).⁹⁹

(3) However, several members were not sure whether the Commission might not subsequently have to allow certain exceptions to the rule that State property passes without compensation in order to take into account the particular circumstances of each case of State succession and especially the nature of the State property in question or the type of succession envisaged. Other members even expressed doubts as to the possibility of framing a general rule on the subject.

(4) The first subsidiary clause of article 8, “Subject to the provisions of the articles in the present part”, is intended to reserve the effects of other provisions in part II. One notable example of such provisions is that of article 9 regarding the absence of effect of a succession of States on third party State property.

(5) The second subsidiary clause of article 8 reads: “unless otherwise agreed or decided”. Its purpose is to provide expressly for the possibility of derogating from the rule in this article. It is identical with the clause in article 7 on which the Commission has already commented.¹⁰⁰

Article 9. Absence of effect of a succession of States on third party State property

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Commentary

(1) The rule formulated in article 9 stems from the fact that a succession of States, that is, the replacement of one State by another in the responsibility for the international relations of territory, can have no legal effect with respect to the property of a third State. Before giving its comments on this article, the Commission wishes to point out that the article has been placed in part II of the draft, which is concerned exclusively with succession with respect to State property. Consequently, no argument *a contrario* can be drawn from the absence from article 9 of any reference to private property, rights and interests.

(2) As emphasized by the words “as such” appearing after the words “a succession of States shall not”, article 9 deals solely with succession of States. It in no way prejudices any measures that the successor State, as a sovereign State, might adopt subsequently to the succession of States with respect to the property of a third State, in conformity with the rules of other branches of international law.

(3) The words “property, rights and interests” have been borrowed from article 5, where they form part of the definition of the term “State property”. In article 9, they

⁹⁸ Annex X, para. 1, and Annex XIV, para. 1, of the Treaty of Peace with Italy (*United Nations, Treaty Series*, vol. 49, pp. 209 and 225); and United Nations General Assembly resolutions 388 (V), of 15 December 1950, entitled “Economic and financial provisions relating to Libya” (article 1, para. 1) and 530 (VI), of 29 January 1972, entitled “Economic and financial provisions relating to Eritrea” (article 1, para. 1).

⁹⁹ Article 60 of the Treaty of Lausanne (League of Nations, *Treaty Series*, vol. XXVIII, p. 53).

¹⁰⁰ See paras. (2)–(5) of the commentary to article 7, above.

are followed by the qualifying clause "which, at the date of the succession of States, are situated in the territory of the predecessor State". The Commission regarded it as obvious that a succession of States could have no effect on the property, rights and interests of a third State situated outside the territory affected by the succession, and that the scope of the present article should therefore be limited to such territory.

(4) The words "according to the internal law of the predecessor State" are also borrowed from article 5. The Commission wishes to refer to observations previously expressed in this connexion.¹⁰¹

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Commentary

(1) In section 1 of the present part, the draft articles dealt with various questions relating to succession of States in respect of State property applicable generally to all types of succession. Articles 10 to 14 comprise section 2, and deal with the question of the passing of State property from the predecessor State to the successor State separately for each type of succession. This method was deemed to be the most appropriate for section 2 of part II of the draft in view of the obvious differences existing between various types of succession, owing, first, to the political environment in each of the cases where there is a change of sovereignty over or a change in the responsibility for the international relations of the territory to which the succession of States relates and, secondly, to the various constraints which the movable nature of certain kinds of property places on the quest for solutions.

Before going into the individual draft articles, the Commission wishes to make the following general observations concerning certain salient aspects of the provisions in the present section.

Choice of types of succession

(2) For the topic of succession of States in respect of treaties, the Commission, in its 1972 provisional draft,¹⁰² adopted four separate types of succession of States: (a) transfer of part of a territory; (b) newly independent States; (c) uniting of States and dissolution of unions; and (d) secession or separation of one or more parts of one or more States. Nevertheless, at its twenty-sixth session, in 1974, in the course of its second reading of the draft articles on succession of States in respect of treaties the Commission made certain changes which had the effect of redefining the first type of succession more fully and clearly and of combining the last two types into one. First of all, "transfer of part of a territory" was referred to as "succession in respect of part of territory". The Commission incorporated into this type of succession the case in which "any territory, not being part of the territory of a State for the international relations of which the State is responsible, becomes part of the territory of another State".¹⁰³ The Commission meant by this formula to cover the case of a non-self-governing territory

which achieves its decolonization by integration with a State other than the colonial State. Any such case is assimilated, for the purposes of succession of States in respect of treaties, to the first type of succession, namely, "succession in respect of part of territory". In addition, the Commission combined the last two types of succession of States under one heading: "Uniting and separation of States".

(3) For the purposes of the draft on succession of States in respect of treaties, the Commission summarized its choice of types of succession as follows:

The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the treaties of the predecessor State of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of one or more new States as a result of the separation of parts of the territory of a State; formation of a union of States; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States.¹⁰⁴

(4) In its work of codification and progressive development of the law relating to succession of States in respect of treaties and to succession of States in respect of matters other than treaties, the Commission has constantly borne in mind the desirability of maintaining some degree of parallelism between the two sets of draft articles and in particular, as far as possible, the use of common definitions and common basic principles, without thereby ignoring or dismissing the characteristic features that distinguish the two topics from one another. The Commission has considered that, so far as is possible without distorting or unnecessarily hindering its work, the parallelism between the two sets of draft articles should be regarded as a desirable objective. Nevertheless, as regards the present draft, the required flexibility should be allowed in order to adopt such texts as best suit the purposes of the codification, in an autonomous draft, of the rules of international law governing specifically succession of States in respect of matters other than treaties and, more particularly, in respect of State property.

(5) In the light of the foregoing, the Commission, while reaffirming its position that for the purpose of codifying the modern law of succession of States in respect of treaties it was sufficient to arrange the cases of succession of States, as it did in the 1974 draft, under the three broad categories referred to above,¹⁰⁵ nevertheless found that in view of the characteristics and requirements peculiar to the subject of succession of States in respect of matters other than treaties, particularly as regards State property, some further precision in the choice of types of succession was necessary for the purpose of the present draft. Consequently, as regards *succession in respect of part of territory*, the Commission decided that it was appropriate to distinguish and deal separately in the present draft with three cases: (1) the case where part of the territory of a State is transferred by that State to another State, which is the subject of article 10; (2) the case where a dependent

¹⁰¹ See para. 11 of the commentary to article 5, above.

¹⁰² *Yearbook . . . 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, sect. C.

¹⁰³ *Yearbook . . . 1974*, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D, article 14.

¹⁰⁴ *Ibid.*, p. 172, para. 71.

¹⁰⁵ See para. (3) of this commentary, above.

territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State, which forms the subject of paragraph 3 of article 11 (Newly independent State); (3) the case where a part of the territory of a State separates from that State and unites with another State, which is the subject of paragraph 2 of article 13 (Separation of part or parts of the territory of a State). Also, as regards the *uniting and separation of States*, the Commission, while following the pattern of dealing in separate articles with those two types of succession, nevertheless found it appropriate to distinguish between the "separation of part or parts of the territory of a State", which is the subject of article 13 and the "dissolution of a State", which forms the subject of article 14.

Choice between general rules and rules relating to property regarded in concreto

(6) On the basis of the reports submitted by the Special Rapporteur, the Commission considered which of three possible methods might be followed for determining the kind of rules that should be formulated for each type of succession. The first method consisted in adopting, for each type of succession, special provisions for each of those kinds of State property affected by a succession of States which are most essential and most widespread, so much so that they can be said to derive from the very existence of the State and represent the common denominators, so to speak, of all States, such as currency, Treasury, State funds, archives and libraries. The second method involved drafting, for each type of succession, more general provisions, not relating *in concreto* to each of these kinds of State property. A third possible method consisted in combining the first two and formulating, for each type of succession, one or two articles of a general character, adding perhaps one or two articles, where appropriate, relating to specific kinds of State property.

(7) The Commission decided to adopt the method to which the Special Rapporteur had reverted in his eighth report,¹⁰⁶ namely, that of formulating, for each type of succession, general provisions applicable to all kinds of State property. The Commission decided not to follow the first method, which was the basis of the Special Rapporteur's seventh report and which it had discussed at the twenty-seventh session (1975), not so much because a choice based on property regarded *in concreto* might be considered as being artificial, arbitrary or inappropriate as because of the extremely technical character of the provisions it would have been obliged to draft for such complex matters as currency, treasury and State funds, etc. Nevertheless, the Commission took the position that the question of archives might, in view of its exceptional importance and its peculiarities, appropriately be dealt with in a separate section of the draft devoted specifically to that matter.

Distinction between immovable and movable property

(8) In formulating, for each type of succession, general provisions applicable to all kinds of State property, the Commission found it necessary to introduce a distinction

between immovable and movable State property, since these two categories of property cannot be given identical treatment and, in the case of succession to State property, must be considered separately, irrespective of the legal systems of the predecessor State and the successor State. The distinction, known to the main legal systems of the world, corresponds primarily to a physical criterion for differentiation, arising out of the very nature of things. Some property is physically linked to territory so that it cannot be moved; this is immovable property. Then there are other kinds of property which are capable of being moved, so that they can be taken out of the territory; these constitute movable property. However, it seems desirable to make it clear that in adopting this terminology the Commission is not leaning towards the universal application of the laws of a particular system, especially those that derive purely from Roman law, because, as is the case with the distinction between public domain and private domain, a notion of internal law should not be referred to when it does not exist in all the main legal systems. The distinction made thus differs from the rigid legal categories found, for example, in French law. It is simply that the terms "movable" and "immovable" seem most appropriate for designating, for the purposes of succession to State property, property which can be moved or which is immobilized.

(9) Referring both categories of State property to "territory" is simply a reflection of the historical fact that State sovereignty developed over land. Whoever possessed land possessed economic and political power, and this is bound to have a far-reaching effect on present-day law. Modern State sovereignty is based primarily on a tangible element: territory. It can, therefore, be concluded that everything linked to territory, in any way, is a base without which a State cannot exist, whatever its political or legal system.

Criteria of linkage of the property to the territory

(10) Succession of States in respect of State property is governed, irrespective of the type of succession, by one key criterion applied throughout section 2 of part II of the draft: the linkage of such property to the territory. Applying this criterion, the basic principle may be stated that, in general, State property passes from the predecessor State to the successor State. It is through the application of a material criterion, namely, the relation which exists between the territory and the property by reason of the nature of the property or where it is situated, that the existence of the principle of the passing of State property can be deduced. Moreover, behind this principle lies the further principle of the actual viability of the territory to which the succession of States relates.

(11) As regards immovable State property, the principle of the linkage of such property to the territory finds concrete application by reference to the geographical situation of the State property concerned. Consequently, for the types of succession dealt with in section 2 of the present part, as appropriate, the rule regarding the passing of immovable State property from the predecessor to the successor State is couched in the following terms, used in paragraphs 2 (a) of article 10 and 1 (d) of article 11:

Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

or in the somewhat different form used in paragraph 1 (a) of articles 13 and 14:

¹⁰⁶ *Yearbook . . . 1976*, vol. II (Part One), pp. 55 *et seq.*, document A/CN.4/292.

Immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated.

It should be evident that, as adopted by the Commission, the rule relating to the passing of immovable State property does not apply to such property when it is situated outside the territory to which the succession of States relates, except, of course, in the case of the dissolution of a State, as is explained in the commentary to article 14.

Special aspects due to the mobility of the property

(12) As regards movable State property, the specific aspects which are due to the movable nature or mobility of State property add a special difficulty to the problem of the succession of States in this sphere. Above all, the fact that the property is movable, and can therefore be moved at any time, makes it easy to change the control over the property. In the Commission's view, the mere fact that movable State property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automatically entitle the predecessor State to retain it. For the predecessor State to retain or the successor State to receive such property, other conditions must be fulfilled. Those conditions are not unrelated to the general conditions concerning viability, both of the territory to which the succession of States relates and of the predecessor State. They are closely linked to the general principle of equity, which should never be lost from view and which, in such cases, enjoins apportionment of the property between the successor State or States and the predecessor State, or among the successor States if there is more than one and the predecessor State ceases to exist. The predecessor State must not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the territory to which the succession of States relates and of jeopardizing the viability of the successor State. Attention should therefore be drawn to the limits imposed by good faith, beyond which the predecessor State cannot go without failing in an essential international duty.

(13) Any movable State property of the predecessor State which is quite by chance in the territory to which the succession of States relates at the time when the succession of States occurs should not *ipso facto*, or purely automatically, pass to the successor State. If solely the place where the property is situated were taken into account, that would in some cases constitute a breach of equity. Moreover, the fact that State property may be where it is purely by chance is not the only reason for caution in formulating the rule. There may even be cases where the predecessor State situates movable property, not by chance, but deliberately, in the territory to which a succession of States will relate, without that property having any link with the territory, or at least without its having such a link to that territory *alone*. In such a case, it would again be inequitable to leave the property to the successor State *alone*. For example, it might be that the country's gold reserves or the metallic cover for the currency in circulation throughout the territory of the predecessor State had been left in the territory to which the succession of States relates. It would be unthinkable, merely because the entire gold reserves of the predecessor State were in that territory, to allow the successor State to

claim them if the predecessor State was unable to evacuate them in time.

(14) On the other hand, while the presence of movable State property in the part of the territory which remains under the sovereignty of the predecessor State after the succession of States normally justifies the presumption that it should remain the property of the predecessor State, such a presumption, however natural it may be, is not necessarily irrefutable. The mere fact that property is situated outside the territory to which the succession of States relates cannot in itself constitute an absolute ground for retention of such property by the predecessor State. If the property is linked solely, or even concurrently, to the territory to which the succession of States relates, equity and the viability of the territory require that the successor State should be granted a right on that property.

(15) In the light of the foregoing considerations, the Commission came to the conclusion that as far as movable State property is concerned, the principle of the linkage of such property to the territory should not find concrete application by reference to the geographical situation of the State property in question. Having in mind that, as explained above,¹⁰⁷ the legal rule applicable to the passing of movable State property should be based on the principle of viability of the territory and take into account the principle of equity, the Commission considered the question of how to give expression to the criterion of linkage between the territory and the movable State property concerned. Various expressions were suggested, including property having a "direct and necessary link" between the property and the territory, "property appertaining to sovereignty over the territory" and "property necessary for the exercise of sovereignty over the territory". Having discarded all these as not sufficiently clear, the Commission adopted the formula "property . . . connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". Consequently, for the types of succession dealt with in section 2 of part II of the draft, as appropriate, the rule regarding the passing of movable State property from the predecessor to the successor State is couched in the following terms, which are used in articles 10 (para. 2 (b)), 11 (para. 1 (b)), 13 (para. 1 (b)) and 14 (para. 1 (c)):

movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory [territories] to which the succession of States relates shall pass to the successor State.

The principle of equity

(16) As indicated above,¹⁰⁸ the principle of equity is one of the underlying principles in the rule regarding the passing of movable State property from the predecessor State to the successor State when that property is connected with the activity of the former in respect of the territory to which the succession of States relates. In that context the principle of equity, although important, does not occupy the pre-eminent position, since the whole rule would then be reduced to a rule of equity. At the limit, that rule would make any attempt at codification unnecessary, and all that would be required would be one article stating that the rule of equitable apportionment of property must be applied in all cases of succession to

¹⁰⁷ Para. (12) of this commentary.

¹⁰⁸ Paras. (12) and (15) of this commentary.

movable State property. Equity cannot be assigned the main role, because there is also a material criterion concerning the connexion of the property with the activity of the predecessor State in the territory. In fact, the principle of equity is more a balancing element, a corrective factor designed to preserve the "reasonableness" of the linkage between the movable State property and the territory. Equity makes it possible to interpret the concept of "property . . . connected with the activity of the predecessor State in respect of the territory . . ." in the most judicious fashion and to give it an acceptable meaning.

(17) The principle of equity, however, is called upon to play a greater role in connexion with the rules established for certain specific types of succession involving the passing from the predecessor State to the successor State or States of movable State property other than that connected with the activity of the former in respect of the territory to which the succession of States relates. When, in the case of a newly independent State, the dependent territory has contributed to the creation of such property, it shall pass to the successor State in proportion to the contribution of the dependent territory (article 11, para. 1(c)). In the case of separation of part or parts of the territory of a State or dissolution of a State, such property shall pass to the successor State or States in an equitable proportion (article 13, para. 1(c) and article 14, para. 1(d)).

(18) In the case of dissolution of a State, the principle of equity is at the basis of the rule regarding the passing of immovable State property of the predecessor State situated outside its territory to one of the successor States, since it requires that the other successor States be equitably compensated (article 14, para. 1(b)).

(19) Finally, as regards the cases of separation of part or parts of the territory of a State and dissolution of a State, the rules regarding the passing both of immovable and movable State property are without prejudice to any question of equitable compensation that may arise as a result of a succession of States (article 13, para. 3, and article 14, para. 2).

(20) What is meant by the principle of equity, according to Charles de Visscher, is "an independent and autonomous source of law".¹⁰⁹ According to a resolution of the Institute of International Law,

1. . . . Equity is normally inherent in a sound application of the law . . . ;

2. The international judge . . . can base his decision on equity, without being bound by the applicable law, only if all the parties clearly and expressly authorize him to do so.¹¹⁰

Under article 38, paragraph 2, of its Statute, the International Court of Justice may in fact decide a case *ex aequo et bono* only if the parties agree thereto.

(21) The Court has, of course, had occasion to deal with this problem. In the *North Sea Continental Shelf* cases, it sought to establish a distinction between *equity* and *equitable principles*. The Federal Republic of Germany had submitted to the Court, in connexion with the delimitation of the continental shelf, that the "equidistance method" should be rejected, since it "would not lead to an equitable apportionment". The Federal

Republic asked the Court to refer to the notion of equity by accepting the "principle that each coastal State is entitled to a just and equitable share."¹¹¹ Of course, the Federal Republic made a distinction between deciding a case *ex aequo et bono*, which could be done only with the express agreement of the parties, and invoking *equity* as a general principle of law. In its Judgment, the Court decided that in the cases before it, international law referred back to equitable principles, which the parties should apply in their subsequent negotiations.

(22) The Court stated:

. . . it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field.¹¹²

In the view of the Court, "equitable principles" are "actual rules of law" founded on "very general precepts of justice and good faith."¹¹³ These "equitable principles" are distinct from "equity" viewed "as a matter of abstract justice". The decisions of a court of justice:

must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.¹¹⁴

(23) Paragraphs 92 and 93 of the Judgment of the Court give a fairly good indication of the direction in which to look when applying the principle of equity:

. . . it is a truism to say that the determination must be equitable: rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable . . . it would . . . be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case . . .

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and *more often than not it is the balancing-up of all such considerations that will produce this result** rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations *naturally varies with the circumstances of the case**.¹¹⁵

(24) Having in mind the Court's elaboration of the concept of equity, as described in the preceding paragraphs, the Commission wishes to emphasize that equity, in addition to being a supplementary element throughout the draft, is also used in the present section as part of the material content of specific provisions and not as the equivalent of the notion of equity as used in an *ex aequo et bono* proceeding, to which a tribunal can have recourse only upon express agreement between the parties concerned.

Article 10. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

¹⁰⁹ *Annuaire de l'Institut de droit international*, 1934 (Brussels), vol. 38, p. 239.

¹¹⁰ *Annuaire de l'Institut de droit international*, 1937 (Brussels), vol. 40, p. 271.

¹¹¹ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 9.

¹¹² *Ibid.*, p. 47.

¹¹³ *Ibid.*, p. 46.

¹¹⁴ *Ibid.*, p. 48.

¹¹⁵ *Ibid.*, p. 50.

2. In the absence of an agreement:

(a) **Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;**

(b) **Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.**

Commentary

(1) As was indicated above,¹¹⁶ the Commission, when establishing its 1974 final draft on succession of States in respect of treaties, concluded that for the purpose of the codification of the modern law relating to that topic it was sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; and (c) uniting and separation of States. In the 1974 draft, succession in respect of part of territory was dealt with in article 14, the introductory sentence of which reads as follows:

When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State; As was also indicated above,¹¹⁷ in adopting the foregoing text for the type of succession characterized as "succession in respect of part of territory", the Commission added the case of non-self-governing territory that achieves its decolonization by integration with a State other than the colonial State to the case of part of the territory of a pre-existing State which becomes part of the territory of another State. The Commission considered that, for the purposes of succession in respect of treaties, the two cases could be dealt with together in the same provision, since one single principle, that of "moving treaty-frontiers", was applicable to both of them.

(2) The quite unique nature of "succession in respect of part of territory" as compared with other types of succession gives rise to difficulties in the context of the topic of succession of States in respect of matters other than treaties. A frontier adjustment, which as such raises a problem of "succession in respect of part of territory", may in some cases affect only a few unpopulated or scarcely populated acres of a territory, but in the case of some States may cover millions of square miles and be populated by millions of inhabitants. It is very unlikely that frontier adjustments affecting only a few unpopulated acres of land, such as that which enabled Switzerland to extend the Geneva-Cointrin airport into what was formerly French territory, will give rise to problems of State property such as currency and treasury and State funds. It should also be borne in mind that minor frontier adjustments are the subject of agreements between the States concerned, whereby they settle all questions arising between the predecessor State transferring territory and the successor State to which it is transferred, without the need to consult a population that may or may not exist. But while it is true that "succession in respect of part of territory" covers the case of a minor frontier adjustment which, moreover, is effected through an agreement providing a general settlement of all the problems involved, without the need to consult the

population, it is nevertheless a fact that this type of succession also includes cases affecting territories and tracts of land that may be densely populated. In these cases, problems concerning the passing of State property such as currency and treasury and State funds certainly do arise, and in fact they are particularly acute.

(3) It is this situation—namely, the fact that the area affected by the territorial change may be either very densely populated or very sparsely populated—that accounts for the ambiguities, the uniqueness, and hence the difficulty, of the specific case of "succession in respect of part of territory" in the context of succession of States in respect of matters other than treaties. In short, the magnitude of the problems of the passing of State property varies not just with the size of the territory transferred, but mainly according to whether or not it is necessary to consult the population of the territory concerned. These problems arise in each and every case, but more perceptibly and more conspicuously when the area of the transferred territory is large and densely populated. This incontrovertible reality is simply a reflection of the phenomenon of substitution of sovereignty over the territory in question, which inevitably manifests itself through an extension to the territory of the successor State's own legal order, and hence through a change, for example, in the monetary tokens in circulation. Currency, in particular, is a very important item of State property, being the expression of a regalian right of the State and the manifestation of its sovereignty.

(4) It should be added that cases of "succession in respect of part of territory" do not always involve agreements the existence of which would explain giving a residual character to the rules to be formulated to govern succession of States in respect of State property. Moreover, it is in those cases where a densely populated part of the territory of a State passes to another State—in other words, precisely the cases in which the problems of State property such as currency and treasury and State funds arise on a larger scale—that agreements for the settlement of such problems may be lacking. This is not a theoretical hypothesis. Apart from war or the annexation of territory by force, both of which are prohibited by contemporary international law, the case can be envisaged of detachment of part of a State's territory and its attachment to another State following a referendum on self-determination, or of secession by part of a State's population and attachment of the territory in which it lives to another State. In such situations, it is not always possible to count on the existence of an agreement between the predecessor State and the successor State, especially in view of the politically charged circumstances which may surround such territorial changes.

(5) It was in the light of the foregoing considerations that the Commission decided that, for the purposes of codifying the rules of international law relating to succession of States in respect of matters other than treaties, and in particular, in respect of State property, it was appropriate to distinguish and deal separately in the present draft with three cases covered by one single provision in article 14 of the 1974 draft on succession in respect of treaties: (1) the case where part of the territory of a State is transferred by that State to another State, which is the subject of the present article; (2) the case where a part of the territory separates from that State and unites with another State, which is the subject of paragraph 2 of article 13 (Separation of part or parts of the territory of a State); and (3) the case where a dependent

¹¹⁶ Introductory commentary to section 2, paras. (2) and (3).

¹¹⁷ *Ibid.*, para. (2).

territory becomes part of the territory of a State other than the State which was responsible for its international relations, which forms the subject of paragraph 3 of article 11 (Newly independent State).

(6) Article 10 is therefore limited to cases of transfer of part of the territory of a State to another State. The word "transfer", in the title of the article, and the words "is transferred", in *paragraph 1*, are intended to emphasize the precise scope of the provisions of article 10. The cases of transfer of territory envisaged are those where the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned does not presuppose the consultation of the population of that part of the territory, in view of its minor political, economic, strategic, etc., importance, or the fact that it is scarcely inhabited, if at all. Furthermore, the cases envisaged are always those which, according to article 3 of the draft, occur in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. In most of these cases, problems concerning the passing of such State property as currency, treasury and State funds, etc., do not actually arise or have no great relevance, and it is by the agreement of the predecessor and the successor States that the passing of State property, whether immovable or movable, from one State to the other, is normally settled. This primacy of the agreement in the situation covered by article 10 is reflected in paragraph 1 of the article, according to which, "When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor to the successor State is to be settled by agreement between the predecessor and successor States". It should be understood that, according to paragraph 1, such passing of State property should in principle be settled by agreement and that the agreement should govern the disposition of the property, no duty to negotiate or agree being thereby implied.

(7) In the absence of an agreement between the predecessor and successor States, the provisions of *paragraph 2* of article 10 apply. Subparagraph (a) of paragraph 2 concerns the passing of immovable State property, whereas subparagraph (b) of the same paragraph deals with the passing of movable State property. As explained above,¹¹⁸ *subparagraph (a) of paragraph 2* states the rule regarding the passing of immovable State property from the predecessor State to the successor State by reference to the geographical situation of the State property concerned, in conformity with the basic principle of the passing of State property from the predecessor State to the successor State. It provides, therefore, that "immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State". It may be convenient to repeat here that this rule does not extend to immovable State property situated outside the territory to which the succession of States relates—property which is and remains that of the predecessor State.

(8) *Subparagraph (b) of paragraph 2* states the rule regarding the passing of movable State property from the predecessor State to the successor State by reference to the material criterion of the connexion between the property concerned and the activity of the predecessor State in respect of the territory to which the succession of

States relates, as explained above.¹¹⁹ By that criterion, there is no distinction to be made as to the actual location of the movable State property in question and, consequently, there is no need to refer expressly to the passing of property "on the date of the succession of States", the time element being, moreover, already implied in the definition of State property contained in article 5 of the draft. Subparagraph (b) of paragraph 2 therefore provides that "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State".

(9) The situation covered by the provisions of article 10 is to be distinguished from that of a part of the territory of a State which separates from that State and unites with another State, contemplated in *paragraph 2 of article 13*, as is indicated above.¹²⁰ In the case of such separation, as opposed to the case of transfer of a part of territory, the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned presupposes the expression of a conforming will on the part of the population of the separating part of the territory, in consequence of its extent and large number of inhabitants or of its importance from a political, economic, strategic, etc., point of view. It is in these cases of separation of part of the territory of a State that problems concerning the passing of such State property as currency, treasury and State funds, etc., arise or have a greater significance, and the resolution of these problems is not always achieved by agreement between the predecessor and the successor States, such agreement being unlikely when the territorial change in question is surrounded by politically charged circumstances, as is often the case. An agreement between the predecessor and successor States is certainly to be envisaged, but not with the primacy that is accorded it in article 10, since what is paramount in the case to which paragraph 2 of article 13 relates is the will of the population expressed in the exercise of the right to self-determination. Consequently, the formulation of paragraph 1 of article 13, which applies to the case of separation of part of the territory of a State when that part unites with another State, departs from that of paragraph 1 of article 10 and contains the following clause: "and unless the predecessor State and the successor State otherwise agree".

(10) A further difference between the rules applicable in the cases covered by article 10, on the one hand, and by paragraph 2 of article 13, on the other, resulting likewise from the factual differences between them as described in the preceding paragraph, is reflected in the provision whereby in the absence of the agreement envisaged in both articles, it is only in the latter case that a third category of State property passes to the successor State. Thus, according to article 13, when a part of the territory of a State separates from that State and unites with another State (para. 2), unless the predecessor State and the successor State otherwise agree (para. 1), movable State property of the predecessor State other than that connected with activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State in an equitable proportion (para. 1 (c) in conjunction with para. 1 (b).

¹¹⁸ *Ibid.*, para. (11).

¹¹⁹ *Ibid.*, in particular para. (15).

¹²⁰ Para. (5) of this commentary.

No such provision is required in the cases covered by article 10.

(11) The rules relating to the passing of State property in cases where part of the territory of a State is transferred to another State (article 10) and where part of the territory of a State separates from that State and unites with another State (article 13, para. 2) are founded in State practice, judicial decisions and legal theory, which admit generally the devolution of the State property of the predecessor State. Some examples may illustrate the point, even if they may seem broader in scope than the rules adopted.

(12) The devolution of such State property is clearly established practice. There are, moreover, many international instruments which simply record the express relinquishment by the predecessor State, without any *quid pro quo*, of all State property without distinction situated in the territory to which the succession of States relates. It may be concluded that relinquishment of the more limited category of immovable State property situated in that territory should *a fortiori* be accepted. The immovable State property which thus passes to the successor State is property which the predecessor State formerly used, as appropriate, in the portion of territory concerned, for the manifestation and exercise of its sovereignty, or for the performance of the general duties implicit in the exercise of that sovereignty, such as the defence of that portion of territory, security, promotion of public health and education, national development, and so on. Such property can easily be listed: it includes, for example, barracks, airports, prisons, fixed military installations, State hospitals, State universities, local government office buildings, premises occupied by the main central government services, buildings of the State financial, economic or social institutions, and postal and telecommunications facilities where the predecessor State was itself responsible for the functions which they normally serve.

(13) Two types of case will be omitted from the examples to follow, as being not sufficiently illustrative because the fact that they reflect the application of a general principle of devolution of State property is due to other causes of a peculiar and specific kind. The first type comprises all cessions of territories against payment. The purchase of provinces, territories and the like was an accepted practice in centuries past but has been tending towards complete extinction since the First World War, and particularly since the increasingly firm recognition of the right of peoples to self-determination. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly, these old cases of transfer are no longer demonstrative. On purchasing a territory, a State purchased everything in it, or everything it wanted, or everything the other party wanted to sell there, and the transfer of State property does not here constitute proof of the existence of the rule, but simply of the capacity to pay.¹²¹

¹²¹ See, for example, the Convention of Gastein of 14 August 1865, whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (*British and Foreign State Papers, 1865-1886*, vol. 56 (London, Ridgeway, 1870), p. 1026, p. 6); the Treaty of Washington of 30 March 1867, whereby Russia sold its North American possessions to the United States of America for \$1.2 million (W. M. Malloy, ed., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, D.C., Government Printing Office, 1910), vol. II, p. 1521);

(14) The second type consists of forced cessions of territory, which are prohibited by international law, so that succession to property in such cases cannot be regulated by international law.¹²² In this connexion, reference is made to the provisions of article 3 of the draft.

(15) A third set of cases, which are perhaps only too demonstrative, consists of those involving "voluntary cessions without payment". In these very special and marginal cases, the passing of immovable State property is neither controversial nor ambiguous, because it takes place not so much under the general principle of succession of States as by an expressly stated wish.¹²³

(16) Territorial changes such as those covered by article 10 and article 13, paragraph 2, have occurred relatively often following a war. In such cases, peace treaties contain provisions relating to territories ceded by the defeated Power. For that reason, the provisions of peace treaties and other like instruments governing the problems raised by transfers of territory must be treated with a great deal of caution, if not with express reservations. Subject to that proviso, it may be noted that the major peace treaties which ended the First World War opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.¹²⁴

(17) As to the Second World War, a Treaty of 29 June 1945 between Czechoslovakia and the USSR stipulated the cession to the latter of the Sub-Carpathian Ukraine within the boundaries specified in the Treaty of Saint-Germain-en-Laye. An annexed protocol provided for "transfer without payment of the right of ownership over

the Convention whereby France ceded Louisiana to the United States of America for \$15 million (English and French texts in de Martens, ed., *Recueil des principaux traités*, vol. VII (*op. cit.*), p. 706).

¹²² In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XXI of the Treaty of the Pyrenees, which gave France Arras, Béthune, Lens, Bapaume, etc., specified that those places:

"... shall remain . . . unto the said Lord the most Christian King, and to his Successors and Assigns . . . with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardianship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priories, Dignities, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countries . . . formerly belonging to the said Lord the Catholick King . . . And for that effect, the said Lord the Catholick King . . . doth renounce [these rights] . . . together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests . . . the said Lord the Catholick King . . . doth consent to be . . . united and incorporated to the Crown of France: all Laws, Customs, Statutes and Constitutions made to the Contrary . . . notwithstanding."

(Israel, *op. cit.*, vol. I, pp. 69-70)

¹²³ Cf., for example, the cession by Great Britain to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; the decision in July 1821, by an assembly of representatives of the Uruguayan people held at Montevideo, concerning the incorporation of the Cisplatina Province; the voluntary incorporation in France of the free town of Mulhouse in 1798; the voluntary incorporation of the Duchy of Courland in Russia in 1795; the Treaty of Rio of 30 October 1909, between Brazil and Uruguay, for the cession without compensation of various lagoons, islands and islets; the voluntary cession of Lombardy by France to Piedmont, without payment, under the Treaty of Zurich of 10 November 1859; etc.

¹²⁴ See articles 256 of the Treaty of Versailles, 208 of the Treaty of Saint-Germain-en-Laye, 191 of the Treaty of Trianon, and 142 of the Treaty of Neuilly-sur-Seine (for references, see foot-note 95 above).

State property in the Sub-Carpathian Ukraine". The Treaty of Peace concluded on 12 March 1940 between Finland and the USSR¹²⁵ provided for reciprocal territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufacturing enterprises, telegraphic installations and electric stations. The Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy also contained provisions applying the principle of the passing of property, including immovable property, from the predecessor State to the successor State. In particular, paragraph 1 of annex XIV to the Treaty (Economic and Financial Provisions Relating to Ceded Territories) provided that "the successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it . . .".¹²⁶

(18) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property, and therefore of immovable property. This is true, in the first place, of national courts. According to Rousseau, "the general principle of the passing of public property to the new or annexing State is now accepted without question by national courts".¹²⁷

(19) Decisions of international jurisdictions confirm this rule. In the *Péter Pázmány University* case, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "principle of the generally accepted law of State succession".¹²⁸ The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 confirmed the principle of the devolution to the successor State, in full ownership, of immovable State property. This can be readily deduced from one of its decisions. The Commission found that:

The main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State that shall receive,

¹²⁵ *Supplement to the American Journal of International Law* (Concord, N.H.), vol. 34 (1940), pp. 127-131.

¹²⁶ United Nations, *Treaty Series*, vol. 49, p. 225.

¹²⁷ C. Rousseau, *Cours de droit international public—Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les Cours de droit, 1964-1965), p. 139.

Reference is generally made to the judgement of the Berlin Court of Appeal (*Kammergericht*) of 16 May 1940 (case of the succession of States to Memel—return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939: see *Annual Digest and Reports of Public International Law Cases, 1919-1942*, Supplementary Volume (London, 1947), case No. 44, pp. 74-76), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 (case of *Amine Namika Sultan v. Attorney-General*: see *Annual Digest . . . , 1947* (London, 1951), case No. 14, pp. 36-40), which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of article 60 of the Treaty of Lausanne of 1923.

¹²⁸ See *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Péter Pázmány University)*, Judgment, 1933, P.C.I.J., Series A/B, No. 61, p. 237.

without payment, not only the State property but also the para-statal property, including *biens communaux* within the territories ceded.¹²⁹

(20) As far as movable State property is concerned, the Commission has already explained¹³⁰ the reasons why the principle of the linkage of such property to the territory should not find concrete application by reference to the geographical situation of the property in question, in view of the special aspects due to the mobility of that property. The Commission decided to give expression to the criterion of linkage between the territory and the movable property concerned by the formula: "property . . . connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". That concept may be regarded as closely related to that sanctioned by international judicial decisions, which concerns the transfer of property belonging to local authorities necessary for the viability of the local territorial authority concerned. For example, in the dispute concerning the apportionment of the property of local authorities whose territory had been divided by a new delimitation of the frontier between France and Italy, the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947, noted that:

. . . the Treaty of Peace did not reflect any distinctions . . . between the public domain and the private domain that might exist in the legislation of Italy or the State to which the territory is ceded. However, the nature of the property and the economic use to which it is put have a certain effect on the apportionment.

The apportionment must, first of all, be just and equitable. However, the Treaty of Peace does not confine itself to this reference to justice and equity, but provides a more specific criterion for a whole category of municipal property and for what is generally the most important category.

The question may be left open whether the . . . [Treaty] provides for two types of agreement . . . , one kind apportioning the property of the public authorities concerned, the other ensuring "the maintenance of the municipal services essential to the inhabitants* . . .". But even if that were so, the criterion of the maintenance of the municipal services necessary to the inhabitants should *a fortiori* play a decisive role* when these services—as will usually be the case—are provided by property belonging to the municipality which must be apportioned. The apportionment should be carried out according to a *principle of utility*,* since in this case that principle must have seemed to the drafters of the Treaty the most compatible with justice and equity.¹³¹

(21) As regards, more specifically, movable State property, the cases of currency, gold and foreign exchange reserves and State funds will be discussed in turn below, by way of example. These cases being sufficiently illustrative for the present purpose, and in view of the Commission's decision referred to above,¹³² no specific reference will be made in the context of article 10 to the case of archives, on which there exists abundant State practice.

¹²⁹ Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 514).

Annex XIV, para. 1, provided that: "The successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it . . .". (United Nations, *Treaty Series*, vol. 49, p. 225).

¹³⁰ See paras. (12)-(15) of the introductory commentary to sect. 2, above.

¹³¹ United Nations, *Report of International Arbitral Awards*, vol. XIII, (*op. cit.*), p. 519.

¹³² See para. (7) of the introductory commentary to sect. 2, above.

Currency

(22) A definition of currency for the purposes of international law should take account of the following three fundamental elements: (a) currency is an attribute of sovereignty, (b) it circulates in a given territory and (c) it represents purchasing power. It has been observed that this legal definition

necessarily relies on the concept of statehood or, more generally, that of *de jure* or *de facto* sovereign authority. It follows from this proposition that media of exchange in circulation are, legally speaking, not currency, unless their issue has been established or authorized by the State and, *a contrario*, that currency cannot lose its status otherwise than through formal demonetization¹³³

For the purposes of the present topic, this means that the predecessor State loses and the successor State exercises its own monetary authority in the territory to which the succession of States relates. That should mean that, at the same time, the State patrimony associated with the expression of monetary sovereignty or activity in that territory (gold and foreign exchange reserves, and real property and assets of the institution of issue situated in the territory) must pass from the predecessor State to the successor State.

(23) The normal relationship between currency and territory is expressed in the idea that currency can circulate only in the territory of the issuing authority. The concept of the State's "territoriality of currency" or "monetary space" implies, first, the complete surrender by the predecessor State of monetary powers in the territory considered and, secondly, its replacement by the successor State in the same prerogatives in that territory. But both the surrender and the assumption of powers must be organized on the basis of a factual situation, namely, the impossibility of leaving a territory without any currency in circulation on the date on which the State succession occurs. The currency inevitably left in circulation in the territory by the predecessor State and retained temporarily by the successor State justifies the latter in claiming the gold and foreign exchange which constitute the security or backing for that currency. Similarly, the real property and assets of any branches of the central institution of issue in the territory to which the State succession relates pass to the successor State under this principle of the State's "currency territoriality" or "monetary space". It is because the circulation of currency implies security or backing—the public debt, in the last analysis—that currency in circulation cannot be dissociated from its base or normal support, which is formed by all the gold or foreign exchange reserves and all assets of the institution of issue. This absolute inseparability, after all, merely describes the global and "mechanistic" fashion in which the monetary phenomenon itself operates.

(24) In the world monetary system as it exists today, currency has value only through the existence of its gold backing, and it would be futile to try, in the succession of States, to dissociate a currency from its backing. For that reason it is essential that the successor State, exercising its jurisdiction in a territory in which there is inevitably paper money in circulation, should receive in gold and foreign exchange the equivalent of the backing for such issue. This, however, does not always happen in practice.

The principle of allocation or assignment of monetary tokens to the territory to which the succession of States relates is essential here. If currency, gold and foreign exchange reserves, and monetary tokens of all kinds belonging to the predecessor State are temporarily or fortuitously present in the territory to which the succession of States relates, without the predecessor State's having intended to allocate them to that territory, obviously they have no link or relationship with the territory and cannot pass to the successor State. The gold owned by the Bank of France that was held in Strasbourg during the Franco-German War of 1870 could not pass to Germany after Alsace-Lorraine was annexed to that country unless it were established that that gold had been "allocated" to the transferred territory.

(25) When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.¹³⁴

(26) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.¹³⁵ Under the peace treaties concluded, the new Soviet régime became fully responsible for the debt represented by the paper money issued by the Russian State Bank in these four countries.¹³⁶ The provisions of some of these instruments indicated that Russia *released* the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those countries during the war.¹³⁷ At the same time, and in these same treaties, part of the bullion reserves of the Russian State Bank was transferred to each of these States. The ground given in the case of Poland is of some interest: the 30 million gold roubles paid by Russia under this head corresponded to the "active participation" of the Polish territory in the economic life of the former Russian Empire.

State funds

(27) State public funds in the territory to which the succession of States relates should be understood to mean cash, stocks and shares which, although they form part of the over all assets of the State, have a link with that territory by virtue of the State's sovereignty over or activity in that region. If they are connected with the activity of the predecessor State in respect of the territory to which the succession of States relates, State funds, whether liquid or invested, pass to the successor State.

¹³⁴ See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, *Treaty Series*, vol. 117, p. 19).

¹³⁵ No reference is made here to the cases of Finland, which already enjoyed monetary autonomy under the former Russian régime, or of Turkey.

¹³⁶ See the following treaties: with Estonia, of 2 February 1920, article 12; with Latvia, of 11 August 1920, article 16; with Lithuania, of 12 July 1920, article 12; and with Poland, of 18 March 1921, article 19 (League of Nations, *Treaty Series*, vol. XI, p. 51; vol. II, p. 212; vol. III, p. 122; and vol. VI, p. 123).

¹³⁷ See B. Nolde, "La monnaie en droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1929-II*, (Paris, Hachette, 1930), vol. 27, p. 295.

¹³³ D. Carreau, *Souveraineté et coopération monétaire internationale* (Paris, Cujas, 1970), p. 27.

The principle of connexion with the activity is decisive in this case, since it is obvious that funds of the predecessor State which are in transit through the territory in question, or are temporarily or fortuitously present in that territory, do not pass to the successor State.

(28) State public funds may be liquid or invested; they include stocks and shares of all kinds. Thus, the acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also, according to the Supreme Court of Poland, the transfer to the successor of a share in the capital of an association.¹³⁸

(29) As part of the "transfer without payment of the right of ownership over State property", the USSR received public funds situated in the Sub-Carpathian Ukraine, which, within the boundaries specified in the Treaty of Saint-Germain-en-Laye of 10 September 1919, was ceded by Czechoslovakia in accordance with the Treaty of 29 June 1945.

Article 11. Newly independent State

1. When the successor State is a newly independent State:

(a) **movable property, having belonged to the territory to which the succession of States relates and become State property of the predecessor State during the period of dependence, shall pass to the newly independent State;**

(b) **movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;**

(c) **movable State property of the predecessor State other than the property mentioned in subparagraphs (a) and (b), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;**

(d) **immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.**

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Commentary

(1) Article 11 concerns succession to State property in

¹³⁸ Digest by the Secretariat of the decision of the Supreme Court of Poland in the Polish State Treasury v. Deutsche Mittelstandskasse case (1929) (*Yearbook . . . 1963*, vol. II, p. 133, document A/CN.4/157, para. 337).

the case of a newly independent State. The term "newly independent State" as used in the present draft is defined in article 2, paragraph 1 (e), and reference should therefore be made to the relevant paragraph of the commentary to article 2.¹³⁹

(2) In contrast to other types of State succession where, until the occurrence of the succession, the predecessor State possesses the territory to which the succession of States relates and exercises its full sovereignty there, the type covered by this article involves a dependent or non-self-governing territory which has a special juridical status under the Charter of the United Nations. As the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations¹⁴⁰ states, such a territory has

a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Moreover, in accordance with General Assembly resolution 1514 (XV) of 14 December 1960, every people, even if it is not politically independent at a certain stage of its history, possesses the attributes of national sovereignty inherent in its existence as a people. There is also no doubt, as is explained below,¹⁴¹ that every people enjoys the right of permanent sovereignty over its wealth and natural resources.

(3) Although the question might be raised as to the usefulness of the Commission's making special provisions relating to newly independent States, in view of the fact that the process of decolonization is practically finished, the Commission is convinced of the need to include such provisions in the present draft. A draft of articles on a topic which, like succession of States in matters other than treaties, necessarily presupposes the exercise of a right which is at the forefront of United Nations doctrine and partakes of the character of *jus cogens*—namely, the right of self-determination of peoples—cannot ignore the most important and widespread form of the realization of that right in the recent history of international relations: that is, the process of decolonization which has taken place since the Second World War. In fact, the Commission cannot but be fully conscious of the precise mandate it has received from the General Assembly, in regard to its work of codification and progressive development of the rules of international law relating to succession of States, to examine the problems of succession of States with appropriate reference to the views of States which have achieved independence since the Second World War.¹⁴² Although the process of decolonization has already been largely effected, it has not yet been completed, as is confirmed in the 1978 report of the Special Committee of Twenty-four,¹⁴³ which points out

¹³⁹ Para. (6) of the commentary to article 2, above.

¹⁴⁰ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

¹⁴¹ Paras. (25)–(31) of the present commentary.

¹⁴² General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963.

¹⁴³ Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 23 A/33/23/Rev.1*).

that many dependent or Non-Self-Governing Territories still remain to be decolonized. Moreover, the usefulness of the present draft articles is not limited to dependent or Non-Self-Governing Territories yet to be decolonized. In many instances, the effects of decolonization, including, in particular, problems of succession to State property, remain for years after political independence is achieved. The necessity of including provisions on newly independent States was fully recognized by the Commission in the course of its work on succession of States in respect of treaties and found reflection in the final draft on that topic submitted in 1974 for consideration by the General Assembly, as well as in the 1978 Vienna Convention adopted on the basis of that final draft. In the present case, there is no reason to depart from the typology established in the draft articles on succession of States in respect of treaties: on the contrary the reasons for maintaining the type of succession involving "newly independent State" are equally if not more compelling in the case of succession of States in respect of matters other than treaties. Besides, in view of the close link and the parallelism between the two sets of draft articles, there would be an inexplicable gap in the present draft if no provision were made for newly independent States.

(4) Article 11 covers the various situations that may result from the process of decolonization: the commonest case, where a newly independent State emerges from a dependent territory; the case where such a State is formed from two or more dependent territories (paragraph 2); and the case where a dependent territory becomes part of the territory of an existing State other than the State which was administering it (paragraph 3). In all these cases the rules relating to the passing of State property should be the same since the basis for the succession in each case is the same: decolonization. It is for this reason that, as has been indicated,¹⁴⁴ the Commission considered it appropriate to deal with the last case in the present article, whereas in the 1974 draft on succession of States in respect of treaties, that case was covered by the provisions of article 14 (Succession in respect of part of territory)¹⁴⁵ since it is a question of the applicability of the same principle—that of the "moving treaty-frontiers" rule—to all the situations covered.

(5) The rules relating to the passing of State property in the case of newly independent States vary somewhat from those relating to other types of succession, in order to take full account of the special circumstances surrounding the emergence of such States. The principle of viability of the territory becomes imperative in the case of States achieving independence from situations of colonial domination, and the principle of equity requires that preferential treatment be given to such States in the legal regulation of succession to State property. Two main differences are, therefore, to be indicated. First, immovable property situated in the dependent territory concerned and movable property connected with the activity of the predecessor State in respect of the dependent territory concerned should, as a general rule, pass to the successor State upon the birth of a newly independent State, whether it is formed from one or two or several dependent territories, or upon the dependent territory's decolonization through integration or association with another

existing State, reference to an agreement being unnecessary, by contrast with the case of the articles relating to other types of succession. The reason why article 11 does not, with reference to newly independent States, use the expressions "in the absence of an agreement" or "unless the predecessor State and the successor State otherwise agree", which are employed in other articles of section 2, is not so much because a dependent territory which is not yet a State could not, strictly speaking, be considered as possessing the capacity to conclude international agreements, but, principally in recognition of the very special circumstances which accompany the birth of newly independent States as a consequence of decolonization and which lead, when negotiations are undertaken for the purpose of achieving independence, to results that are, in many instances, distinctly unfavourable to the party acceding to independence, because of its unequal and unbalanced legal, political and economic relationship with the former metropolitan country.

(6) The second difference resides in the introduction of the concept of the contribution of the dependent territory to the creation of certain movable property of the predecessor State which is not connected with the activity of that State in respect of the dependent territory in question, so that such property should pass to the successor State in proportion to the contribution made by the dependent territory. This provision represents a concrete application of the concept of equity forming part of the material content of a rule of positive international law which is designed to preserve, *inter alia*, the patrimony and the historical and cultural heritage of the people inhabiting the dependent territory concerned. In cases of newly independent States, entire nations are affected by the succession of States which have contributed to the creation of the predecessor State's property. It is only equitable that such property should pass to the successor State in proportion to the contribution of the dependent territory to its creation. In this connexion, reference may be made to resolution 3391 (XXX), of 19 November 1975, in which the General Assembly calls for the "restitution of works of art to countries victims of expropriation", affirms that "the prompt restitution to a country of its *objets d'art*, monuments, museum pieces and manuscripts by another country, without charge, is calculated to strengthen international co-operation", and invites States Members of the United Nations to ratify the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the General Conference of UNESCO in 1970.¹⁴⁶

(7) Paragraph 1 (a) of article 11 deals with a problem unique to newly independent States. It concerns the case of movable property which, prior to the period of dependence, belonged to the territory to which the succession of States relates. During the period of its dependence, some or all of such property may well have passed to the predecessor State administering the territory. This might be movable property of cultural or historical significance, such as works of art or museum pieces, or such immovable property as embassies and administrative buildings. The subparagraph sets forth a rule of restitution of such property to the former owner. The text of the subparagraph refers, however, only to

¹⁴⁴ See para. (5) of the introductory commentary to sect. 2, above.

¹⁴⁵ That article corresponds to article 15 of the 1978 Vienna Convention.

¹⁴⁶ UNESCO, *Records of the General Conference, Sixteenth Session*, vol. I, *Resolutions* (Paris, 1970), p. 135.

“movable property”, and states that such movable property shall pass to the newly independent State. Immovable property was excluded from paragraph 1 (a) because paragraph 1 (d) covers all “immovable State property of the predecessor State situated in the territory”, including immovable property which had belonged to the territory before it became dependent. The situation covered by paragraph 1 needs to be provided for expressly, even though it might be considered to be a particular aspect of the larger question relating to the “*biens propres*” of the dependent territory. The provisions of article 11 are not intended to apply to property belonging to the Non-Self-Governing Territory, as that property is not affected by the succession of States. Generally speaking, colonies enjoyed a special régime under what was termed a legislative and conventional speciality. They possessed a certain international personality so that they could own property inside and outside their territory. Consequently, there is no reason why succession should cause colonies to lose their own property. Only the metropolitan patrimony situated in, or connected with the activity of the predecessor State in relation to the territory, forms part of the succession. However, in the absence of express regulations for the situations covered by paragraph 1 (a) and (d), the question might be raised whether, in the case of a State having become a dependent territory, property which, having belonged to that State, passed to the administering Power, was still to be regarded as property of the dependent territory or not.

(8) It should be noted that, unlike the other subparagraphs of paragraph 1, subparagraph (a) does not mention “State property” but merely “property” at the beginning of the sentence. This is intended to widen the scope of the provision in order to include the property which, prior to the period of dependence, belonged to the territory of the successor newly independent State, whether that territory, during the pre-dependence period, was an independent State or an autonomous entity of other form, such as a tribal group or a local government.

(9) Paragraph 1 (b) concerns the movable State property “connected with the activity of the predecessor State in respect of the territory to which the succession of States relates”, and states the common rule adopted with respect to the transfer of part of the territory of a State, the separation of part or parts of the territory of a State, and the dissolution of a State. Reference may be made in this connexion to paragraphs (12) to (15) of the introductory commentary to section 2, which are relevant to this subparagraph. It should be noted that movable State property which may be located in the dependent territory only temporarily or fortuitously, like the gold of the Banque de France which was evacuated to West Africa during the Second World War, is to be excluded from the application of the rule, since it is not actually connected with the activity of the State “in respect of the territory to which the succession of States relates”.

(10) State practice relating to the rule enunciated in paragraph 1 (b) can be discussed with reference to two main categories of movable State property, namely, currency and State funds.

(11) The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State, since it is a regalian right and an attribute of public authority. In this sense, as far as the privilege of issue is concerned, there is no question of succession of States involved; the predecessor

State loses its privilege of issue in the dependent territory and the newly independent State exercises its own privilege, which it derives from its own sovereignty, upon achieving independence. Nor does the question of monetary tokens issued in the dependent territory by its own institution of issue relate directly to succession of States.

(12) Among the examples that may be given is that of the various Latin American colonies which became independent at the beginning of the nineteenth century, from which the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscription of the new State for the image and name of His Most Catholic Majesty on the coins in circulation, or to giving some other name to the Spanish peso, without changing its value or the structure of the currency.

(13) In the case of India, that country succeeded to the sterling assets of the Reserve Bank of India, estimated at £1,160 million.¹⁴⁷ However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder—i.e., the greater part of the assets—was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.¹⁴⁸

(14) The French Government withdrew its monetary tokens from the French Establishments in India, but agreed to pay compensation. Article 23 of the Franco-Indian Agreement of 21 October 1954¹⁴⁹ stated:

The Government of France shall reimburse to the Government of India within a period of one year from the date of the *de facto* transfer the equivalent value at par in £ sterling or in Indian rupees of the currency withdrawn from circulation from the Establishments after the *de facto* transfer.

(15) State practice not being uniform, it is not possible to establish a rule applicable to all situations regarding succession in respect of currency. It is necessary to examine the concrete situation obtaining on the date of the succession of States. If the currency is issued by an institution of issue belonging to the territory itself, independence will not change the situation. However, if the currency issued for the territory by and under the responsibility of a “metropolitan” institution of issue is to be kept in circulation, it must be backed by gold and reserves, for reasons already explained in the commentary to article 10.

(16) With regard to State funds, some examples may be given. On termination of the French Mandate, Syria and Lebanon succeeded jointly to the “common interests” assets, including “common interests” treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of

¹⁴⁷ United Kingdom, *Financial Agreement between the Government of the United Kingdom and the Government of India*, Cmd. 7195 (London, H.M. Stationery Office, 14 August 1947).

¹⁴⁸ For details, see I. Paenson, *Les Conséquences financières de la succession des Etats (1932–1953)* (Paris, Domat-Monchrestien, 1954), *passim* and in particular pp. 65–66 and 80.

¹⁴⁹ India, *Foreign Policy of India: Texts of Documents, 1947–64* (New Delhi, Lok Sabha (Secretariat), 1966), p. 212.

the Banque de Syrie et du Liban, although most of these assets were blocked and were released only progressively over a period extending to 1958.¹⁵⁰ In the case of the advances which the United Kingdom had made in the past towards Burma's budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of 20 years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the costs it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.¹⁵¹

(17) *Paragraph 1 (c)* of article 11 relates to the apportionment between the predecessor State and the successor State of movable State property of the predecessor State other than the property falling under subparagraphs (a) and (b), to the creation of which the dependent territory contributed. Like subparagraph (b), subparagraph (c) deals with such property regardless of whether it is situated in the territory of the predecessor State, of the successor State or of a third State. The question may be asked, for example, whether successor States can claim any part of the subscriptions made by the administering States to the shares of the capital stock of international or regional financial institutions such as the World Bank. Although there seems to be no precedent regarding the apportionment of such assets between the predecessor State and the successor State, the question may well arise in view of the fact that participation in various inter-governmental bodies of a technical nature is open to dependent territories as such. Such property may well be considered property which belonged as of right to the dependent territory in the proportion determined by the territory's contribution. The Commission believes that the rule set forth in subparagraph (c) (to the effect that the property of the predecessor State other than the property mentioned in subparagraphs (a) and (b), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of that territory) will make it possible to solve more easily and equitably many of the problems arising in this connexion.

(18) *Paragraph 1 (d)* regulates the problem of immovable property of the predecessor State situated in the territory which has become independent. In accordance with the principle of the passing of State property based on the criterion of linkage of the property to the territory, this subparagraph provides, as in the articles concerning other types of succession, that immovable property so situated shall pass to the newly independent State. This solution is generally accepted in legal literature and in State practice, although in neither case is express reference always made to "immovable" property of the predecessor State "situated in the territory"; rather, the reference is frequently to property in general, irrespective

of its nature or its geographical situation. Thus, if general transfer is the rule, the passing to the successor State of the more limited category of property provided for in this subparagraph must *a fortiori* be permitted.

(19) Reference may be made in this connexion to article 19, first paragraph, of the Declaration of principles concerning economic and financial co-operation of 19 March 1962 (Evian agreement between France and Algeria), which provided that:

Public real estate of the [French] State in Algeria will be transferred to the Algerian State . . .¹⁵²

In fact, all French military real estate and much of the civil real estate (excluding certain property retained by agreement and other property which is still in dispute) has, over the years, gradually passed to the Algerian State.

(20) A great many bilateral instruments or unilateral enactments of the administering or constituent Power simply record the express relinquishment by the predecessor State, without any *quid pro quo*, of all State property or, even more broadly, all public property without distinction, situated in the territory to which the succession of States relates. For example, the Constitution of the Federation of Malaya (1957) provided that all property and assets in the Federation or one of the colonies which were vested in Her Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or specifications, authorizes the transfer of all the property, of whatever kind, of the predecessor State.¹⁵³ Reference may also be made to the Final Declaration of the International Conference at Tangier, of 29 October 1956, although it is not strictly applicable since the International Administration of Tangier cannot be regarded as a State. Article 2 of the Protocol annexed to the Declaration stated that the Moroccan State, "which recovers possession of the public and private domain entrusted to the International Administration . . . receives the latter's property . . ." ¹⁵⁴ Among other examples that may be given is the "Draft agreement on Transitional Measures" of 2 November 1949 between Indonesia and the Netherlands, adopted at the end of the Hague Round-Table Conference (August–November 1949),¹⁵⁵ which provided for the devolution of all property, and not only immovable property, in the Netherlands public and private domain in Indonesia. A subsequent military agreement transferred to Indonesia, in addition to some warships and military maintenance equipment of the Netherlands fleet in Indonesia, which constituted movable property, all fixed installations and equipment used by the colonial troops.¹⁵⁶ Similarly, when the Colony of Cyprus attained independence, all property of the Government of the island (including immovable property) became the prop-

¹⁵⁰ For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (France, *Journal officiel de la République française, Lois et décrets* (Paris), 82nd year, No. 60 (10 March 1950), pp. 2697–2700); for Lebanon, see the Franco-Lebanese monetary and financial agreement of 24 January 1948 (*ibid.*, 81st year, No. 64 (14 and 15 March 1949), pp. 2651–2654; also in United Nations, *Treaty Series*, vol. 173, p. 99).

¹⁵¹ The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign, and for certain costs relating to demobilization.

¹⁵² United Nations, *Treaty Series*, vol. 507, p. 65.

¹⁵³ *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 85–86. See also the Constitution of the Independent State of Western Samoa (1962), which declared: "All property which immediately before Independence Day is vested in Her Majesty . . . or in the Crown . . . shall, on Independence Day, vest in Western Samoa" (*ibid.*, p. 117).

¹⁵⁴ United Nations, *Treaty Series*, vol. 263, p. 171.

¹⁵⁵ *Ibid.*, vol. 69, p. 266.

¹⁵⁶ *Ibid.*, p. 288.

erty of the Republic of Cyprus.¹⁵⁷ Libya received "the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration".¹⁵⁸ In particular, the following property was transferred immediately: "the public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya", as well as "the property in Libya of the Fascist Party and its organizations".¹⁵⁹ Likewise, Burma was to succeed to all property in the public and private domain of the colonial Government,¹⁶⁰ including fixed military assets of the United Kingdom in Burma.¹⁶¹

(21) The Commission is not unaware of agreements concluded between the predecessor State and the newly independent successor State under which the latter has relinquished in favour of the former its right of ownership to the part of the State property which had passed to it on the occurrence of the succession of States.¹⁶² The independence agreements were followed by various protocols concerning property under which the independent State did not succeed to the whole of the property belonging to the predecessor State. This was usually done in order to provide for common needs in an atmosphere of close co-operation between the former metropolitan State and the newly independent State. The forms those agreements took were, however, varied. In some cases, the pre-independence *status quo*, with no transfer of property, was provisionally maintained.¹⁶³ In others, devolution of the (public and private) domain of the former metropolitan State was affirmed as a principle, but was actually implemented only in the case of property which would not be needed for the operation of its various military or civilian services.¹⁶⁴ Sometimes the agreement with the

territory that had become independent clearly transferred all the public and private domain to the successor, which incorporated them in its patrimony, but under the same agreement expressly retroceded parts of them either in ownership or in usufruct.¹⁶⁵ In some cases the newly independent State agreed to a division of property between itself and the former metropolitan State, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and of the presence of the former metropolitan State.¹⁶⁶ Lastly, there have been cases where a treaty discarded the distinctions between public and private domains of the territory or of the metropolitan State, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements:

The Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by a global settlement based on equity and satisfying their respective needs.¹⁶⁷

(22) However, it should be pointed out that these instruments have usually been of a temporary character. The more balanced development of the political relations between the predecessor State and the newly independent successor State has in many cases enabled the successor State, sooner or later, to regain the immovable State property situated in its territory which had been the subject of agreements with the former metropolitan State.

(23) Paragraph 2 concerns the cases of newly independent States formed from two or more dependent territories. It states that the general rules set out in paragraph 1 of article II apply to such cases. As examples of such newly independent States, mention may be made

¹⁵⁷ Treaties concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. United Nations, *Treaty Series*, vol. 382, annex E, pp. 130-138, article 1 and *passim*.

¹⁵⁸ United Nations General Assembly resolution 388 (V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya", article 1.

¹⁵⁹ *Ibid.* The inalienable property of the State is defined in articles 822-828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks (i.e. immovable property), arms, munitions, etc. (i.e. movable property).

¹⁶⁰ Government of Burma Act, 1935.

¹⁶¹ United Kingdom, *Treaty between the Government of the United Kingdom and the Provisional Government of Burma Regarding the Recognition of Burmese Independence and Related Matters*, Annex: Defence Agreement signed on 29 August 1947 in Rangoon, Cmd. 7360 (London, H.M. Stationery Office, 1948).

¹⁶² See G. Fouilloux: "La succession aux biens publics français dans les Etats nouveaux d'Afrique", in *Annuaire français de droit international*, *Annuaire français de droit international*, 1965 (Paris), vol. XI (1966), pp. 885-915. Cf. also G. Fouilloux, "La succession des Etats de L'Afrique du Nord aux biens publics français", in *Annuaire de L'Afrique du Nord*, 1966, pp. 51-79.

¹⁶³ Agreement between the Government of the French Republic and the Government of the Republic of Chad concerning the transitional arrangements to be applied until the entry into force of the agreements of co-operation between the French Republic and the Republic of Chad, signed in Paris on 12 July 1960 (*Materials on Succession of States (op. cit.)*, pp. 153-154), article 4. A protocol to a property agreement was signed later, on 25 October 1961. It met the concern of the two States to provide for "common needs" and enabled the successor State to waive the devolution of certain property (see Decree No. 63-271 of 15 March 1963 publishing the Protocol to the property agreement between France and the Republic of Chad of 25 October 1961 (with the text of the Protocol annexed), in: France, *Journal officiel de la République française*, *Lois et décrets* (Paris), 95th year, No. 69 (21 March 1963), pp. 2721-2722).

¹⁶⁴ See Decree No. 63-270 of 15 March 1963 publishing the Convention concerning the property settlement between France and

Senegal, signed on 18 September 1962 (with the text of the Convention annexed), *ibid.*, p. 2720. Article 1 establishes the principle of the transfer of "ownership of State appurtenances registered . . . in the name of the French Republic" to Senegal. However, article 2 specifies: "Nevertheless, State appurtenances shall remain under the ownership of the French Republic and be registered in its name if they are certified to be needed for the operation of its services . . . and are included in the list" given in an annex. This provision concerns, not the *use* of State property for the needs of the French services, but the *ownership* of such property.

¹⁶⁵ A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26 October 1963), in: France, *Journal officiel de la République française*, *Lois et décrets* (Paris), 95th year, No. 256 (31 October 1963), pp. 9707-9708. Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

¹⁶⁶ Cf. Decree No. 63-268 of 15 March 1963 publishing the Protocol to the property agreement between France and the Gabonese Republic of 6 June 1961, in: France, *Journal officiel de la République française*, *Lois et décrets* (Paris) 95th year, No. 69 (21 March 1963), pp. 2718-2719.

¹⁶⁷ Article 31 of the Franco-Malagasy agreement of 27 June 1960 concerning economic and financial co-operation, approved by a Malagasy Act of 5 July 1960 and by a French Act of 18 July 1960 (France, *Journal officiel de la République française*, *Lois et décrets* (Paris), 92nd year, No. 167 (20 July 1960), p. 6615) [translation by the Secretariat]. A Franco-Malagasy Protocol on property was signed later, on 18 October 1961 (Decree No. 63-269 of 15 March 1963 publishing this Protocol, in: France, *Journal officiel de la République française*, *Lois et décrets* (Paris), 95th year, No. 69 (21 March 1963), pp. 2719-2720). This confirms the situation created by another economic co-operation agreement of 27 June 1960 and acknowledges—but in this context—Madagascar's ownership of the remaining State appurtenances, although France retains the ownership of military premises and constructions.

of Nigeria, which was created out of four former territories, namely, the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons; Ghana, which was formed from the former colony of the Gold Coast, Ashanti, the Northern Territories Protectorate and the Trust Territory of Togoland; and the Federation of Malaya, which emerged in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. The Commission finds no reason to depart from the formula contained in article 30, paragraph 1, of the 1978 Vienna Convention, which deals with the case of newly independent States formed from two or more territories in the same way as the case of newly independent States which emerge from one dependent territory, for the purpose of applying the general rules concerning succession in respect of treaties.

(24) *Paragraph 3* involves a dependent territory which becomes part of the territory of an existing State other than the administering State of the dependent territory. As explained above,¹⁶⁸ the Commission considered it more appropriate to deal with this case together with that of newly independent States, unlike the 1978 Vienna Convention, which included this case under "succession in respect of part of territory" together with the case of simple transfer of part of a territory. Association or integration with an independent State is a mode of implementing the right of self-determination of peoples, exactly like the establishment of a sovereign and independent State, as is clearly stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It is therefore more logical to include this paragraph in an article dealing with newly independent States. In view of the basic similarity of the questions involved in succession in respect of State property when the successor State is a newly independent State and when it is a State with which a dependent territory has been integrated or associated, the present paragraph calls for the application to both cases of the same general rules provided for in paragraph 1 of the article.

(25) *Paragraph 4* is a provision which confirms that the principle of the permanent sovereignty of every people over its wealth and natural resources takes precedence over agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the principles stated in article 11. The principle of the permanent sovereignty of every people over its wealth and natural resources has been forcefully affirmed in a number of General Assembly resolutions and in other United Nations instruments.¹⁶⁹

(26) The formulation of the Charter of Economic Rights and Duties of States under the auspices of the United Nations Conference on Trade and Development looms large among recent developments within the

United Nations system concerning permanent sovereignty over natural resources. This Charter, which was adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, should, according to the resolution, "constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries". The 15 fundamental principles which, according to this Charter (chapter I), should govern economic as well as political relations among States, include:

Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development.*

State property is certainly one of those necessary "natural means". Article 2 of this Charter (para. 1) states that:

Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

Expanding the passage from the resolution quoted above, article 16 states, in paragraph 1, that:

It is the right and duty of all States, individually and collectively, to eliminate colonialism . . . neo-colonialism . . . and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the *restitution** and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

(27) The General Assembly, meeting in special session for the first time in the history of the United Nations to discuss economic problems following the "energy crisis", gave due prominence to the "full permanent sovereignty of every State over its natural resources and all economic activities" in its Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI), of 1 May 1974). In section VIII of its Programme of Action on the Establishment of a New International Economic Order (resolution 3202 (S-VI) of 1 May 1974), the Assembly stated that:

All efforts should be made:

(a) To defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources.

(28) Just as individuals are equal before the law in a national society, so all States are said to be equal in the international sphere. But in spite of this theoretical equality, flagrant inequalities remain among States so long as sovereignty—a system of reference—is not accompanied by economic independence. When the elementary bases of national economic independence do not exist, it is idle to speak of the principle of sovereign equality of States. If it is really desired to free the principle of the sovereign equality of States from its large element of illusion, the formulation of the principle should be adapted to modern conditions in such a way as to restore to the State the elementary bases of its national economic independence. To this end, the principle of economic independence, invested with a new and vital legal function and elevated accordingly to the status of a principle of contemporary international law, must be reflected, in particular, in the right of peoples to dispose of their natural resources and in the prohibition of all forms of unwarranted intervention in the economic affairs of States, together with the outlawing of the use of force and of any form of coercion in economic and commercial

¹⁶⁸ See para. (5) of the introductory commentary to sect. 2, above.

¹⁶⁹ See, for example, General Assembly resolutions 626 (VII) of 21 December 1952; 1803 (XVII) of 14 December 1962; 2158 (XXI) of 25 November 1966; 2386 (XXIII) of 19 November 1968; and 2692 (XXV) of 11 December 1970. See also Economic and Social Council resolutions 1737 (LIV) of 4 May 1973, and 1956 (LIX) of 25 July 1975. See, further, article 1, para. 2, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, annex).

relations. General Assembly resolution 1514 (XV), of 14 December 1960, which did not neglect the right of peoples to dispose of their natural resources, and, more particularly, resolution 1803 (XVII) and other subsequent resolutions which affirmed the principle of the permanent sovereignty of States over their natural resources,¹⁷⁰ demonstrate the efforts of the General Assembly to make a legal reality of the fundamental matter of the principle of economic independence, and to remedy the disturbing fact that the gap between developed and developing States is constantly widening.

(29) It is by reference to these principles that an appraisal should be made of the validity of the so-called "co-operation" or "devolution" agreements and of all bilateral instruments which, under the pretext of establishing "special" or "preferential" ties between the new States and the former colonial Powers, impose on the former excessive conditions which are ruinous to their economies. The validity of treaty relations of this kind should be measured by the degree to which they respect the principles of political self-determination and economic independence. Some members of the Commission expressed the view that any agreements which violate these principles should be void *ab initio*, without even any need to wait until the new State is in a position formally to denounce their unfair character. Their invalidity should derive intrinsically from contemporary international law and not simply from their subsequent denunciation.

(30) Devolution agreements must therefore be judged according to their content. Such agreements do not, or only rarely, observe the rules of succession of States. In fact, they impose new conditions for the independence of States. For example, the newly independent State can remain independent only if it agrees not to claim certain property, or to assume certain debts, extend certain laws or respect certain treaties of the administering Power. Therein lies the basic difference from the other types of succession, where the independence of the will of the contracting parties must be recognized. In the case of devolution agreements, freedom to conclude an agreement results in conditions being imposed on the very independence of the State itself. Through their restrictive content such agreements institute a "probation" system, the conditional independence, of the newly independent State. It is for this reason that the question of their validity must be raised with respect to their content.

(31) In the light of the foregoing considerations, the Commission, while being aware that the principle of permanent sovereignty over wealth and natural resources applies in the case of *every* people and not only of peoples of newly independent States, nevertheless thought it particularly relevant and necessary to stress that principle in the context of succession of States relating to newly independent States.

(32) In adopting article 11 on first reading, one member of the Commission expressed reservations concerning its text. In his view, paragraph 1 of that article, literally interpreted, would go too far to be applicable in practice. For example, subparagraph (a) might apply to movable property which had originated in the territory before its dependence and been acquired by the predecessor State through the normal course of commercial transactions or by way of gift. Furthermore, in his view, the words

"connected with the activity of the predecessor State" in subparagraph (b) were not sufficiently clear, and the application of subparagraph (c) would involve extremely difficult problems.

Article 12. *Uniting of States*

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

Commentary

(1) In the present draft, the Commission uses the term "uniting of States" in the same sense as it did in the 1974 draft articles on the succession of States in respect of treaties, namely, the "uniting in one State of two or more States, which had separate international personalities at the date of the succession".¹⁷¹ Article 12 covers the case where one State merges with another State, even if the international personality of the latter continues after they have united. It should thus be distinguished from the case of the emergence of a newly independent State out of two or more dependent territories, or from the case of a dependent territory which becomes integrated or associated with a pre-existing State, which have been dealt with in article 11.

(2) As the Commission wrote in 1974, the succession of States envisaged in the present article does not take account of the particular form of the internal constitutional organization adopted by the successor State:

The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions . . .

Being concerned only with the uniting of two or more States in one State, associations of States having the character of intergovernmental organizations such as, for example, the United Nations, the specialized agencies, OAS, the Council of Europe, CMEA, etc., fall completely outside the scope . . . ; as do some hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new State and do not therefore constitute a succession of States.¹⁷²

(3) The formulation in article 12 of the *international* legal rule governing succession to State property in cases of the uniting of States, is limited to setting forth a general rule for the passing of State property from the predecessor States to the successor State, while making a provision of *renvoi* to the internal law of the successor State as far as the internal allocation of the property which passes is concerned. Thus, *paragraph 1* states that when two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State, and *paragraph 2* provides that the allocation of the property so passed as belonging to the successor State itself or, as the case may be, to its

¹⁷⁰ See foot-note 169 above.

¹⁷¹ *Yearbook . . . 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, chap. II, sect. D, para. (1) of the commentary to articles 30 and 31. See the 1978 Vienna Convention, article 31.

¹⁷² *Ibid.*, paras. (2) and (3) of the commentary.

component parts, shall be governed by the internal law of the successor State. Paragraph 2 is, however, qualified by the words "Without prejudice to the provision of paragraph 1", in order to stress the provision of paragraph 1 as the basic international legal rule of the article.

(4) "Internal law" as referred to in *paragraph 2* includes, in particular, the constitution of the State and any other kind of internal legal rules, written or unwritten, including those which effect the incorporation into internal law of international agreements.¹⁷³

Article 13. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) **immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;**

(b) **movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;**

(c) **movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.**

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 14. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) **immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;**

(b) **immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;**

(c) **movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;**

(d) **movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.**

¹⁷³ Examples of such internal law are: the Constitution of the United States of America [1787] (article IV, section 3), in: A. P. Blaustein and G. H. Flanz, eds., *Constitutions of the Countries of the World: United States of America* (Dobbs Ferry, N.Y., Oceana, 1975); the Swiss Constitutions of 1848 (article 33) and of 1874 (article 22), in: C. Hilty, *Les Constitutions fédérales de la Suisse* (Neuchâtel, Attinger, 1891), pp. 451 and 443; the Malaysia Act of 1963 (section 75), in: United Nations, *Materials on Succession of States (op. cit.)*, pp. 92-93.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Commentary to articles 13 and 14

(1) *Articles 13 and 14* both deal with cases where part or parts of the territory of a State separate from that State and form one or more individual States. However, article 13 concerns the case of secession of States where the predecessor State continues its existence, while article 14 relates to the case of dissolution of States where the predecessor ceases to exist after the separation of parts of its territory.

(2) It may be recalled that, in its 1972 provisional draft articles on succession of States in respect of treaties, the Commission made a clear distinction between the separation of part of a State, or secession, and the dissolution of a State.¹⁷⁴ However, that approach having been disputed by a number of States in their comments on the draft¹⁷⁵ and also by certain representatives in the Sixth Committee at the twenty-eighth session of the General Assembly, the Commission subsequently, in its 1974 draft articles, somewhat modified the treatment of these two cases. While maintaining the theoretical distinction between the dissolution of a State and the separation of parts of a State, it dealt with both cases together in one article from the standpoint of the successor States (article 33), and at the same time made provision for the case of separation of parts of a State from the standpoint of the predecessor State which continues to exist (article 34).¹⁷⁶

(3) With regard to the question of succession in respect of State property, the Commission believes that the distinction between secession and dissolution should be maintained in view of the special characteristics of succession in that sphere. It considers that if the distinction was deemed to be valid for succession in respect of treaties, it is the more so for the purposes of succession in respect of State property. If the predecessor State survives, it cannot be deprived of all its State property; and if it disappears, its State property cannot be left uninherited.

(4) *Paragraph 1 (a) of articles 13 and 14* lays down a common rule relating to the passing of immovable State property, according to which unless it is otherwise agreed by the predecessor State and the successor State, or when the predecessor State ceases to exist, by the successor States concerned, immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated. As has been explained, this basic rule, with slight variations, has been given for all the types of succession of States provided for in section 2 of part II of the draft.¹⁷⁷

(5) Some examples of relevant State practice can be cited in the present context. With regard to the separation of a part or parts of a State under *article 13*, it should first be noted that before the establishment of the United Nations most examples of secession were to be found

¹⁷⁴ *Yearbook . . . 1972*, vol. II, pp. 292 and 295, document A/8710/Rev.1, chap. II, sect. C, articles 27 and 28.

¹⁷⁵ *Yearbook . . . 1974*, vol. II (Part One), pp. 68-69, document A/CN.4/278 and Add.1-6, paras. 390-391.

¹⁷⁶ *Ibid.*, pp. 260-266, document A/9610/Rev.1, chap. II, sect. D, articles 33 and 34. See 1978 Vienna Convention, articles 34 and 35.

¹⁷⁷ See para. (11) of the introductory commentary to sect. 2, above.

among cases of the "secession of colonies", because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State, since according to contemporary international law what we are concerned with is newly independent States resulting from decolonization under the Charter of the United Nations. Since the establishment of the United Nations, there have been only three cases of secession which were not cases of decolonization: the separation of Pakistan from India, the withdrawal of Singapore from Malaysia, and the secession of Bangladesh. In the case of Pakistan, according to one author, an Expert Committee was appointed on 18 June 1947 to consider the problem of apportionment of the property of British India, and the presumption guiding its deliberations was that "India would remain a constant international person, and Pakistan would constitute a successor State".¹⁷⁸ Thus, Pakistan was regarded as a successor State by a pure fiction. On 1 December 1947, an agreement was concluded between India and Pakistan under which each of the Dominions would become the owner of the immovable property situated in its territory.¹⁷⁹

(6) An old example of State practice is to be found in the Treaty of 19 April 1839 concerning the Netherlands and Belgium, article XV of which provided as follows:

Public or private utilities, such as canals, roads or others of a similar nature constructed, in whole or in part, at the expense of the Kingdom of the Netherlands, shall belong, with the benefits and charges attaching thereto, to the country in which they are situated.¹⁸⁰

The same rule was applied in the case of the Federation of Rhodesia and Nyasaland in 1963, after which "freehold property of the Federation situated in a Territory would vest in the Crown in right of the Territory".¹⁸¹

(7) As far as doctrine is concerned, this aspect of State succession, namely, succession through secession or dissolution, has not been given much attention in legal literature. The writings of A. Sánchez de Bustamante Sirvén may, however, be cited. On the question of secession, he stated that:

In the sphere of principles, there is no difficulty about the general principle of the passing of public property, except where the devolution of a particular item is agreed on for special reasons.¹⁸²

He also refers to the draft code of international law by E. Pessoa, article 10 of which provided that "If a State is formed through the emancipation of a province or region, property in the public and private domain situated in the detached territory passes to it."¹⁸³

The same author writes on the cases of dissolution of States as follows:

In cases where a State is divided into two or more States and none of the new States retains or perpetuates the personality of the State which has ceased to exist, the doctrines with which we are already familiar [the

principle that property passes to the successor State] must be applied to public and private property which is within the boundaries of each of the new States.¹⁸⁴

(8) As for immovable State property of the predecessor State situated outside its territory, no specific provision is made in article 13, in conformity with the general principle of the passing of State property applied throughout the articles of section 2 of part II of the draft, which requires the geographical location of that State property in the territory to which the succession of States relates. The common rule stated in paragraph 1 (a) is, however, tempered in the case of both articles by the provisions of paragraph 3 of article 13 and paragraph 2 of article 14, which reserve any question of equitable compensation that may arise as a result of a succession of States. However, in the case of dissolution of the predecessor State, immovable State property should naturally pass to the successor States. Since immovable property is indivisible, article 14, paragraph 1 (b) states that such property shall pass to one of the successor States, with the condition that the other successor State or States should be equitably compensated.

(9) The foregoing rule conforms to the opinions of publicists, who generally take the view that the predecessor State, having completely ceased to exist, no longer has the legal capacity to own property and that its immovable property abroad should therefore pass to the successor State or States. It is the successor State which has the better title to such property, having, after all, formed part of the State that has ceased to exist. The question is not that on the extinction of the predecessor State the successor receives the State property of the predecessor because otherwise the property would become abandoned and ownerless. Abandonment of the property, if that is the case, is not the cause for the occurrence of a right of succession; at the most, it is the occasion for it. In any event, in practice, such property is normally apportioned under special agreements between the successor States. Thus, in the Agreement of 23 March 1906 concerning the settlement of economic questions arising in connexion with the dissolution of the union between Sweden and Norway, the following provisions are found in article 7:

The right of occupation of the consular premises in London, which was acquired on behalf of the "Joint Fund for Consulates" in 1877 to have effect until 1945, and which is at present enjoyed by the Swedish Consul-General in London, shall be sold by the Swedish Consul-General. . . . The proceeds of the sale shall be apportioned equally between Sweden and Norway.¹⁸⁵

(10) In connexion with a more recent case, it has been reported that, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, agreements were concluded for the devolution of property situated outside the territory of the union under which Southern Rhodesia was given Rhodesia House in London and Zambia the Rhodesian High Commissioner's house.¹⁸⁶

(11) Article 13, paragraph 1 (b) and article 14, paragraph 1 (c) set forth the basic rule relating to movable State property, which is applied consistently throughout section 2 of part II of the draft. It stipulates that movable State property of the predecessor State connected with the activity of that State in respect of the territory (territories)

¹⁷⁸ D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *Internal Relations*, p. 220.

¹⁷⁹ *Ibid.*

¹⁸⁰ *British and Foreign State Papers, 1838-1839*, vol. XXVII (London, Harrison, 1856), pp. 997-998.

¹⁸¹ O'Connell, *op. cit.*, p. 230.

¹⁸² A. Sánchez de Bustamante y Sirvén, *Drout international public*, French trans. P. Goulé (Paris, Sirey, 1936), vol. III, p. 310.

¹⁸³ *Ibid.*, pp. 281-282.

¹⁸⁴ *Ibid.*, p. 335.

¹⁸⁵ Baron Descamps and L. Renault, *Recueil international des traités du XX^e siècle, 1906* (Paris, Rousseau), pp. 861-862.

¹⁸⁶ O'Connell, *op. cit.*, p. 231.

to which the succession relates shall pass to the successor State.¹⁸⁷

(12) When Pakistan was separated from India under an agreement signed on 1 December 1947, a great deal of equipment, especially arms, was attributed to India, which undertook to pay Pakistan a certain sum to contribute towards the construction of munitions factories.¹⁸⁸ Upon the dissolution of the Federation of Rhodesia and Nyasaland, the assets of the joint institution of issue, and gold and foreign exchange reserves, were apportioned in proportion to the volume of currency circulating or held in each territory of the predecessor State which became a successor State.¹⁸⁹

(13) *Article 13, paragraph 1 (c)* and *article 14, paragraph 1 (d)* enunciate a common rule according to which movable State property of the predecessor State, other than that connected with the activity of that State in respect of the territory (territories) to which the succession of States relates, shall pass to the successor State or States in an equitable proportion. The reference to equity, a key element in the material content of the provisions regarding the distribution of property which thus has the character of a rule of positive international law, has already been explained.¹⁹⁰

(14) The agreement concerning the settlement of economic questions arising in connexion with the dissolution of the union between Sweden and Norway contains the following provisions:

Article 6. (a) Sweden shall repurchase from Norway its . . . half-share in movable property at legations abroad which was purchased on joint account.* An expert appraisal of such property shall be made and submitted for approval to the Swedish and Norwegian Ministries of Foreign Affairs.

(b) Movable property at consulates which was purchased on joint account shall be apportioned between Sweden and Norway, without prior appraisal, as follows:

There shall be attributed to Sweden the movable property of the consulates-general in . . .

There shall be attributed to Norway the movable property of the consulates-general in . . .¹⁹¹

(15) The practice followed by Poland when it was reconstituted as a State upon recovering territories from Austria-Hungary, Germany and Russia was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories it regained or to the acquisition of which those territories had contributed. Poland claimed its share of such property in proportion to the contribution of the territories which it recovered. However, this rule apparently has not always been followed in diplomatic practice. Upon the fall of the Hapsburg dynasty, Czechoslovakia sought the restitution of a number of vessels and tugs for navigation on the Danube. An arbitral award was made.¹⁹² In the course of the proceedings,

Czechoslovakia submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subsidy from them, on the ground that these interests had been bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that those countries had contributed thereto in proportion to the taxes paid by them, and were therefore to the same proportionate extent the owners of the property.¹⁹³ The position of Austria and Hungary was that, in the first place, the property was not *public* property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "the Treaties themselves do not give Czecho-Slovakia the right to State property except to such property situated in Czecho-Slovakia".¹⁹⁴ The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of the passing of public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

(16) *Article 13, paragraph 2* states that the rules enunciated in paragraph 1 of the same article apply when part of the territory of a State separates from that State and unites with another State. Reference to this provision has already been made in the commentary to article 10,¹⁹⁵ where the case concerned is distinguished from that covered by the provisions of article 10, namely, the transfer of part of the territory of a State. In the 1974 draft on succession in respect of treaties, the situations covered by paragraph 2 of article 13 and by article 10 were dealt with in a single provision,¹⁹⁶ since the question there was the applicability to both cases of the same principle of treaty law, that of moving treaty-frontiers. In the context of succession of States in respect of matters other than treaties, however, there are differences between the two situations which call for regulation by means of separate legal provisions. These differences are connected principally with whether or not it is necessary to consult the population of the territory to which the succession of States relates, depending on the size of the territory and of its population and, in consequence, its political, economic and strategic importance, and also with the fact of the usually politically charged circumstances that surround the succession of States in the case to which paragraph 2 of article 13 relates. As was explained above,¹⁹⁷ the differences which ensue in the legal sphere are of two kinds: first, in the case covered by article 13, paragraph 2, where part of the territory of a State separates from that State and unites with another State, the agreement between the predecessor State and the successor State is not given the pre-eminent role it has under article 10, which is concerned with the transfer of

¹⁸⁷ See para. (15) of the introductory commentary to sect. 2, above.

¹⁸⁸ O'Connell, *op. cit.*, pp. 220–221.

¹⁸⁹ *Ibid.*, p. 196.

¹⁹⁰ See paras. (17) *et seq.* of the introductory commentary to sect. 2, above.

¹⁹¹ Descamps and Renault, *op. cit.*, pp. 860–861.

¹⁹² Case of the cession of vessels and tugs for navigation on the Danube, Allied Powers (Greece, Romania, Serb-Croat-Slovene Kingdom, Czechoslovakia) v. Germany, Austria, Hungary and Bulgaria (*Decision: Paris: 2 August 1921, Arbitrator: Walter D. Hines (U.S.A.)*). See United Nations, *Reports of International Arbitral Awards*, vol. 1 (United Nations publication, Sales No. 1948.V.2), pp. 97–212.

¹⁹³ *Ibid.*, p. 120.

¹⁹⁴ *Ibid.*, pp. 120–121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers, 1919*, vol. 112 (*op. cit.*), pp. 412–414), and article 191 of the Treaty of Trianon (*ibid.*, 1922, vol. 113 (*op. cit.*), pp. 564–565).

¹⁹⁵ See paras. (5), (9) and (10) of the commentary to article 10, above.

¹⁹⁶ Article 14, which corresponds to article 15 of the 1978 Vienna Convention.

¹⁹⁷ See paras. (9) and (10) of the commentary to article 10, above.

part of the territory of a State to another State. Secondly, by contrast with article 10, article 13 provides for the passing to the successor State of a third category of movable State property, namely, movable State property of the predecessor State other than that connected with the activity of that State in respect of the territory to which the succession of States relates.

(17) Lastly, *article 13, paragraph 3* and *article 14, paragraph 2* lay down the common rule that the general rules contained in these articles are without prejudice to any question of equitable compensation that may arise as a result of a succession of States. There is a further example, in section 2, of a rule of positive international law incorporating the concept of equity, to which reference has already been made.¹⁹⁸ It is intended to ensure a fair compensation for any successor State, as well as any predecessor State which would be deprived of its legitimate share as a result of the exclusive attribution of certain property either to the predecessor State or to the successor State or States. For example, there may be cases where all or nearly all the immovable property belonging to the predecessor State is situated in that part of its territory which later separates to form a new State, although such property was acquired by the predecessor State with common funds. If, under paragraph 1 (a) of articles 13 and 14, such property were to pass to the successor State in the territory of which it is situated, the predecessor might be left with little or no resources permitting it to survive as a viable entity. In such a case, the rule contained in article 13, paragraph 3, and article 14, paragraph 2, should be applied in order to avoid this inequitable result.

PART III

STATE DEBTS

SECTION I. GENERAL PROVISIONS

Article 15. Scope of the articles in the present Part

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

Commentary

As already noted,¹⁹⁹ the Commission, with a view to maintaining as close a parallelism as possible between the provisions concerning succession in respect of State debts in the present part and those relating to succession in respect of State property in part II, decided to include at the beginning of part III a provision on the scope of the articles contained therein. Article 15 therefore, provides that the articles in part III apply to the effects of a succession of States in respect of State debts. It corresponds to article 4 of the draft and reproduces its wording, with the required replacement of the word "property" by the word "debts". The article is intended to make it clear that part III of the draft deals with only one category of public debts, namely, State debts, as defined in the following article.

¹⁹⁸ See paras. (17) *et seq.* of the introductory commentary to sect. 2 above.

¹⁹⁹ See para. 51 above.

Article 16. State debt

For the purposes of the articles in the present Part, "State debt" means:

(a) any financial obligation of a State towards another State, an international organization or any other subject of international law;

(b) any other financial obligation chargeable to a State.

Commentary

(1) Article 16, which corresponds to article 5, contains a definition of the term "State debt" for the purposes of the articles in part III of the draft. In order to determine the precise limits of this definition, it is necessary at the outset to ascertain 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. Also, it is necessary to specify which "State" is meant.

The concept of debt and the relationships which it establishes

(2) The concept of "debt" is one which writers do not usually define because they consider the definition self-evident. Another reason is probably that the concept of "debt" involves a two-way or two-sided problem, which 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"). This latter point suggests one element of a definition, in that 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. Thus, the relationship created by such an obligation 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 which 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.²⁰⁰

²⁰⁰ H., L. and J. Mazeaud, *Leçons de droit civil*, 4th ed. (Paris, Montchrestien, 1969), vol. II, p. 1093.

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) For the purposes of the present part, the question arises whether the foregoing also applies in international law. Especially where succession of States is concerned, the main question is whether and in what circumstances a triangular relationship is created and dissolved between a third State as creditor,²⁰¹ a predecessor State as first debtor and a successor State which agrees to assume the debt.

Exclusion of debts of a State other than the predecessor State

(6) 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; but in fact, only the debts of one of them are legally "involved" as a result of the phenomenon of State succession: those of the predecessor State.

(7) A third State might assume financial obligations towards another third State, towards the successor State or towards the predecessor State. In the first case, the financial relationship—like any other relationship of whatever kind between two States both of which are third parties as regards the State succession—obviously cannot be affected in any way by the phenomenon of territorial change that has occurred, or by its consequences with respect to State succession. The same can be said of any financial relationship which may 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 State (or to a potential successor State) should come to be treated differently simply because of the succession of States. This succession does not alter the international personality of the successor State in cases where it existed as a State before the occurrence of the succession. The fact that the succession may have the effect of modifying, by enlargement, the territorial composition of the successor State does not affect, and should not in future affect, debts owed to it by a third State. If the successor State had no international personality as a State at the time the debt of the third State arose (e.g. in the case of a commercial debt between a third State and a territory having the potential to become independent or to detach itself from the territory of a State in order to form another State), it is perfectly clear that the acquisition of statehood would not cause the successor State to forfeit its rights vis-à-vis the third State.

(8) As to debts owed by a third State to the predecessor State, they are *debt-claims* of the predecessor State against the third State. Such debt-claims are State property and are considered in the context of succession of States in respect of State property. They are, therefore, not covered in the present part.

(9) The successor State might assume financial obligations to either a third State or the predecessor State. In the case of a debt to a third State, no difficulty arises. In this instance, the debt came into existence at the time when the succession of States occurred—in other words, precisely when the successor State acquired the status of successor. To speak of a debt of the successor State to a third State, that debt must have been assumed by the successor State on its own account, and in this case it is clearly unconnected with the succession of States which has occurred. The category of debt of the successor State to a third State which must be excluded from this part is precisely that kind of debt which, in the strict legal sense, is a debt of the successor State actually assumed by that State with respect to the third State and coming into existence in a context completely unconnected with the succession of States. In cases where this kind of debt was incurred after the succession of States, it is *a fortiori* excluded from the present part. On the other hand, any debt for which the successor State could be held liable vis-à-vis a third State because of the very fact of the succession of States would, strictly speaking, be not a debt assumed directly by the former with respect to the latter but rather a debt transmitted indirectly to the successor State as a result of the succession of States.

(10) The debt of the successor State to the predecessor State can have three possible origins. First, it may be completely unconnected with the relationship between the predecessor State and the successor State created and governed by the succession of States, in which case it should clearly remain outside the area of concern of the draft. Second, it can have its origin in the phenomenon of State succession, which may make the successor State responsible for a debt of the predecessor State. Legally speaking, however, this is not a debt of the successor State, but a debt of the predecessor State transmitted to the successor State as a result of the succession of States. This case will be discussed in connexion with the debt of the predecessor State.²⁰² It concerns a debt which came into existence as part of the liabilities of the predecessor State prior to the succession of States, and the subject-matter of State succession is, precisely, to determine what happens to such debt. Strictly speaking, however, this case is no longer one of a debt to the predecessor State assumed previously by the successor State.

(11) Lastly, the debt may be owed by the successor State to the predecessor State as a result of the succession of States. In other words, there may be liabilities which would have to be assumed by the successor State during, and as a result 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. This no longer involves debts which originated previously, and the subject-matter of State succession is what ultimately happens to the latter type of debt. Here, the problem has already been solved by the succession of States. This is not to say that such debts do not relate to State succession, but simply that they no longer relate to it.

(12) The predecessor State may have assumed debts with respect to either the potential successor State or a third State. In both cases, these are debts directly related to the succession of States, the difference being that, in the

²⁰¹ Although in the following paragraphs of the commentary to the present articles reference will be made, for purposes of convenience only, to "a third State" as creditor, it should be understood that the relevant considerations are applicable also to international organizations or other subjects of international law as creditors.

²⁰² See para. (12) of this commentary, below.

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 other words, in this case, transmitting the debt would in fact mean not transmitting it, or extinguishing it. In any event, the basic subject-matter of State succession to debts is what becomes of debts assumed 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 which has occurred in the extent 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 debts is whether this change has any effects, and if so what effects, on debts contracted by the State in question.

Exclusion of debts of a non-State organ

(13) Debts occur in a variety of forms, the exact features of which should be ascertained in the interests of a sounder approach to the concept of State debt. The following brief review of different categories of debts may help to clarify that concept.

In State practice, in judicial decisions and in legal literature, a distinction is made in general between:

- (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 non-guaranteed debts;
- (k) State debts and other State debts termed "odious" debts, war debts or subjugation debts and, by extension, régime debts.

(14) A distinction should first of all 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 which usually is not of the same political nature as the State and which is in any event inferior to the State. Such a local authority has a territorial jurisdiction which is limited and is in any case less extensive than that of the State. It may be a federal unit, 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. The local authority may also have a degree of financial autonomy in order to be able to borrow in its own name. It nevertheless remains subordinate to the State, not being a part of the sovereign structure which is recognized as a subject of public international law. That is why the defining of "local authority" is normally a matter of internal public law, and no definition of it exists in international law.

(15) Despite this, writers on international law have at times concerned themselves with the question of defining

an authority such as "the commune". The occasion for this arose in particular when article 56 of the Regulations annexed to the Convention respecting the laws and customs of war on land, signed at The Hague on 18 October 1907²⁰³ and following the example of the 1899 Hague Convention, attempted to make provision for a system to protect public property, including property owned by municipalities (*communes*), in case of war. The term "commune" then attracted the attention of writers.²⁰⁴ 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.

(16) Strictly speaking, State succession should not be concerned with what happens to "local" debts because, prior to succession, such debts were, and after succession will be, the responsibility of the detached territory. Having never 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 which 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. Unfortunately, legal theory is not as clear on this point as would be desirable. There is in legal literature almost unanimous agreement on the rule that "local" debts should pass to the successor State. This may not be incorrect in substance, but at least it is badly expressed. If it is established absolutely that the debts in question are local debts, duly distinguished 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 they 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. However, in the case of one type of State succession, namely, that of newly independent States, debts proper to the territory, which are called "local" (in relation to the metropolitan territory of the colonial Power), would be assumed by the successor State, since in this case the detached territory and the successor State are one and the same.

(17) However, a careful distinction must be drawn between *local debts*, meaning those contracted by a territorial authority inferior to the State, for which the detached territory was responsible before the succession of States and for which it alone will be responsible afterwards, and debts which may be the responsibility of the State itself and for which the State is liable, incurred either for the general good of the national community or solely for the benefit of the territory now detached. Here there is subject-matter for the theory of State succession, the question being what happens to these two categories of debt on the occurrence of a succession of States. The comparison of general debts and special or "localized" debts which follows is intended to make the distinction clear.

²⁰³ J. B. Scott, *The Proceedings of the Hague Peace Conferences*, vol. I (New York, Oxford University Press, 1920), p. 623.

²⁰⁴ 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. 29–30 and foot-notes 34–35.

(18) In the past, a distinction was made between "general debt", which is regarded as State debt, and regional or local debts contracted, as was noted above, by an inferior territorial authority, which is solely responsible for this category of debts. It is possible nowadays 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, without the predecessor State's having to bear any portion of them. This is simply an application of the adage *res transit cum suo onere*.

(19) Writers differentiate between several categories of "local" debts, but do not always draw a clear dividing-line between those debts and "localized" debts. This should be gone into with more precision. "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 the 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.

(20) The following criteria may be tentatively suggested for distinguishing between localized State debt and local debt:

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

(b) Whether the part of territory which 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 which is detached;

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

Although these criteria are not absolutely sure guides, each of them can provide part of the answer to whether the debt should be considered more a local debt or more a localized State debt. The criteria show 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 the extent of its autonomy is in relation to the State. Moreover, even when the State's liability (in other words, the fact that the debt assumed is a State debt) is clear, it is not always possible to establish with certainty what the intended purpose of each individual loan is at the time when it is assumed, where the corresponding expenditure is to be effected, and whether the expenditure actually serves the interests of the detached territory.

(21) The personality of the debtor is still the least uncertain of the criteria. If a local territorial authority has itself assumed 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, the successor State will also not

be involved. There will be no subject-matter for State succession here. If the debt is assumed by a central Government, but expressly on behalf of the detached local authority, it is legally a State debt. It could 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.

(22) 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 a "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? 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 the purpose of which is to install settlers from the metropolitan country or to suppress an independence movement?²⁰⁵ 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 assumed for the purpose of making such expenditures are State debts.

(23) The third criterion, namely, the intended purpose and actual use of the debt contracted, in and of itself cannot provide the key for distinguishing between local (non-State) debts 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 which it has assumed to a local use. It is a State debt earmarked for territorial use. The criterion of intended purpose must be combined with the others in determining whether the debt is or is not a State debt. In other words, implicit in both the concept of local debt and that of 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.

(24) To refine the argument still further, it may be considered that, from this third point of view, there are three successive stages in the case of a localized State debt. First, the State must have intended the corresponding expenditures to be effected for the territory concerned (the principle of earmarking or intended use). Second, the State must actually have used the proceeds of the loan in the territory concerned (the criterion of actual use). Third, the expenditure must have been effected for the benefit and in the actual interest of the territory in

²⁰⁵ There is here the problem of "odious" debts, régime debts, war debts or subjugation debts; see paras. (41)–(43) of this commentary, below.

question (the criterion of the interest or benefit of the territory). On these terms, abuses by a central Government could be avoided and problems such as those of régime debts or subjugation debts could be solved in a just and satisfactory manner.

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

(26) 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 State succession to debts—what finally happens to 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 detached territory. Perhaps the predecessor State had no other property which could be used as security. It would therefore be unfair to place the burden of such a debt on the successor State, simply because the territory which 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. In the case of debts secured by local fiscal resources, 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 which 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 the State and the province can both secure their respective debts with local fiscal resources.

(27) 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 purposes 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".²⁰⁶

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

²⁰⁶ International Law Association, *Report of the Fifty-fourth Conference, held at The Hague, 23rd–29th August 1970* (London, 1971), p. 108.

In addition, a "*localized debt*" is a State debt which is used specifically by the State in a clearly defined portion of territory. Because State debts are not generally "localized", it is considered 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 to specify that a debt is "localized" is that it is a State debt which happens to be, by way of exception, geographically "situated". In short, while all local debts are by definition "localized", State debts usually are not; when they are, this must be expressly indicated so that it will be known that such is the case.

(29) The present part is limited to State debts, excluding from this term any debts which 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 does prove 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 to be State debts. There arises, first of all, a problem in defining a public establishment or public enterprise.²⁰⁷ These are entities distinct from the State 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. The Special Rapporteur on State responsibility described 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".²⁰⁸ In the

²⁰⁷ These two terms will be used interchangeably, even though the legal régime for the bodies in question may be different under the internal 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 hardly seem to make any 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).

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

International judicial bodies 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. W. N. Beichmann), publication of the Reparation Commission, annex 2145a (Paris, 1924) and United Nations, *Reports of Arbitral Awards*, vol. I (*op. cit.*), 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 (*op. cit.*), pp. 390 *et seq.*); and

(c) A decision of the P.C.I.J. in a case relating to a Hungarian public university establishment of 15 December 1933 (*Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (*op. cit.*), pp. 236 *et seq.*).

²⁰⁸ *Yearbook . . . 1971*, vol. II (Part One), p. 254, document A/CN.4/246 and Add.1–3, para. 163.

Certain Norwegian Loans case, considered by the International Court of Justice, the agent of the French Government stated:

... in internal 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 legal personality under internal law.²⁰⁹

(30) In its draft on State responsibility, the Commission has settled the question whether, in respect of international responsibility of the State, the debt of a public establishment can be considered a State debt. In respect of State succession, however, the answer to the question whether the debt of such a body is a State debt can obviously only be in the negative. The category of debts of public establishments will therefore be excluded from the scope of the present part of the draft in the same way as that of debts of inferior territorial authorities, despite the fact that 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.

(31) The preceding paragraphs show that the public character of a debt is absolutely necessary, but by no means sufficient, to identify it 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 which contracted it, so that it may be the State, 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 helpful in identifying a State debt. This term is too broad and covers not only State debts, which are the subject of the present debt of other public entities, whether or not of a territorial character.

(32) 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 International Law Association cites several examples:²¹⁰ certain expenses of former State services; debt-claims resulting from decisions of public authorities; debt-claims against public establishments of the State or companies belonging to the State; building subsidies payable by the State; salaries and remuneration of civil servants.²¹¹ While financial debts may be either public or private, administrative debts can only be public.

(33) Regarding political debts and commercial debts, while commercial debts may be State debts, debts of local authorities or public establishments or private debts, political debts are always State debts. The term "political debts", as described by one writer, 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.²¹²

The same writer adds that "a political debt is one which exists only between Governments, between one State and another. The creditor is a State, and the debtor is a State. It is of little consequence whether the debt arises from a loan or from war reparations."²¹³ He contrasts political debts, which establish between the creditor and the debtor a relationship between States, with commercial debts, which "are those arising from a loan contracted by a State with private parties, whether bankers or individuals".²¹⁴

(34) The International Law Association makes distinctions between 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 organizations.²¹⁵

(35) 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. An internal debt is one for which the creditors are nationals of the debtor State,²¹⁶ while external debt includes all debts contracted by the State with other States or with foreign bodies corporate or individuals.

(36) Delictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession of States, the solution of which is governed primarily by the principles relating to international responsibility of States.²¹⁷

(37) Although all debts, whether they are private, public or State debts, may or may not be secured in some manner, this part deals 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 which are specially secured by certain tax funds, it having been decided or agreed that the revenue from certain taxes would be used to secure the service of the State debt. Second, there may be cases in which State debts are

²¹² G. Jèze, "Les défaillances d'Etat", *Recueil des cours* ... 1935-III (Paris, Sirey, 1936), vol. 53, p. 383.

²¹³ *Ibid.*, pp. 383-384.

²¹⁴ *Ibid.*, p. 383.

²¹⁵ International Law Association, *op. cit.*, p. 106.

²¹⁶ See D. Bardonnnet, *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.

²¹⁷ *Ibid.*, p. 305. The author 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.*, with regard to succession of States in respect of delictual or quasi-delictual debts. See also ILA, *op. cit.*, p. 122 (appendix C, "Debts of the Belgian Congo", Brussels Court of Appeal, Bougnet et Hock v. Belgium, judgement of 4 December 1963).

²⁰⁹ *I.C.J. Pleadings, Certain Norwegian Loans* (1955), vol. II, p. 72. [Translation by the Secretariat.]

²¹⁰ International Law Association, *op. cit.*, pp. 118-121.

²¹¹ See *Materials on Succession of States (op. cit.)*, pp. 114-115 (Poldermans v. State of the Netherlands: judgement of 8 December 1955).

specially secured by specific property, the borrowing State having in a sense mortgaged certain national assets.

(38) A State's liability can arise not only from a loan contracted by that State itself, but also from a guarantee which 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. The World Bank, when granting a loan to a dependent territory, 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.²¹⁸ However, a study of the actual record of loans contracted with IBRD shows that a succession of States does not alter the previously existing situation. The dependent territory which attains independence remains the principal debtor, and the former administering Power remains the guarantor. The only difference, which has no real effect on what happens to the debt, is that the dependent territory has changed its legal status and become an independent State.

(39) The distinction to be made here serves not only to separate two complementary concepts but also to distinguish among a whole set of terms which are used at various levels. For the sake of strict accuracy, a contrast might be attempted between State debts and *régime debts* since the latter, as the term indicates, are debts contracted by a political régime or a Government having a particular political form. 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 would involve a mere succession of Governments in which régime debts may be repudiated. On the contrary, what is here involved is a succession of States, or, in other words, the question whether the régime debts of a predecessor State pass to the successor State. For the purposes of this part, régime debts must be regarded as State debts. The law of State succession 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.

(40) In the opinion of one writer, what is meant by régime debts is:

debts contracted by the dismembered State in the temporary interest of a particular political form, and the term can include, in peacetime, *subjugation debts* specifically contracted for the purpose of colonizing or absorbing a particular territory and, in wartime, *war debts*.²¹⁹

This is one application of the broader theory of "odious" debts, to which reference will be made in the ensuing paragraphs.

The question of "odious debts"

(41) In his ninth report,²²⁰ the Special Rapporteur included a chapter entitled "Non-transferability of 'odious' debts". That chapter dealt, first, with the definition of "odious debts". The Special Rapporteur re-

called, *inter alia*, the writings of jurists who referred to "war debts" or "subjugation debts"²²¹ and those who referred to "régime debts".²²² For the definition of odious debts, he proposed an article C, which read as follows:

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.

(42) Second, the chapter dealt with the determination of the fate of odious debts. The Special Rapporteur reviewed State practice concerning "war debts", including a number of cases of the non-passing of such debts to a successor State,²²³ as well as cases of the passing of such debts.²²⁴ He further cited cases of State practice concerning the passing or non-passing to a successor State of "subjugation debts".²²⁵ He proposed the following article D, concerning the non-transferability of odious debts:

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.

(43) The Commission, having discussed articles C and D, recognized the importance of the issues raised in

²²¹ For example, Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 293-294 and P. Fauchille, *Traité de droit international public*, 8th ed. of *Manual de droit international public*, ed. H. Bonfils (Paris, Rousseau, 1922), vol. 1 (part I), p. 352.

²²² For example, G. Jèze, *Cours de science des finances et de législation financière française*, 6th ed. (Paris, Giard, 1922), vol. 1 (part I), pp. 302-305, 327.

²²³ The report mentions, *inter alia*, the following examples: article 24 of the Treaty of Tilsit between France and Prussia (see E. H. Feilchenfeld, *Public Debts and State Succession* (New York, Macmillan, 1931), p. 91); the annexation of the Transvaal ("South African Republic") by the United Kingdom (*ibid.*, pp. 380-396, cf. J. de Louter, *Le droit international public positif* (Oxford, University Press, 1920), vol. 1, p. 229); peace treaties following the end of the First and Second World Wars, in particular article 254 of the Treaty of Versailles (*British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), pp. 124-125); article 203 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 405-407); article 141 of the Treaty of Neuilly-sur-Seine (*ibid.*, p. 821); article 186 of the Treaty of Trianon (*ibid.*, vol. CXIII, pp. 556-568); article 50 of the Treaty of Lausanne (League of Nations, *Treaty Series*, vol. XXVIII, pp. 41 and 43); and annexes X and XIV of the Treaty of Peace with Italy (United Nations, *Treaty Series*, vol. 49, pp. 209, 225).

²²⁴ For example, the 1720 treaty between Sweden and Prussia (see E. Feilchenfeld, *op. cit.*, p. 75, foot-note 6); the unification of Italy (*ibid.*, p. 269); and the assumption by Czechoslovakia, for a short period of time, of certain debts of Austria-Hungary (see O'Connell, *op. cit.*, pp. 420-421).

²²⁵ The Special Rapporteur made reference to the 1847 treaty between Spain and Bolivia (see below, para. (11) of the commentary to article 20); the question of Spanish debts with regard to Cuba in the context of the 1898 Treaty of Paris between Spain and the United States (see Feilchenfeld, *op. cit.*, pp. 337-342, cf. Rousseau, *op. cit.*, p. 459); article 255 of the Treaty of Versailles (for reference, see foot-note 223 above) and the Reply of the Allied and Associated Powers concerning the German colonization of Poland (*British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), p. 290); the question of Netherlands debts with regard to Indonesia in the context of the 1949 Round Table Conference and of the subsequent 1956 denunciation by Indonesia (see below, paras. (16)-(19) of the commentary to article 20); and the question of French debts in Algeria (see below, para. (36) of the commentary to article 20).

²¹⁸ G. R. Delaume, *Legal Aspects of International Lending and Economic Development Financing* (Dobbs Ferry, N.Y., Oceana, 1967), p. 321; K. Zemanek, "State succession after decolonization", *Recueil des cours* . . . 1965-III (Leyden, Sijthoff, 1965), vol. 116, pp. 259-260.

²¹⁹ C. Rousseau, *Droit international public* (Paris, Sirey, 1977), vol. III, p. 458.

²²⁰ *Yearbook* . . . 1977, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1.

connexion with the question of "odious" debts, but was of the opinion initially that the rules formulated for each type of succession of States might well settle the issues raised by the question and might dispose of the need to draft general provisions on it. In completing the first reading of this part, the Commission confirmed that initial view.

Definition of State debt

(44) Having in mind the foregoing considerations, the Commission adopted the text of article 16, which contains the definition of State debt for the purposes of the articles in part III of the draft. The reference in the text of the article to the "articles in the present Part" conforms to usage throughout the draft and in particular to the language of the corresponding provision in part II, namely, article 5. The text of article 16 refers to a "financial obligation" in order to make it clear that the debt in question involves a monetary aspect, and divides such financial obligations into two categories. The first is any financial obligation of a State "towards another State, an international organization or any other subject of international law" (*subparagraph (a)*), which may be characterized as an international financial obligation. The second category is "any other financial obligation chargeable to a State" (*subparagraph (b)*), which is intended to cover State debts whose creditors are not subjects of international law.

(45) The Commission adopted article 16, despite the reservations concerning subparagraph (*b*) expressed by some members, in whose view "State debt" should be limited to financial obligations arising at the *international* level. Furthermore, in the view of some members of the Commission, subparagraph (*b*) should not extend to "any other financial obligation chargeable to a State" when the creditor was an individual who was a national of the debtor predecessor State, be it a juridical or natural person. Other members, however, favoured subparagraph (*b*), in view of the volume and importance of the credit currently extended to States from foreign private sources. It was considered that the deletion of subparagraph (*b*) would lead to a limitation of the sources of credit available to States and international organizations, which would be detrimental to the interests of the international community as a whole and, in particular, to those of the developing countries that were in dire need of external financing for their development programmes and whose easier access to private capital markets was one of the objectives of the "North-South dialogue" on economic matters.²²⁶

Article 17. Obligations of the successor State in respect of State debts passing to it

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 articles in the present Part.

Commentary

(1) Article 6 (Rights of the successor State to State

property passing to it) lays down a rule confirming the dual juridical effect of a succession of States upon the respective rights of the predecessor State and the successor State as regards State property passing from the former to the latter, consisting in the extinction of the rights of the predecessor State to the property in question and the simultaneous arising of the rights of the successor State to that property. Article 17 embodies a parallel rule regarding the obligations of the predecessor and successor States in respect of State debts which pass to the successor State in accordance with the provisions of the articles in part III.

(2) It should be stressed that this rule applies only to the State debts which actually pass to the successor State "in accordance with the provisions of the articles in the present Part". Particularly important among such provisions is article 18, which, as a complement to article 17, guarantees the rights of creditors.

Article 18. Effects of the passing of State debts with regard to creditors

1. A succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State or an international organization asserting a claim unless:

(a) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part; or

(b) the agreement has been accepted by that third State or international organization.

Commentary

(1) In part II (State property) of the present draft articles, the Commission has adopted a rule, i.e., article 9, for the protection of the property of a third State from any "disturbance" as a result of territorial change through a succession of States. If article 9 were to be given a narrow interpretation, it could be said to relate only to tangible property, such as land, buildings, consulates and possibly bank deposits, whose location in the territory of the predecessor State in accordance with article 9 could, by their nature, be determined. However, no restriction was placed on the expression "property, rights and interests" of the third State that would enable third State debt-claims, which constitute intangible property whose location it might prove difficult to determine, to be excluded from it. If, therefore, article 9 is taken to refer also to third State debt-claims, this would mean that the debts of the predecessor State corresponding to those debt-claims of the third State should in no way be affected by the succession of States. In other words, it would be pointless to study the general problem of succession of States in respect of debts, since the debts of the predecessor State (which are nothing more than the debt-claims of the third State) must remain in a strict *status quo*, which cannot be changed by the succession of States.

(2) What article 9 really means is that the debt-claims of the third State must not cease to exist or suffer as a result of the territorial change. Prior to the succession of States,

²²⁶ Conference on International Economic Co-operation, which opened in Paris in December 1975.

the debtor State and the creditor State were linked by a specific, legal debtor/creditor relationship. The problem which then arises is whether the succession of States is, in this case, intended not only to create and establish a legal relationship between the debtor predecessor State and the successor State, enabling the former to shift on to the latter all or part of its obligation to the creditor third State, but also 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. The answer must be 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 which linked the former to a third State, but that it cannot, in 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 succession of States in respect of debts is much more akin to that of succession of States in respect of treaties than to that of succession in respect of property.

(3) 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 a "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 pass to the successor State solely by virtue of a norm of international law providing for such passing, independently of any manifestation of will on the part of the predecessor State or the successor State. But the effect, in itself, of the succession of States 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 with a new "successor State/third State" relationship in respect of the obligation in question.

(4) If, then, it is concluded that there is a passing of the debt to the successor State (in a manner which it is precisely the main purpose of the succession of States to determine), it cannot be argued that it must 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. As in the case of succession of States in respect of treaties, there is a personal equation involved in the matter of succession in respect of State debts. The legal relationship which 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.

(5) 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 debts 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 guarantee them; until that operation, which constitutes the novation in legal relations, has taken place, the predecessor State remains liable to the creditors for the whole of its debts. 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. (6) The above position has been supported by an author, who wrote:

If the annexation is *not total*, if there is *partial* dismemberment, there can be no doubt on the question: after the annexation, as before it, the bondholders have only one *creditor*, namely the State which 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 *right* of the creditors to *institute proceedings* remains as it was before the 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 all the interests involved*, that the creditors should have as the *direct* debtor the *real and 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*.²²⁷

²²⁷ 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* (Paris), vol. XIX, No. 1 (Jan.-March 1921), pp. 67-69. Jèze also quotes A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pedone, 1905), vol. 1, p. 287.

A contrary position was taken, however, by A. N. Sack, who 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 the 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 which 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, or 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 suc-

(7) For the sake of the argument, reference may be made to the case of a State debt which has come into existence as a result of an agreement between two States. In this case, the creditor third State and the debtor predecessor State may set out their relationship in a treaty. The fate 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 it is diminished, if it considers it more solvent than the successor State. In consequence of its debt-claim, the third State possessed a right which 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 (in other words, articles 34 to 36 of the 1969 Vienna Convention) 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 passing 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 continuance of the debt incurred to that State.

(8) However, as the Commission observed with respect to 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.²²⁸

And the Commission further stated:

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 assignment by itself changes the legal position of any of the interested States. The [1969] 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

cession to debts is based on the relations of States between 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." (A. N. Sack, "La succession aux dettes publiques d'Etat", *Recueil des cours* . . . 1928-III (Paris, Hachette 1929), vol. 23, pp. 303-304, 306 and 320.)

²²⁸ *Yearbook* . . . 1974, vol. II (Part One), p. 184, document A/9610/Rev. I, chap. II, sect. D, para. (5) of the commentary to art. 8.

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 the 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.²²⁹

(9) A similar situation exists as to the 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, however consented to by the latter. 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*, a 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, at least in principle, also 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. However, the creditor third State might have a political or material interest in refusing to agree to substitution of the debtor or to assignment of the debt. Moreover, under most national systems of law, the assignment of debts is, of course, 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 which the third State has 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 which the successor State has unilaterally decided to assume.

(10) Having in mind the foregoing considerations relation to creditor third States, which are equally valid in cases where the creditors are not States, the Commission has adopted article 18 on the effects of the passing of State debts with regard to creditors. *Paragraph 1* of the article enunciates the basic principle that a succession of States does not, by that phenomenon alone, affect the rights and obligations of creditors. Under this paragraph, while a succession of States may have 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. Furthermore, a succession of States does not, of and by itself, have the effect of giving

²²⁸ *Yearbook* . . . 1974, vol. II (Part One), p. 184, document

²²⁹ *Ibid.*, paras. (6) and (11) of the commentary.

the creditor an established claim equal to the amount of the State debt which may pass to the successor State; in other words, the creditor does not, in consequence only of the succession of States, have a right of recourse or a right to take legal action against the State which succeeds to the debt. The word "creditors" covers such owners of debt-claims as fall within the scope of the articles in part III and should be interpreted to mean *third creditors*, thus excluding successor States or, when appropriate, natural or juridical persons under the jurisdiction of the predecessor or successor States. Although this paragraph will in practice apply mostly to the "rights" of creditors, it refers as well to "obligations" in order not to leave a possible lacuna in the rule nor allow it to be interpreted as meaning that a succession as such could affect that aspect of the debt relationship involving the creditor's obligations arising out of the State debt.

(11) *Paragraph 2* envisages the situation where the predecessor and the successor States or, as the case may be, the successor States themselves, conclude an agreement specifically for the passing of State debts. It is evident that such an agreement has by itself no effect on the rights of creditors. To have such an effect, the consequences of such an agreement must be in accordance with the other applicable rules of the articles in the present part, i.e., other than the rule that questions relating to succession should be settled by agreement between the predecessor and successor States. This is the rule contained in *subparagraph (a)*. It should be stressed that *subparagraph (a)* deals only with the *consequences* of the agreement and not with the agreement itself, whose effect would be subject to the general rules of international law concerning treaties and third States: articles 34 and 36 of the 1969 Vienna Convention. The effects of such an agreement can also be recognized if the creditor third State or international organization has accepted the agreement on the passing of debts from the predecessor to the successor States. In other words, succession of States does not, *of itself*, have the effect of automatically releasing the predecessor State from the State debt (or a fraction of it) assumed by the successor State or States unless the consent, express or tacit, of the creditor has been given. This is provided for in *subparagraph (b)*. There may be cases where the creditors feel more secured by an agreement between a predecessor State and a successor State or between successor States concerning the passing of State debts because, for example, of the greater solvency of the successor State or States as compared with the predecessor State. It would therefore be to the advantage of creditors to be given the possibility, provided for in *subparagraph (b)*, of accepting such an agreement.

(12) Since the rule embodied in article 18 concerns the effects of the passing of State debts with regard to creditors, paragraph 2 is drafted in such a way as to preclude the invoking of the agreement in question against creditors unless one or another of the conditions set out in *subparagraphs (a)* and *(b)* is fulfilled. Although the introductory sentence of paragraph 2 refers to "a third State or an international organization" without mentioning other subjects of international law, it is not the intention of the Commission to exclude the latter; the rule applies equally to such subjects, mention of which is being omitted simply in order not to make the text unduly heavy.

(13) When the Commission adopted article 18 on first reading, certain members pointed out the ambiguity of

the words used in its text, in particular "the consequences" and "the other applicable rules of the article . . .", in paragraph 2 (*a*). It decided, however, to adopt the text as it stood, leaving open the possibility of reviewing the wording at the second reading.

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Commentary

In part II (State property) of the draft articles, the Commission decided to draft the provisions relating to each type of succession of States following the broad categories of succession which it had adopted for the draft articles on succession of States in respect of treaties, yet introducing certain modifications to those categories in order to accommodate the characteristics and requirements proper to the topic of succession of States in respect of matters other than treaties. The Commission, therefore, established a typology consisting of the following five types of succession: (*a*) transfer of part of the territory of a State; (*b*) newly independent States; (*c*) uniting of States; (*d*) separation of part or parts of the territory of a State; and (*e*) dissolution of a State. In the present part also, the Commission has attempted to follow, in so far as appropriate, the typology of succession of States adopted in part II. Thus the titles of section 2 and of the draft articles therein correspond to those of section 2 of part II and of the draft articles in that section.

Article 19. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

Commentary

(1) The type of succession of States which article 19 deals with corresponds to that covered by article 10. There is divergency in State practice and in legal literature on the legal principle to be applied concerning the passing (or non-passing) of the State debt of the predecessor State to the successor State for the type of succession envisaged in article 19. In the following paragraphs, reference will be made to doctrinal views and to examples of State practice and judicial decisions concerning the fate of the general debt of a State as well as that of localized State debts.

(2) Commenting on the uncertainties of the doctrine regarding the general public debt contracted for the general needs of a dismembered State, one writer summed up the situation 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 . . . The second holds that the public debt of the dismembered State must be divided between that State and the territory which is annexed; the annexing State should not bear any portion of it . . . 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. Firstly, since the public debt was contracted in the interest of the entire territory of the State and the portion which is now detached benefited just as did the rest, it is only fair that it should continue to bear the burden to some extent. 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.²³⁰

(3) The arguments in favour of the passing of part of the general debt can be divided into four groups. The first is the theory of the patrimonial State and of the territory encumbered in its entirety with debts. One author, for example, advocating the passing of a part of the general debt of the predecessor State to the successor State in proportion to the contributing capacity of the transferred territory, argued 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.²³¹ The legal basis for public credit lies precisely in the fact that public debts encumber the territory of the debtor State. . . .

Seen from that standpoint, the principle of *indivisibility*²³² proclaimed in the French constitutions of the great Revolution is very enlightening; it has also been proclaimed in a good number of other constitutions. . . . Government actions and their consequences, as well as other events, may adversely affect the finances and the capacity to pay of the debtor State.

All these are risks which 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 do have a legal guarantee in that their claims encumber the territory of the debtor State.

The debt which 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.²³³

(4) In the foregoing passage, two arguments are intermingled. The first is debatable so far as the principle is concerned. Since all parts of the territory of the State "guarantee", as it were, the debt that is contracted, the part which is detached will continue to do so, even if it is placed under another sovereignty; as a result of this, the successor State is responsible for a corresponding part of the general debt of the predecessor State. Such an argument is as valid as the theories of the patrimonial State may be valid. In addition, another argument casts an awkward shadow over the first: it is the reference to the

benefit which the transferred territory may have derived from the loan, or to the justification for taking over liabilities because of the acquisition of assets. This argument may fully apply in the case of "local" or "localized" debts, where it is necessary to take into consideration the benefit derived from these debts by the transferred territory or to compare the assets with the liabilities. It has no relevance in the case in point, which involves a general State debt contracted for a nation's general needs, since these needs may be such that the transferred territory will not benefit—or will not benefit as much as other territories—from that general debt.

(5) A second argument is the theory of the profit derived from the loan by the transferred territory. One author, for instance, wrote:

The State which 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 from which the territory it is acquiring profited in various ways, directly or indirectly.²³⁴

Another author wrote that "the State which 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 profit as a result".²³⁵ And he drew the same conclusion. Again, it has been said that "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."^{236, 237}

(6) In practice, this theory leads to an impasse; for in fact, since this 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 profited a particular transferred territory leads to vagueness and uncertainty. It does not give an automatic and reliable criterion for the assumption by the successor State of a fair and easily calculated share of the general debt of the predecessor State. In actual fact, this theory is an extension of the principle of succession to local debts, which, not being State debts, are outside the scope of the present draft, and to localized State debts, which will be considered below.²³⁸ In addition, it may prove unfair in certain cases of territorial transfer, and this would destroy its own basis of equity and justice.

(7) A third argument purports to explain *why* part of the general debt is transferable, but in fact it explains only *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. Such positions are diametrically opposed to the theory of benefit, so that they and it cancel each other out. The "contributory strength" of a trans-

²³⁴ H. Bonfils, *Manuel de droit international public (droit des gens)*, 5th ed. (Paris, Rousseau, 1908), p. 117.

²³⁵ N. Politis, *Les emprunts d'Etat en droit international public* (Paris, 1891) p. 111 [thesis].

²³⁶ R. Selosse, *Traité de l'annexion au territoire français et de son démembrement* (Paris, Larose, 1880), p. 168.

²³⁷ For all these and other authors, see the details given by Sack, *loc. cit.*, pp. 295 *et seq.*

²³⁸ See paras. (22) *et seq.* of the present commentary, below.

²³⁰ Fauchille, *op. cit.*, p. 351.

²³¹ It is clear from the context that the author meant the entirety of the territory of the predecessor State prior to its amputation.

²³² The author is referring here to the indivisibility of the Republic and of its territory.

²³³ Sack, *loc. cit.*, pp. 274–277.

ferred territory, calculated for example by reference to the fiscal resources and economic potential which it previously provided for the predecessor State, is a criterion which is at variance with the theory of the profit derived from the loan by the transferred territory. A territory already richly endowed by nature, which was attached to another State, may not have profited much from the loan but may, on the other hand, have contributed greatly by its fiscal resources to the servicing of the general State debt, within the framework of the former national solidarity. If, when the territory becomes attached to another State, that successor State is asked to assume a share of the predecessor State's national public debt, computed according to the financial resources which the territory provided up to that time, such a request would not be justified by the theory of profit. The criterion of the territory's financial capacity takes no account of the extent to which that territory may have profited from the loan.

(8) A fourth argument is the one 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. The predecessor State—and indeed the creditors—relied on those resources. It is claimed that it is only fair and equitable, as a consequence, to make the successor State assume part of the general debt of the predecessor State. But 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 which the territory has derived from the loan. Thus the same overlapping considerations, always entangled and interlocked, are found in the works of various authors. It is particularly surprising to find the argument of justice and equity in the works of 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 which it had geographically diminished. There is a certain lack of realism in this theoretical construction.

(9) The arguments which deny that there is any legal basis for the passing of the general State debt from the predecessor to the successor State in the case of transfer of part of the territory have been advanced on two different bases. The first is based on the sovereign nature of the State. The sovereignty which the successor State exercises over the detached territory is not a sovereignty transferred by the predecessor State; the successor State exercises its own sovereignty there. Where State succession is concerned, there is no transfer of sovereignty, but a substitution of one sovereignty for another. In other words, the successor State which 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.

(10) The second argument is derived 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) passes to the successor State consider that this is a personal debt of

the State which contracted it. Thus, in their view, on the occasion of the territorial change 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, one author wrote:

... The dismembered or annexed State *personally* contracted the debt. (We are considering here only *national* debts, and not local debts . . .). It gave a solemn undertaking to service the debt, *come what might*. It is true 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 is 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.²³⁹

And he added a foot-note stating:

In the case of partial annexation, most English and American authors consider this principle to be absolute, so that they even declare that the annexing State is not *legally* bound to assume *any* part of the debt of the dismembered State.²⁴⁰

For example, one such author wrote:

The general debt of a State is a personal obligation. . . . With the rights which have been contracted by the State as personal rights and obligations, the new State has nothing to do. The old State is not extinct.²⁴¹

(11) The practice of States on the question of the passing of general State debts with a transfer of part of the territory of a predecessor State is equally divided. Several cases can be cited where the successor State assumed such debts.

(12) Under article 1 of the Franco-Sardinian Convention of 23 August 1860, France, which had gained Nice and Savoy from the Kingdom of Sardinia, did assume responsibility for a small part of the Sardinian debt. In 1866, Italy accepted a part of the Pontifical debt

²³⁹ Jéze, "L'emprunt dans les rapports internationaux . . ." (*loc. cit.*), p. 65. However, the same author writes in the same article:

"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 obligated 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.)

Jéze thus favours in this passage a contribution by the successor State with regard to the general debt of the predecessor State. But see also *ibid.*, p. 70, where he states:

"*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 which 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 in resources, remain bound by the original obligation."

Jéze 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 State may suspend or reduce the debt to the extent strictly necessary to obtain the desirable financial stability." (*Ibid.*, p. 72.)

²⁴⁰ *Ibid.*, p. 65, foot-note 2.

²⁴¹ W. E. Hall, *A Treatise on International Law*, 7th ed. (Oxford, Clarendon, 1917), pp. 93 and 95.

proportionate to the population of the Papal States (Romagna, the Marches, Umbria and Benevento) which the Kingdom of Italy had annexed in 1860. In 1881, Greece, having incorporated in its territory Thessaly, which until then had belonged to Turkey, 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).

(13) 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 one author,

... political and economic considerations came ... into play. The Allied Powers, who drafted the peace treaties practically on their own, had no intention of entirely destroying the economic structure of the vanquished countries and reducing them to a state of complete insolvency. This 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-service 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 is obligatory caused a cleavage between the States concerned, entailing a radical opposition between the domestic judicial decisions of the dismembered States and those of the annexing States.²⁴²

A general principle of succession to German public debts was accordingly affirmed in article 254 of the Treaty of Versailles of 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 the debt of the German *State* to which the ceded territory belonged, as they had stood on 1 August 1914.²⁴³ However, article 255 of the Treaty provided a number of exceptions to this principle. For example, in view of Germany's earlier refusal to assume, in consideration of the annexation of Alsace-Lorraine in 1871, part of France's general public debt, the Allied Powers decided, as demanded by France, to exempt France in return from any participation in the German public debt for the retrocession of Alsace-Lorraine.

(14) One author cites a case of participation of the successor State in part of the general debt of its predecessor. However, that case 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, did assume 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 all the debts of the former Czechoslovak armed forces, as of 15 March 1939, which were State debts and which the said author incorrectly included among the debts of the territories conquered by the Reich).²⁴⁴

(15) On the other hand, there have often been cases where the successor State was exonerated from any portion of the general State debt of the predecessor State. Thus, in the "Peace Preliminaries between Austria, Prussia and Denmark," signed at Vienna on 1 August 1864, article 3 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.²⁴⁵

(16) 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 taken from the Ottoman Empire. Its plenipotentiaries drew a distinction between the transfer of part of 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 on 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." It is said in the record of that meeting that:

Count Shuvalov replied that he believed he was justified in considering it generally recognized that, whereas debts in respect of territories that were detached 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 said that, in fact, he was astonished by 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.²⁴⁶

(17) The Treaty of Frankfurt of 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 French national public debt proportionate to the size of the territories

²⁴⁴ Paenson, *op. cit.*, pp. 112–113.

The author refers to an irregular annexation and, moreover, considers the Czechoslovak case as falling within the category of "cession of part of the 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.

²⁴⁵ de Martens, ed., *Nouveau Recueil* ... (Göttingen, Dieterich, 1869), vol. XVII, pp. 470 *et seq.*

²⁴⁶ Protocol No. 17 of the Congress of Berlin for the Settlement of Affairs in the East, *British and Foreign State Papers 1877–1878* (London, Ridgway, 1885), vol. LXIX, p. 862 and pp. 1052 *et seq.* This was exactly the policy followed by the other European Powers in the case of conquest.

²⁴² Rousseau, *Droit international public* (*op. cit.*), p. 442.

²⁴³ War debts were thus excluded. Article 254 of the Treaty of Versailles [for reference, see foot-note 223 above] 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 ..."

detached from France.²⁴⁷ The cession of Alsace-Lorraine to Germany in 1871, free and clear of any contributory share in France's public debt, had, as has been seen,²⁴⁸ 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.

(18) When, under the Treaty of Ancón of 20 October 1883, Chile 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, signed by them at Lima on 3 June 1929, confirmed Chile's exemption from any part of Peru's general debt.²⁴⁹

(19) In 1905, no part of Russia's public debt was transferred to Japan with the southern part of the island of Sakhalin.

(20) 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 of 10 February 1947 ruled out any passing of the debts of the predecessor State, for instance in the case of Trieste,²⁵⁰ except with regard to the holders of bonds for those debts issued in the ceded territory.

(21) With regard to judicial precedent, the arbitral award most frequently cited is that rendered by E. Borel on 18 April 1925 in the case of the *Ottoman public debt*. Even though this involved a type of succession of States other than the transfer of part of the territory of one State to another—since the case 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 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 award, 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 automatically

²⁴⁷ One must not be led astray by the fact that Prince von Bismarck affected to reduce the cost of war indemnities by first fixing them at 6 billion francs, since it did not correspond to 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 Conference, on 26 April 1871, as a pretext for ruling out any participation by Germany in France's general public debt.

²⁴⁸ See para. (13) of the present commentary, above.

²⁴⁹ 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 Rapperswil, of 5 July 1901). See Feilchenfeld, *op. cit.*, pp. 321-329 and D. P. 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.

²⁵⁰ For reference, see foot-note 223 above.

responsible for a corresponding part of the public debt of the State to which the territory formerly belonged.²⁵¹

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 over a corresponding portion of the latter's public debts is established in positive international law. Such an obligation can derive only from a treaty in which it is assumed by the State in question, and exists only on the terms and to the extent stipulated therein.²⁵²

(22) Consideration has so far been focused on the general State debts of the predecessor State. What then is the situation as regards localized State debts, i.e. State debts contracted by the central Government on behalf of the entire State but intended particularly to meet the specific needs of a locality, so that the proceeds of the loan may have been used for a project in the transferred territory? At the outset it should be pointed out that, although localized State debts are often dealt with separately from general State debts, identifying such debts can prove to be difficult in practice. As has been stated:

... it is not always possible to establish precisely: (a) the intended purpose of each particular loan at the time when 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 did in fact benefit the territory in question.²⁵³

(23) Among the views of publicists, the most commonly—and perhaps most easily—accepted theory appears to be 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 with the transferred territory "by virtue of a kind of right of continuance (*droit de suite*)."²⁵⁴ However, a sufficiently clear distinction is not made between State debts contracted for the special benefit of a portion of territory and local debts proper, which are not contracted by the State. Yet the assertion that they follow the fate of the territory by virtue of a right of continuance, and that they remain charged to the transferred territory, implies that they were already charged to it before the territory was transferred, which is not the case for localized State debts, these being normally charged to the central State budget.

(24) Writers on the subject appear, generally speaking, 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 can be argued that if the transferred territory was previously responsible for the debt it could not be regarded with certainty as a State debt specially contracted by the central Government for the benefit or the needs of the territory concerned. Rather would it be a local debt contracted and assumed by the territorial district itself. That is a completely different case, which does not involve the question of a State debt

²⁵¹ United Nations, *Reports of International Arbitral Awards*, vol. I (*op. cit.*), p. 573.

²⁵² *Ibid.*, p. 571.

²⁵³ Sack, *loc. cit.*, p. 292.

²⁵⁴ F. Despagnet, *Cours de droit international public*, 3rd ed. (Paris, Larose et Tenin, 1905), p. 109.

and hence falls outside the scope of the present draft articles.

(25) The practice of States shows that, in general, the attribution of localized State debts to the successor State has nearly always been accepted. Thus, in 1735, the Emperor Charles VI borrowed the sum of one million crowns from some London financiers and merchants, securing the loan with 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 be called today) with which the province was encumbered as a result of the security arrangement.

(26) 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 when Austria ceded those territories to France:

Article IV. All debts which were secured, prior to the war, on the territory of the countries specified in the preceding articles, and which 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.²⁵⁵

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. However, the context suggests that it was in fact a question of 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.²⁵⁶

(27) As a result of this, 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 this Treaty, those into whose possession they come shall assume 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.²⁵⁷ [The word "States" here refers not to a State entity, but to provincial bodies.]

(28) The Treaty of Peace between France and Prussia, signed at Tilsit on 9 July 1807, made the successor State liable for debts contracted by the former sovereign for or in the ceded territories. Article 24 of the Treaty 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 . . .²⁵⁸

(29) 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.²⁵⁹

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 . . .²⁶⁰

Article XIV of the Treaty of 28 April 1811 between Westphalia and Prussia is identical with the article just cited.²⁶¹

(30) Article VIII of the Treaty of Lunéville of 9 February 1801 served as a model for article 5 of the Treaty of Paris between France and Württemberg of 20 May 1807, 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.²⁶²

The Treaty of 14 November 1802 between the Batavian Republic and Prussia contains a similarly worded article IV.²⁶³ 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] . . . specially secured on the ceded districts".²⁶⁴

(31) 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 IV, V and IX of the Treaty of 29 May 1815 between Prussia and His Britannic Majesty, King of Hanover . . .²⁶⁵ 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),

²⁵⁵ de Clercq, *op. cit.*, vol. I (1713–1802), pp. 336–337; de Martens, *Recueil . . .* (Göttingen, Dieterich, 1829), vol. VI, pp. 422–423. [Translation by the Secretariat.]

²⁵⁶ See Sack, *loc. cit.*, pp. 268–269.

²⁵⁷ de Clercq, *op. cit.*, vol. I, pp. 426–427; de Martens, ed. *Recueil . . .* (Göttingen, Dieterich 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. [Translation by the Secretariat.]

²⁵⁸ de Clercq, *op. cit.* (1880), vol. II, (1803–1815), p. 221; de Martens, *Recueil . . .* (1835), vol. VIII, p. 666; Descamps and Renault, *Recueil . . . XIX^e siècle (op. cit.)*, vol. I, p. 184 [Translation by the Secretariat.]

²⁵⁹ de Clercq, *op. cit.*, vol. II, pp. 147–148; de Martens, ed., *Recueil . . .*, vol. VIII (*op. cit.*), p. 391; Descamps and Renault, *Recueil . . . XIX^e siècle (op. cit.)*, vol. I, p. 153. [Translation by the Secretariat.]

²⁶⁰ de Clercq, *op. cit.*, vol. II, p. 241; de Martens, ed., *Recueil . . .*, vol. VIII (*op. cit.*), p. 720. [Translation by the Secretariat.]

²⁶¹ de Martens, ed., *Nouveau Recueil . . .* (Göttingen, Dieterich, 1817), vol. I, p. 367.

²⁶² de Clercq, *op. cit.*, vol. I, p. 582; de Martens, ed., *Recueil . . . (op. cit.)*, vol. VII, p. 430. [Translation by the Secretariat.]

²⁶³ de Martens, ed., *Recueil . . .*, vol. VII (*op. cit.*), pp. 427–428.

²⁶⁴ de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1831), vol. III, p. 330; Descamps and Renault, *Recueil . . . XIX^e siècle (op. cit.)*, p. 513.

²⁶⁵ de Martens, ed., *Nouveau Recueil . . .*, vol. II (*op. cit.*), p. 350; Descamps and Renault, *Recueil . . . XIX^e siècle (op. cit.)*, vol. I, p. 426.

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).²⁶⁶

(32) Even though an irregular forced annexation of territory was involved, mention may be made of the assumption by the Third Reich, under the Agreement of 4 October 1941, of debts contracted by Czechoslovakia for the purpose of private railways in the *Länder* seized from it by the Reich.²⁶⁷ Debts of this kind seem to be governmental in origin and local in purpose.

(33) After the Second World War, France, which had regained Tenda and Briga from Italy, agreed to assume part of the Italian debt only subject to 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 was contracted before Italy's entry into the war and was not intended for military purposes; (c) that the transferred territories had benefited from the debt; and (d) that the creditors resided in the transferred territories.

(34) Succession to special State debts which were used to meet the needs of a particular territory is more likely if the debts in question are backed by a special security arrangement. The predecessor State may have secured its special debt on tax revenue derived from the territory which it is losing or on property situated in the territory in question, such as forests, mines or railways. In both cases, succession to such debts is usually accepted.

(35) On rare occasions, however, the passing of localized debts has been refused. One such example is article 255 of the Treaty of Versailles, which provided a number of exceptions to the general principle, laid down in article 254, of the passing of public debts of the predecessor State.²⁶⁸ Thus, in the case of all ceded territories other than Alsace-Lorraine, that portion of the debt of the German Empire or the German States which represented expenditure by them on property and possessions belonging to them and situated in the ceded territories was not assumed by the successor States. Obviously, political considerations played a role in this particular case.

(36) From the foregoing observations, it may be concluded that, while there appears to exist a fairly well established practice requiring the successor State to assume a localized State debt, no such consensus can be found with regard to general State debts. Although the 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. At the same time, those considerations appear to have weighed even more heavily 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 acknowledged that the bulk of the treaty precedents available consists largely 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.

(37) Whatever the 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 one author remarks, although he agrees that this approach 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."²⁶⁹ It is useless, however, to seek for the existence of an incontestable rule of international law to avoid this situation. Under the circumstances, the Commission proposes, in the absence of an agreement between the parties concerned, the introduction of the concept of equity as the key to the solution of problems relating to the passing of State debts. That concept has already been adopted by the Commission in part II of the draft and therefore does not require detailed commentary here.²⁷⁰

(38) The rules enunciated in article 19 keep certain parallelisms with those of article 10, relating to the passing of State property. *Paragraph 1* thus provides for, and thereby attempts to encourage, settlement by agreement between the predecessor and successor States. Although it reads "the passing . . . is to be settled . . .", the paragraph should not be interpreted as presuming that there is always such a passing. *Paragraph 2* provides for the situation where no such agreement can be reached. It stipulates that "an equitable proportion" of the State debt of the predecessor State shall pass to the successor State. In order to determine what constitutes "an equitable proportion", all the relevant factors should be taken into account in each particular case. Such factors must include, among others, "the property, rights and interests" which pass to the successor State in relation to the State debt in question.

(39) Article 19 is drafted in such a way as to cover all types of State debts, whether general or localized. It may readily be seen that under *paragraph 2* localized State debts would pass to the successor State, since the "property, rights and interests" derived from the localized State debts pass by definition to the successor State.

Article 20. Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor

²⁶⁶ de Martens, ed., *Nouveau Recueil . . .*, vol. II (*op. cit.*), p. 723; Descamps and Renault, *Recueil . . . XIXe siècle (op. cit.)*, vol. I, p. 531; *British and Foreign State Papers, 1815-1816*, vol. III (London, Ridgeway, 1838), pp. 326-327. See also article 5 of the Treaty of 14 October 1809 between France and Austria, concerning debts secured on the territories ceded to France by Austria (Upper Austria, Carniol, Carinthia, Istria) (de Clercq, *op. cit.*, vol. II, p. 295; de Martens, ed., *Nouveau Recueil . . .*, vol. I (*op. cit.*), p. 213); article VII of the Treaty of 3 June 1814 between Austria and Bavaria (de Martens, ed., *Nouveau Recueil . . .*, vol. II (*op. cit.*), p. 21); article IX of the Treaty of 18 May 1815 between Prussia and Saxony (de Clercq, *op. cit.* vol. II, pp. 520-521; de Martens, ed., *Nouveau Recueil . . .*, vol. II (*op. cit.*), pp. 277-278); article XIX of the Treaty of Cession of 16 March 1816 under which the Kingdom of Sardinia ceded to Switzerland various territories in Savoy which were incorporated into the Canton of Geneva (de Martens, ed., *Nouveau Recueil . . .* (Göttingen, Dieterich, 1880, vol. IV p. 223; Descamps and Renault, *Recueil . . . XIXe siècle (op. cit.)*, vol. I, p. 555).

²⁶⁷ Paenson, *op. cit.*, p. 113.

²⁶⁸ See para. (13) of this commentary, above.

²⁶⁹ L. Cavaré, *Le droit international public positif*, 3rd ed. (Paris Pedone, 1967), vol. I, p. 380.

²⁷⁰ See paras. (16)-(24) of the introductory commentary to section 2 of part II, above.

State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should its implementation endanger the fundamental economic equilibria of the newly independent State.

Commentary

(1) Article 20 concerns succession of States in respect of State debts when the successor State is a newly independent State. This is an article parallel to article 11, relating to succession of States in respect of State property in the case of a newly independent State.

(2) The Commission has on several occasions affirmed the necessity and utility of including "newly independent State" as a distinct type of succession of States. It did so in its draft articles on succession of States in respect of treaties²⁷¹ and again in the present set of draft articles in connexion with succession in respect of State property.²⁷² It might be argued by some that decolonization is a thing of the past, belonging almost entirely to the history of international relations, and that consequently there is no need to include "newly independent State" in a typology of succession of States. In fact, decolonization is not yet fully completed. Important parts of the world are still dependent, even though some cover only a small area. And decolonization is far from complete from yet another point of view. If decolonization is taken to mean the end of a relationship based on political domination, it has reached a very advanced stage. But economic relations are vital, and are much less easily rid of the effects of colonization than political relations. Political independence may not be genuine independence and, in reality, the economy of newly independent States may long remain particularly dependent on the former metropolitan country and firmly bound to it, even allowing for the fact that the economies of nearly all countries are interdependent. Hence it cannot be denied that the draft articles on succession of States in respect of State debts may be useful, not only with respect to territories which are still dependent but also with respect to countries which have recently attained political independence, and even to countries which attained political independence much earlier. In fact, the debt problem, including the servicing of the debt, the progressive amortization of the principal and the payment of interest, all spread over several years, if not decades, is the most typical example of matters covered by succession which long survive political independence. Thus the effects of problems connected with succession of States in respect of State debts continue to be felt for many decades and would appear more lasting than the effects of succession in respect of treaties or State property, in each of which cases the Commission nevertheless devoted a chapter to decolonization.

(3) Before reviewing State practice and the views of jurists on the fate of State debts in the process of

decolonization, it may be of historical interest to note the extent to which colonial Powers were willing, in cases of *colonization* which occurred during the last century and the early 1900s, to assume the debts of the territories colonized. State practice seems contradictory in this respect. In the cases of the annexation of Tahiti in 1880 (by internal law), Hawaii in 1898 (by internal law), and Korea in 1910 (by treaty), the States which annexed those territories assumed wholly or in part the debts of the territory concerned.²⁷³ In an opinion relating to the Joint Resolution of the United States Congress providing for the annexation of Hawaii, the United States Attorney-General stated that:

... the general doctrine of international law, founded upon obvious principles of justice, is that, in the case of annexation of a State or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed State or territory—it takes the burdens with the benefits.²⁷⁴

In the case of the annexation of the Fiji Islands in 1874, it appears that the United Kingdom, after annexation, agreed voluntarily to undertake payment of certain debts contracted by the territory before annexation, as an "act of grace".²⁷⁵ The metropolitan Power did not recognize a legal duty to discharge the debts concerned. A similar position appears to have been taken on the annexation of Burma by the United Kingdom in 1886.²⁷⁶

(4) In other cases, the colonial Powers refused to honour the debts of the territory concerned. In the 1895 treaty establishing the (second) French protectorate over Madagascar, article 6 stated that, *inter alia*,

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.²⁷⁷

Shortly after the signing of that treaty, the French Minister for Foreign Affairs declared in the Chamber of Deputies that, as regards the debts contracted abroad by the Madagascar Government,

the French Government will, 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.²⁷⁸

According to one writer, while that declaration recognized the existence of rules of international law governing the treatment of debts of States that had lost their sovereignty, it also made clear that, according to the opinion of the French Government, there was no rule of international law which compelled an annexing State to guarantee or assume the debts of annexed States.²⁷⁹ The Annexation Act of 1896 by which Madagascar was declared a French colony was silent on the issue of succession to Malagasy debts. Colonial Powers also refused to honour debts of colonized territories on the grounds that the previously independent State retained a measure of legal personality. Such appears to have been

²⁷³ Feilchenfeld, *op. cit.*, pp. 369, 377 and 378, respectively.

²⁷⁴ O'Connell, *State Succession* . . . (*op. cit.*), p. 377.

²⁷⁵ Feilchenfeld, *op. cit.*, p. 292.

²⁷⁶ *Ibid.*, p. 379. It appears that the British Government did not consider Upper Burma to be a "civilized country", and that therefore rules more favourable to the "succeeding Government" could be applied than in the case of the incorporation of a "civilized" State. O'Connell, *State Succession* . . . (*op. cit.*), pp. 358–360.

²⁷⁷ See Feilchenfeld, *op. cit.*, p. 372, foot-note 20.

²⁷⁸ *Ibid.*, p. 373, foot-note 22.

²⁷⁹ *Ibid.*, p. 373.

²⁷¹ *Yearbook* . . . 1974, vol. II (Part One), pp. 167–169, document A/9610/Rev.1, paras. 45 and 57–60.

²⁷² See para. (3) of the commentary to article 11, above.

the case with the protectorates established at the end of the nineteenth century in Tunisia, Annam, Tonkin and Cambodia.²⁸⁰ A further example may be mentioned, that of the annexation of the Congo by Belgium.²⁸¹ In the 1907 treaty of cession, article 3 provided for the succession of Belgium in respect of all the liabilities and all the financial obligations of the "Congo Free State", as set forth in annex C. However, in article 1 of the Colonial Charter of 1908 it was stated that the Belgian Congo was an entity distinct from the metropolitan country, having separate laws, assets and liabilities, and that, consequently, the servicing of the Congolese debt was to remain the exclusive responsibility of the colony, unless otherwise provided by law.

Early decolonization

(5) In the case of the independence of 13 British colonies in North America, the successor State, the United States, did not succeed to any of the debts of the British Government. Neither the Treaty of Versailles of 1783, by which Great Britain recognized the independence of those colonies, nor the constituent instruments of the United States (the Articles of Confederation of 1776 and 1777 and the Constitution of 1787) mention any payment of debts owed by the former metropolitan Power.²⁸² This precedent was alluded to in the 1898 peace negotiations between Spain and the United States following the Spanish-American War. The Spanish delegation asserted that there were publicists who maintained that the 13 colonies which had become independent had paid 15 million pounds to Great Britain for the extinguishment of colonial debts. The American delegation, however, viewed the assertion as entirely erroneous, pointing out that the preliminary (1782) and definitive (1783) treaties of peace between the United States and Great Britain contained no stipulation of the kind referred to.²⁸³

(6) A similar resolution of the fate of the State debts of the predecessor State occurred in South America upon the independence of Brazil from Portugal in the 1820s. 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 the recognition of their independence; recently the United States likewise paid no monetary compensation to Great Britain for similar recognition.²⁸⁴

The Treaty between Brazil and Portugal of 29 August 1825 which resulted from the negotiations in fact made no express reference to the transfer of part of the Portuguese State debt to Brazil. However, since there

²⁸⁰ *Ibid.*, pp. 369–371.

²⁸¹ *Ibid.*, pp. 375–376.

²⁸² *Ibid.*, pp. 53–54.

²⁸³ *Ibid.*, p. 54, foot-note 95.

²⁸⁴ Dispatch of 2 August 1824, in *Arquivo diplomático da independência*, vol. II, p. 95, cited by H. Accioly in *Traité de droit international public*, trans. P. Goulé (Paris, Sirey, 1940), vol. I, pp. 198–199. It would appear that the matter at issue was less a question of Brazil's taking over part of the Portuguese State public debt than of the payment of "compensation" in exchange for the "recognition of independence".

were reciprocal claims involving the two States, a separate instrument—an additional agreement of the same date—made Brazil responsible for the payment of 2 million pounds sterling as part of an arrangement designed to liquidate those reciprocal claims.

(7) With regard to the independence of the Spanish colonies in America,²⁸⁵ article VII 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.²⁸⁶

It thus seems clear that, in accordance with its unilateral statement, independent Mexico had taken over only those debts of the Spanish State which had been contracted for and on behalf of Mexico and had already been charged to the Mexican Treasury.

(8) Article V of the Treaty of Peace and 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 1822²⁸⁷

(9) A provision more or less similar to the one in the 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 accounts books of the former Captaincy-General of Venezuela, or which may arise from other fair and legitimate claims.²⁸⁸ Similar wording may be found in a number of treaties concluded between Spain and the former colonies.²⁸⁹

(10) The cases of decolonization of the former Spanish

²⁸⁵ See J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. I, pp. 342–343. See also Feilchenfeld, *op. cit.*, pp. 251–257, and Jéze, "L'emprunt dans les rapports internationaux . . ." (*loc. cit.*), p. 76. The case of Cuba is dealt with in para. (12) of this commentary, below.

²⁸⁶ *British and Foreign State Papers, 1835–1836* (London, Ridgway, 1853), vol. 24, pp. 868–869.

²⁸⁷ *Ibid.*, 1840–1841 (1857), vol. 29, pp. 1316–1317.

²⁸⁸ *Ibid.*, 1846–1847 (Harrison, 1860), vol. 35, p. 302.

²⁸⁹ For example, article IV of the Treaty between Spain and Argentina of 9 July 1859 (*ibid.*, 1859–1860 (Ridgway, 1867), vol. 50, p. 1161); article 11 of the Treaty between Spain and Uruguay of 9 October 1841 (*ibid.*, 1841–1842 (1858), vol. 30, p. 1360); 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. 1340); article IV of the Treaty between Spain and Guatemala of 29 May 1863 (*ibid.*, 1868–1869 (Ridgway, 1874), vol. 59, p. 120); article IV of the Treaty between Spain and El Salvador of 25 June 1865 (*ibid.*, 1867–1868 (1873), vol. 58, pp. 1251–1252).

dependencies in America would seem to represent a departure from the earlier precedents set by the United States and Brazil. However, it may be noted that the departure was a limited one, not involving a succession to the national debt of the predecessor State, but rather to two types of debts: those contracted by the predecessor State for and on behalf of the dependent territory, and those contracted by an organ of the colony. As has been noted,²⁹⁰ the latter category of debts, considered as proper to the territory itself, are in any event excluded from the subject-matter of the present draft articles as they do not properly fall within the scope and definition of State debts of the predecessor State. In spite of the fact that overseas possessions were considered, under the colonial law of the time, a territorial extension of the metropolitan country, with which they formed a single territory, it did not occur to writers that any part of the national public debt of the metropolitan country should be imposed on those possessions.²⁹¹ That was a natural solution, according to one author, because "the creditors [of the metropolitan country] could never reasonably assume that their debts would be paid out of the resources to be derived from such a financially autonomous territory".²⁹² What was involved was not a participation of the former Spanish American colonies in the national debt of the metropolitan territory of Spain, but a take-over 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.²⁹³ It must also be pointed out that in the case of 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.

Finally, it may be noted that, in most of the cases involving Spain and her former colonies, the debts assumed by the successor States were assumed by means of internal legislation, even before the conclusion of treaties with Spain, which often merely took note of the provisions of those internal laws. None of the treaties, however, speak of rules or principles of international law governing succession to State debts. Indeed, many of the treaty provisions indicate that what was involved was a "voluntary and spontaneous" decision on the part of the newly independent State.

(11) Mention should, however, be made of one Latin American case which appears to be at variance with the general practice of decolonization in that region as outlined in the preceding paragraph. This relates to the independence of Bolivia. A Treaty of Recognition, Peace

and Friendship, signed between Spain and Bolivia on 21 July 1847, provides in article 5 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 . . .²⁹⁴

(12) The Anglo-American precedent of 1783 and the Portuguese-Brazilian precedent of 1825 were followed by the Peace Treaty of Paris of 10 December 1898, concluded at the end of the war between the United States and Spain. 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 it was a debt contracted on behalf and for the benefit of the island was successfully challenged by the United States plenipotentiaries. The Treaty of 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 which Spain had charged to Cuba.²⁹⁵

Decolonization since the Second World War

(13) An examination of cases of decolonization since the Second World War indicates little conformity in the practice of newly independent States. There are precedents in favour of the passing of State debts and precedents against, as well as cases of repudiation of such debts after they had been accepted. It is not the intention of the Commission to overburden this commentary by including a complete catalogue of all cases of decolonization since the Second World War. The cases mentioned below are not intended to represent an exhaustive survey of practice in the field, but are rather provided as illustrative examples.

(14) The independence of the Philippines was authorized by the Philippines Independence Act (otherwise known as the "Tydings-McDuffie Act") of the United States Congress, approved on 24 March 1934.²⁹⁶ By that Act, a distinction was made between the bonds issued before 1934 by the Philippines with the authorization of the United States Congress and other public debts. It provided that the United States declined all responsibility for those post-1934 debts of the archipelago. The inference has accordingly been drawn that the United States intended to maintain pre-1934 congressionally author-

²⁹⁰ See paras. (14) *et seq.* of the commentary to article 16, above.

²⁹¹ Cases of unlimited colonial exploitation whereby a metropolitan Power, during the time of the old colonial empires, was able to cover part of its national debt by appropriating all of the resources or raw materials of the colonies, have been disregarded as being archaic or rare. See foot-note 339 below.

²⁹² Jèze, "L'emprunt dans les rapports internationaux . . ." (*loc. cit.*), p. 74.

²⁹³ It seems clear, however, that the South American republics which attained 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. Such an assumption was vigorously challenged in later cases of succession. See para. (12) of this commentary, below.

²⁹⁴ *British and Foreign State Papers, 1868-1869 (op. cit.)*, vol. LIX, p. 423.

²⁹⁵ Feilchenfeld, *op. cit.*, pp. 329-343; Moore, *op. cit.*, pp. 351 *et seq.*, and Jèze, "L'emprunt dans les rapports internationaux . . ." (*loc. cit.*), p. 84.

²⁹⁶ O'Connell, *State Succession . . . (op. cit.)*, p. 433; G. Fischer, *Un cas de décolonisation - Les Etats-Unies et les Philippines* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 264; and M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1963), vol. 2, pp. 211-213, 854.

ized debts.²⁹⁷ As regards these pre-1934 debts, by a law of 7 August 1939, the proceeds of Philippine export taxes were allocated to the United States Treasury for the establishment of a special fund for the amortization of the pre-1934 debts contracted by the Philippines with United States authorization. Under the 1934 and 1939 Acts, it was provided that the archipelago could not repudiate loans authorized by the predecessor State and that if, on the date of independence, the special fund should be insufficient for service of that authorized debt, the Philippines would make a payment to balance the account. Under both its Constitution (article 17) and the Treaty of 4 July 1946 with the United States, the Philippines assumed all the debts and liabilities of the islands.

(15) The case of the independence of India and Pakistan is another example where the successor State accepted the debts of the predecessor State. It would be more correct to speak of successor States, and in fact this seems a two-stage succession as a result of partition, Pakistan succeeding to India, which succeeded to the United Kingdom. It has been explained that:

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 . . . While India continued to be the sole debtor of the central debt, Pakistan's share of this debt, proportionate to the assets it received, became a debt to India.²⁹⁸

It does not seem that many distinctions were made regarding the different categories of debt. Only one appears to have been made by the Committee of Experts set up to recommend the apportionment of assets and liabilities. This was the public debt, composed of permanent loans, treasury bills 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 not indicated 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. 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. An agreement of 1 December 1947 between the two States was to embody the practical consequences of this and determine the respective contributions. That division, however, has not been implemented, owing to differences between the two States as to the sums involved. (These problems relating to separation of States will be considered in greater detail in connexion with a more appropriate type of succession).

(16) The problems arising from the succession of Indonesia to the Kingdom of the Netherlands were, as far as debts are concerned, reflected essentially in two instruments: the Round-Table Conference Agreement, signed at The Hague on 2 November 1949,²⁹⁹ and the Indonesian Decree of 15 February 1956, which repudiated the debt, Indonesia having denounced the 1949 agreements on 13 February 1956.³⁰⁰ The Financial and

Economic Agreement (which is only one of the Conference agreements) specifies the debts which Indonesia agreed to assume.³⁰¹ Article 25 distinguishes four series of debts: (a) a series of six consolidated loans; (b) debts to third countries; (c) debts to the Kingdom of the Netherlands; (d) Indonesia's internal debts.

(17) The last two categories of debts need not be taken into consideration here. Indonesia's debts to the Kingdom of the Netherlands were in fact debt-claims of the predecessor State, and thus do not come within the scope of the present commentary. The internal debts of Indonesia at the date of the transfer of sovereignty are also excluded by definition. However, it should be noted that this category was not precisely defined. The predecessor State later interpreted that provision as including debts which the successor State considered as "war debts" or "odious debts". It would appear that this was a factor in the denunciation and repudiation of the debt in 1956.³⁰²

(18) The other two categories of debts to which the newly independent State succeeded involved: (a) consolidated debts of the Government of the Netherlands-Indies³⁰³ and the portion attributed to it in the consolidated national debt of the Netherlands, consisting of a series of loans issued before the Second World War; (b) certain specific debts to third States.³⁰⁴

(19) During the Round-Table Conference, Indonesia brought up issues relating to the degree of autonomy which its organs had possessed by comparison with those of the metropolitan country at the time when the loans were contracted. The Indonesian plenipotentiaries also, and in particular, referred to the problem of their assignment, and the utilization of and benefit derived from those loans by the territory. As in the other cases, it appears that the results of the negotiations at The Hague should be viewed as a whole and in the context of an overall arrangement. The negotiations had led to the creation of a "Netherlands-Indonesian Union", which was dissolved in 1954. Shortly afterwards, in 1956, Indonesia repudiated all of its colonial debts.

(20) On the accession of Libya to independence, the General Assembly of the United Nations resolved the problem of the succession of States, including the succession to debts, in resolution 388 (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".

(21) Guinea attained its independence in 1958, following its negative vote in the constitutional referendum of 28 September of the same year establishing the Fifth

²⁹⁷ United Nations, *Treaty Series*, vol. 69, pp. 252-258, draft Financial and Economic Agreement, articles 25-27.

²⁹⁸ See "L'Indonésie répudie sa dette envers les Pays-Bas", in *Libre Belgique* of 12 August 1956, quoted in: France, Présidence du Conseil et Ministère des affaires étrangères, *La documentation française - Problèmes économiques* (Paris, 28 August 1956), No. 452, pp. 17-18.

²⁹⁹ It has been maintained that these debts were contracted by the dependent territory on its own behalf and for its own account (Rousseau, *Droit international public* (op. cit.), p. 451; O'Connell, *State Succession* . . . (op. cit.), p. 437). It appears, however, that the loans were contracted under Netherlands legislation; thus the argument could be made that the debts were contracted by the metropolitan Power for the account of the dependent territory.

³⁰⁰ This involved debts contracted under the Marshall Plan and to the United States in 1947, to Canada in 1945 and to Australia in 1949.

²⁹⁷ Fischer, *op. cit.*, p. 264.

²⁹⁸ O'Connell, *State Succession* . . . (op. cit.), p. 404.

²⁹⁹ United Nations, *Treaty Series*, vol. 69, p. 3. See also O'Connell, *State Succession* . . . (op. cit.), pp. 437-438, and Paenson, *op. cit.*, pp. 77-78.

³⁰⁰ Rousseau, *Droit international public* (op. cit.), pp. 451-452.

Republic and the French Community. One writer stated: "Rarely in the history of international relations has a succession of States begun so abruptly".³⁰⁵ The implementation of a monetary reform in Guinea led to that country's leaving the franc area. To that was added the fact that diplomatic relations between the former colonial Power and the newly independent State were severed for a long period. This situation was not conducive to the promotion of a swift solution of the problems of succession of States which arose some 20 years ago. However, it seems that a trend towards a settlement has emerged since the resumption of diplomatic relations between the two States in 1975. But apparently the problem of debts has not assumed a significant dimension in the relations between the two States; it seems to be reduced essentially to questions regarding civil and military pensions.

(22) Among other newly independent States which had formerly been French dependencies in Africa, the case of Madagascar³⁰⁶ may be noted. 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. The decision in principle to issue a loan was made in Madagascar by the Governor-General, after hearing the views of various administrative organs and economic and financial delegations. If the process had stopped there and it had been possible for the public actually to subscribe to the loan, the debt would simply have been contracted within the framework of the financial autonomy of the dependent territory. The loan 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 within the scope of the present commentary.³⁰⁷ But it appears that a further decision had to be taken by the administering Power. The decision-making process, begun in Madagascar, was completed within the framework of the laws and regulations of the central Government of the administering Power. Approval could have been given either by a decree adopted in the Conseil d'Etat or by statute. In actual fact, all the Malagasy loans were the subject of legislative authorization by the metropolitan country.³⁰⁸ This authorization might be said to have constituted a substantial condition of the loan, a *sine qua non*, without which the issue of the loan would have been impossible. The power to enter into a genuine commitment in this regard lay only, it would seem, with the administering Power, and by so doing, it assumed an obligation which 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".³⁰⁹

(23) These debts were assumed by the Malagasy Republic, which, it appears, did not dispute them at the time. The negotiators of the Franco-Malagasy Agreement of 27 June 1960 on co-operation in monetary, economic and financial matters thus did not work out any special provisions for this succession. Later, following a change of régime, the Government of Madagascar denounced the 1960 Agreement on 25 January 1973.³¹⁰

(24) The former Belgian Congo acceded to independence on 30 June 1960, in accordance with article 259 of the Belgian Act of 19 May 1960. Civil war erupted, and diplomatic relations between the two States were severed from 1960 to 1962. The problems of succession of States were not resolved until five years later, in two conventions dated 6 February 1965. The first relates to "the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony".³¹¹ The second concerns the statutes of the "Belgo-Congolese Amortization and Administration Fund".³¹²

(25) The classification of debts was made in article 2 of the Convention for the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony, which distinguished three categories of debt: (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) . . .". This classification thus led ultimately to a distinction between the internal debt and the external debt.

(26) The internal debt should not engage our attention for long, not because it was "internal" but because it was held by public agencies of the Congo,³¹³ or as one writer specifies, "three quarters" of it was.³¹⁴ It was thus intermingled with the debts of local public authorities and hence cannot be regarded as a State debt of the predecessor State.

(27) The external debt was subdivided into guaranteed external debt and non-guaranteed external debt. The external debt guaranteed or assigned by Belgium extended to two categories of debt, which are set out in schedule 3 annexed to the above convention.³¹⁵ The first concerns the Congolese debt in respect of which Belgium intervened only as guarantor. It was a debt denominated in foreign currencies (United States dollars, Swiss francs and other currencies). In this category, mention may be made of the loan agreements concluded between the Belgian Congo and the World Bank, 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

³⁰⁵ Gonidec, quoted by G. Tixier in "La succession à la régie des chemins de fer de l'A.O.F.", *Annuaire français de droit international*, 1965 (Paris, 1966), vol. XI, p. 921.

³⁰⁶ See Bardonnet, *op. cit.*

³⁰⁷ For a different reason, the first Malagasy loan of 1897 must be disregarded in the present commentary. It was subscribed for a term of 60 years, and redemption was completed in 1957, prior to the date of independence. Whether it is defined as a debt exclusive to the territory or a debt of the metropolitan country, this loan clearly does not concern the succession of States. It remains an exclusively colonial affair. The other loans do concern the succession of States because their financial consequences continued to have an effect in the context of decolonization.

³⁰⁸ 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 Bardonnet, *op. cit.*, p. 650.

³⁰⁹ See paras. (51) to (54) of this commentary, below.

³¹⁰ See Rousseau, *Droit international public (op. cit.)*, p. 454.

³¹¹ United Nations, *Treaty Series*, vol. 540, p. 227.

³¹² *Ibid.*, p. 275.

³¹³ A list of these agencies and funds is annexed to the Convention: *ibid.*, p. 253.

³¹⁴ C. Lejeune, "Le contentieux financier belgo-congolais", *Revue belge de droit international* (Brussels), 1969-2, p. 546.

³¹⁵ United Nations, *Treaty Series*, vol. 540, p. 255.

amounts withdrawn by the Belgian Congo . . . before 30 June 1960", i.e. before independence. When it gave its guarantee, it seemed that Belgium intended to act "as primary obligor and not as surety merely". According to the actual provisions of the agreements with IBRD, the character of State debt of the predecessor State emerges even more clearly for the second category of debt guaranteed by Belgium.

(28) The second type of external debt was called "assigned" debt; it relates to "loans subscribed by Belgium, the proceeds of which were assigned to the Belgian Congo".³¹⁶ 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 was that country which was the debtor.

(29) The two types of debt, guaranteed and assigned, were to become the responsibility of Belgium. That is what is provided by 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 preceding paragraphs describe the contents of schedule 3.]

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 1960.³¹⁷

(30) The external debt not guaranteed by Belgium, 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', 95 per cent of whom were Belgians".³¹⁸ What would seem to have been involved was a kind of "colonial debt", which would be outside the scope of consideration of the present commentary. It might be relevant, however, according to another author's view, "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".³¹⁹ However, neither Belgium nor the Congo agreed to have that 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.³²⁰

(31) The establishment of the Fund, an "autonomous

³¹⁶ *Ibid.*, p. 257.

³¹⁷ *Ibid.*, p. 231.

³¹⁸ Lejeune, *loc. cit.*, p. 546.

³¹⁹ Rousseau, *Droit international public (op. cit.)*, p. 453.

³²⁰ See article 5, para. 1, of the Convention:

"Belgium and the Congo jointly establish, by this Convention, an autonomous international public agency to be known as 'the Belgo-Congolose 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).

international public agency", and the arrangement for joint contributions to it implied two things:

(a) Neither State in any sense accepted the status of debtor. 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.

(b) 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 Contracting 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.

(32) In the case of the independence of Algeria, article 18 of the "Declaration of Principles concerning Economic and Financial Co-operation", contained in the Evian Agreements,³²¹ provided for the succession of the Algerian State to France's rights and obligations in Algeria. However, neither this declaration of principles nor the other declarations contained in the Evian Agreements referred specifically to public debts, much less to the various categories of such debts, so that authors have taken the view that the Agreements were silent on the matter.³²²

(33) 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 the agreement 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 since, if it had so succeeded, 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 which might be termed "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 its activities in Algeria.

(34) 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 the economic and social development of Algeria and "Marketing facilities on French

³²¹ 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.

³²² Rousseau, *Droit international public (op. cit.)*, p. 454, and O'Connell, *State Succession . . . (op. cit.)*, pp. 444-446.

territory for Algerian surplus production" (wine)³²³ were to be the *quid pro quo* for the obligations assumed by Algeria under article 18 of the Declaration. The Algerian negotiators maintained that that "contractual" undertaking between Algeria and France could only be regarded as valid if two conditions were met: (a) that the respective obligations were properly balanced, and (b) that the financial situation inherited by Algeria was a sound one. (35) Algeria also refused to assume debts representing loans which France had contracted during the war of independence for the purpose of carrying out economic projects in Algeria. 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 fell within the over-all framework of France's economic strategy, since nearly all of France's investment in Algeria had been complementary in nature. The Algerians also argued 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 the necessary income had dried up and, in addition, a process of disinvestment had developed.

(36) The Algerian negotiators stated 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-a-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. Finally, the Algerian negotiators refused to assume certain debts they considered to be "odious debts" or "war debts", which France had charged to Algeria.

(37) This brief account, which shows the extent of the controversy surrounding even the question how to refer to the debts (French State debts or debts proper to the dependent territory), gives an indication of the complexity of the Algerian-French financial dispute, which the negotiators finally settled at the end of 1966.³²⁴

(38) As to the independence of British dependencies, it would appear that borrowings of British colonies were made by the colonial authorities and were charges on colonial revenues alone.³²⁵ The general practice appears to have been that, upon attaining independence, former British colonies succeeded to four categories of loans: loans under the Colonial Stock Acts; loans from IBRD; colonial welfare and development loans; and other raisings in the London and local stock market.³²⁶ It would therefore seem that such debts were considered to be debts proper to the dependent territory and hence might be outside the scope of the draft articles, in view of the definition of State debts as those of the predecessor State.

Financial situation of newly independent States

(39) International law cannot be codified or progressively developed in isolation from the political and economic context in which the world is living at present.

The Commission believes that it must reflect the concerns and needs of the international community in the rules which it proposes to that community. For that reason, it is impossible to evolve a set of rules concerning State debts for which newly independent States are liable, without to some extent taking into account the situation in which a number of these States are placed.

(40) Unfortunately, statistical data are not available to show exactly how much of the extensive debt problem of these countries is due to the fact of their having attained independence and assumed certain debts in connexion with the succession of States, and how much to the loans which they have had to contract as sovereign States in an attempt to overcome their under-development.³²⁷ Similarly, the relevant statistics covering all the 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 the developing countries; they include the Latin American countries—i.e., countries decolonized long 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 as to highlight a dramatic and widespread debt problem affecting the majority of the developing countries. This context and this situation impart particular and specific overtones to succession of States involving newly independent States that do not generally arise in connexion with other types of succession.

(41) The increasingly burdensome debt problem of these countries has become a structural phenomenon whose profound effects were apparent long before the present international economic crisis. In 1960, the developing countries' external public debt already 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 the external public debt of these 80 countries amounted to \$59 billion.³²⁸ It was estimated that at the same date the total sums disbursed by those countries simply for servicing the public debt and repatriation of profits was \$11 billion.³²⁹ At that time already, in certain developing countries the servicing of the public debt alone consumed over 20 per cent of their total export earnings. As at 31 December 1973, the data collected by the World Bank for 86 developing countries showed a total outstanding external public debt of \$119 billion,³³⁰ which was about double the amount calculated by UNCTAD in 1969 for 80 countries. Service payments

³²⁷ The statistics published or made available by international economic or financial organizations are not sufficiently detailed to enable a distinction to be drawn between debts which predate and debts which postdate 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 of whether the debts are "colonial debts". See OECD, *Total external liabilities of developing countries* (Paris, 1974).

³²⁸ UNCTAD, *Debt problems of developing countries: Report by the UNCTAD secretariat* (United Nations publication, Sales No. E.72, II.D.12), para. 12.

³²⁹ 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.6) p. 71, document TD/118/Supp. 5, para. 4.

³³⁰ IBRD, *Annual Report, 1975* (Washington D.C.), p. 81.

³²³ United Nations, *Treaty Series*, vol. 507, pp. 57 and 59.

³²⁴ One writer has stated that the 1966 agreement constituted "a compromise" (Rousseau, *Droit international public* (*op. cit.*), p. 454).

³²⁵ O'Connell, *State Succession* . . . (*op. cit.*), p. 423.

³²⁶ *Ibid.*, p. 424.

on the public debt alone, excluding all other financial outflows, then amounted to \$11 billion.³³¹

(42) This considerable increase in the external debt placed an unbearable burden on certain countries, particularly a number of developing countries which faced an alarming situation:

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.³³²

(43) The considerable increase in inflation in the industrialized economies that began in 1973 was to have serious consequences for the developing countries, which depend heavily on those economies for their imports, and thus aggravated their external debt.

(44) 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 1976.³³³ These deficits resulted in a huge increase in the outstanding external debt of the developing countries and in the service payments on that debt in 1974 and 1975. A recent study by IMF reveals that the total outstanding guaranteed public debt of these countries increased from about \$62 billion in 1973 to an estimated \$95.6 billion in 1975—an increase of over 50 per cent.³³⁴

(45) In addition, while the developing countries' indebtedness was increasing, the relative value of official development assistance was declining, the volume of such transfers having remained far below the minimum of 1 per cent of GNP called for by the International Development Strategy. In addition to 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 developed countries in developing countries. The increase in the absolute value of resources transferred to the developing countries in fact conceals a worsening of the debt situation of those countries. 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.

(46) Concern about the debt problem has been reflected in the proceedings of many international meetings, of which those mentioned in this and the following two paragraphs may serve as illustrations. Arrangements agreeable to both developing countries and industrialized creditor States to remedy this dramatic situation have not been easy to reach. The debtor countries have indicated that, in their view, their indebtedness is such that, if it is

not readjusted, it may cancel out any development effort.³³⁵

(47) The issue of cancellation of the debts of the former colonized countries has been raised by certain newly independent States.³³⁶ The General Assembly, by resolution 3202(S-VI) of 1 May 1974, adopted the "Programme of Action on the Establishment of a New International Economic Order", which provided in section II.2 that all efforts should be made to take, *inter alia*, the following measures:

(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.

(48) Resolution 31/158, adopted by the General Assembly of the United Nations on 21 December 1976, concerning "debt problems of developing countries" states:

The General Assembly,

...

Convinced that the situation facing the developing countries can be mitigated by decisive and urgent relief measures in respect of . . . their official . . . debts . . . ,

³³⁵ At the Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers from 5-9 September 1973, the problem was stated as follows:

"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." (Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, "Action programme for economic co-operation", section entitled "International monetary and financial systems", paras. 6-7 (A/9330, p. 92).)

³³⁶ 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." (*Official Records of the General Assembly, Sixth Special Session, Plenary Meetings*, 2208th meeting, para. 136.)

At the second session of the United Nations Conference on Trade and Development, held at New Delhi, Mr. L. Nègre, Minister of Finance of Mali, said at the 58th plenary meeting:

"Many 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 . . ." (*Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I (and Corr. 1 and 3 and Add.1-2), *Report and annexes* (United Nations publication, Sales No. E.68.II.D.14), annex V, p. 140).

During an official visit to French-speaking Africa, the President of the French Republic, Mr. G. Pompidou, decided to cancel a debt of about 1 billion francs owed by 14 African countries. That gesture, which was well received, does not fall within the scope of this draft, which is not concerned with the debt-claims of the predecessor State (constituting State property of that State). See *Journal officiel de la République française: Lois et décrets* (Paris, 20 July 1974), 106th year, No. 170, p. 7577.

³³¹ *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.*

³³² OECD, *Debt problems of developing countries* (Paris, 1974), p. 2.

³³³ IMF, "World economic outlook: Developments and prospects in the non-oil primary producing countries", p. 4, table 1.

³³⁴ *Ibid.*, table 8. The figures differ from those of IBRD because of the difference in the countries chosen, in the elements studied and in the method of calculation used.

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, and debt reorganization of interested developing countries carried out in accordance with the objectives, procedures and institutions evolved for that purpose;

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.³³⁷

Rule reflected in Article 20

(49) It may, at this juncture, be helpful to recall the scope of part III of the draft articles and the provisions of article 16, defining "State debt". As has been noted,³³⁸ debts proper to the territory to which a succession of States relates and contracted by one of its territorial authorities are excluded from the scope of "State debt" in this draft, as they may not properly be considered to be the debts of the predecessor State. In adopting such an approach in the context of decolonization, the Commission is aware that not all problems relating to succession in respect of debts are settled for newly independent States by article 20. In fact, the bulk of the liabilities involved in the succession may not, in the case of decolonization, consist of State debts of the predecessor State. They may be 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 may constitute a considerable volume of liabilities. As has been seen, disputes have frequently arisen concerning the real nature of debts of this kind, which are at times considered by the newly independent State as "State debts" of the predecessor State, which must remain the responsibility of the latter. The category of debts directly covered by article 20 is therefore those debts contracted by the Government of the administering Power on behalf and for the account of the dependent territory. These are, properly speaking, the State debts of the predecessor State, the fate of which upon the emergence of a newly independent State is the subject matter of the article.

³³⁷ The Conference on International Economic Co-operation (sometimes referred to as the "North-South Conference") did not reach final agreement on the issue of debt relief or reorganization.

³³⁸ See paras. (14) *et seq.* of the commentary to article 16, above.

(50) Also excluded are certain debts assumed by a successor State within the context of an agreement or arrangement providing for the independence of the formerly dependent territory. They include "miscellaneous debts" resulting from the take-over by the newly independent State of, for example, all public services. They do not appear to be debts of the predecessor State at the date of the succession of States, but rather correspond to what the successor State pays for the final settlement of the succession of States. Indeed, such debts may be said to represent "debt-claims" of the predecessor State against the successor State for the settlement of a dispute arising on the occasion of the succession of States.³³⁹ Finally, as explained above,³⁴⁰ the Commission has left aside, for the time being, the question of drafting general provisions relating to "odious debts".

(51) Further in regard to the scope of the present article, State practice concerning the emergence of newly independent States has shown the existence of another category of debts: those contracted by a dependent territory, but with the guarantee of the administering Power. This category includes, in particular, most loans contracted between dependent territories and IBRD. The latter required a particularly sound guarantee from the administering Power. In most, if not all, guarantee agreements³⁴¹ concluded between IBRD and an administering Power for a dependent territory, there are two important articles, articles II and III:

Article II

Paragraph 2.01. Without limitation or restriction upon any of the other covenants on its part in this Guarantee 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 . . .

Paragraph 2.02. Whenever there is reasonable cause to believe that the borrower will not have sufficient funds to execute or to arrange the execution of the project in conformity with the Loan Agreement, the guarantor, in consultation with the Bank and the borrower, will take the measures necessary to help the borrower to obtain the additional funds required.

Article III

Paragraph 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. . . .

³³⁹ Another category of debts should be excluded: that of the "national" debt of the predecessor State. Such debts would be those contracted by the predecessor State for its own account and for its own national metropolitan use, but part of which it was decided should be borne by its various dependent territories. This category relates to the archaic practices of certain States during the time of colonial empires several centuries ago, which are irrelevant in the contemporary world. It also covers certain rare cases occurring in modern times when the administering Power, in the face of national or international danger (such as the First and Second World Wars) may have contracted loans to sustain its war effort and associated its dependent territories in such efforts by requesting them to contribute. (This does not, of course, relate to military efforts directed against the dependent territory itself.) As this category of debts is exceptionally rare, it was decided to leave it aside in the present context.

³⁴⁰ See paras. (41)–(43) of the commentary to article 16.

³⁴¹ See, for example, 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).

(52) In the case of a guaranteed debt, the guarantee furnished by the administering Power legally creates a specific obligation for which it is liable, and a correlative subjective right of the creditor. If the succession of States had the effect of extinguishing the guarantee altogether and thus relieving the predecessor State of one of its obligations, a right of the creditor would unjustifiably disappear. The problem is not, therefore, to determine what happens to the debt proper to the dependent territory—which, it appears, is in fact normally assumed by the newly independent State—but rather to ascertain what becomes of the element by which the debt is supported, furnished in the form of a guarantee by the administering Power. In other words, what is at issue 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.

(53) The practice followed by IBRD in this regard seems clear. The Bank 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 seems to consider, as it were, that the succession of States has not changed the identity of the entity which existed before independence. However, the World Bank considers—and the predecessor State which has guaranteed the loan does not in any way deny—that the legal effects of the contract of guarantee continue to operate after the territory has become independent, so that the Bank can at any time turn to the predecessor State if the successor State defaults. The practice of the World Bank 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 for the purpose of relieving the predecessor State of all charges and obligations which it assumed by virtue of the guarantee given by it earlier.

(54) Bearing these considerations in mind, the Commission considers it sufficient to note that a succession of States does not as such affect a guarantee given by a predecessor State for a debt assumed by one of its formerly dependent territories.

(55) In the search for a general solution to the question of the fate of State debts of the predecessor State upon the emergence of a newly independent State, some writers have stressed the criterion of the utility or actual benefit which the loan afforded to the formerly dependent territory.³⁴² While such a criterion may appear useful at first glance, it is clear that if established as the basic rule governing the matter at issue, it would be extremely difficult to apply in practice. During a regional symposium held at Accra by UNITAR 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.³⁴³

(56) 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 have taken place as a result of these loans must be kept in mind. 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.³⁴⁴ Even if the successor 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.

(57) Another factor to be taken into account in the drafting of a general rule concerning the subject-matter of this article is the capacity of the newly independent State to pay the relevant debts of the predecessor State. This factor has arisen in State practice in connexion with cases other than that of newly independent States. The Permanent Court of Arbitration, in the *Russian Indemnity* case³⁴⁵ of 1912, recognized that:

The defence of *force majeure* . . . may be pleaded in public as well as in private international law: international law must adapt itself to political necessities.³⁴⁶

The treaties of peace concluded at the end of the First World War seem to indicate that, in the apportionment of predecessor State debts between various successor States, the financial capacity of the latter States, in the sense of future paying capacity (or contributing capacity), was in some cases taken into account.³⁴⁷ One author quotes an example of State practice in 1932, in which the creditor State (the United States) declared in a note to the debtor State (the United Kingdom) that the principle of capacity to pay did not require that the foreign debtor should pay to the full limit of its present or future capacity, as no settlement which was oppressive and which delayed the recovery and progress of the foreign debtor was in accordance with the true interest of the creditor.³⁴⁸

(58) 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 in the search for a basic rule governing such succession. The Commission is not unaware of the fact

³⁴³ Report of the United Nations Regional Symposium on International Law for Africa, 14–28 January 1971, Accra, Ghana, organized by UNITAR at the invitation of the Ghanaian Government, p. 9.

³⁴⁴ Mention may be made of article 255, section 2, of the Treaty of Versailles, which provided that:

"In the case of Poland that portion of the debt which, in the opinion of the Reparation 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", *British Foreign and State Papers, 1919*, (*op. cit.*), p. 125). [See foot-note 125 above.]

³⁴⁵ United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 421.

³⁴⁶ *Ibid.*, p. 443. [Translation by the Secretariat.]

³⁴⁷ See Rousseau, *Droit international public (op. cit.)*, pp. 442–447, 464–466, and Feilchenfeld, *op. cit.*, pp. 458–461, 852–856.

³⁴⁸ G. Jèze, "Les défaillances d'Etat", *Recueil des cours* . . . , 1935–III (Paris, Sirey, 1936), vol. 53, p. 392.

³⁴² Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 296–297.

that cases of "State default" involve debts already recognized by and assigned to the debtor whereas, in the cases with which this article is concerned, the debt is not yet "assigned" to the successor State and the whole problem is first to decide whether the newly independent State must be made legally responsible for such a debt before deciding whether it can assume it financially. Nevertheless, the two questions must be linked if practical and just solutions are to be found for situations in which prevention is better than cure. It may be asked 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 already known in advance to constitute a substantial impediment to the payment of such debts.³⁴⁹ Admittedly, taking into account explicitly in a draft article the "financial capacity" of a State would involve a somewhat vague phrase and might leave the way open for 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 for the creditor.

(59) The above general considerations concerning the capacity to pay must be viewed in relation to the developments occurring in contemporary international relations concerning the principle of the permanent sovereignty of every people over its wealth and natural resources, which constitutes a fundamental element in the right of peoples to self-determination.³⁵⁰ This principle, as it emerges from United Nations practice, is of substantial significance in the context of the financial capacity of newly independent States to succeed to State debts of the predecessor State which may have been linked to such resources (which may for example have been pledged as security for a debt). Thus the traditional issue of "capacity to pay" must be seen in its contemporary framework, taking into account the present financial situation of newly independent States as well as the implications of the paramount right of self-determination of the peoples and the principle of the permanent sovereignty of every people over its wealth and natural resources.

(60) In attempting to draft a basic rule applicable to succession to State debts of the predecessor State by newly independent States, the Commission has approached its task by drawing inspiration from Article 55 of the United Nations Charter:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health and related problems; and international cultural and educational co-operation;

...
Stability and orderly relations between States, which are necessary for peaceful and friendly relations cannot be divorced from the principles of equal rights and self-determination of peoples or from the over-all efforts of

the present-day international community to promote conditions of economic and social progress and to provide solutions of international economic problems. State practice and the writings of jurists do not provide clear and consistent answers to the question of the fate of State debts of the former metropolitan Power. Thus, the Commission is aware that, in drawing up rules governing the subject-matter, it is inevitable that a measure of progressive development of the law should be involved. State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles, and serious divergences of views, which continue to manifest themselves many years after the purported settlement of a succession of States. It is true, nevertheless, that in many cases the State debts of the predecessor metropolitan State have not passed to the newly independent State. The Commission cannot but recognize certain realities of present-day international life, in particular the severe burden of debt reflected in the financial situation of a number of newly independent States, nor can it ignore, in the drafting of legal rules governing succession to State debts in the context of decolonization, the legal implications of the fundamental right of self-determination of peoples and of the principle of the permanent sovereignty of every people over its wealth and natural resources. The Commission considered the possibility of drafting a basic rule which would provide for the passing of such debts if the dependent territory actually benefited therefrom. But as indicated above,³⁵¹ that criterion taken alone seems difficult to apply in practice, and does not provide for stable and friendly solution of the problems. It should not be forgotten that the subject-matter at issue—the succession to State debts of a metropolitan Power by a newly independent State—takes place wholly within the context of decolonization, which imports special and unique considerations not found in other types of succession of States. The latter consideration also implies the necessity to avoid such general language as "equitable proportion", which has proved appropriate in other types of succession but which would raise serious questions of interpretation and possible abuse in the context of decolonization.

(61) The Commission, in the light of all the above considerations, decided to adopt as a basic rule the rule of the non-passing of the State debt of the predecessor State to the successor State. This rule is found in the *first part of paragraph 1* of article 20, which states: "no State debt of the predecessor State shall pass to the newly independent State . . .". Having thus provided for the basic rule of non-passing, however, the Commission did not wish to foreclose the important possibility of an agreement on succession in respect of State debts being validly and freely concluded between the predecessor and successor States. The Commission was fully aware that newly independent States often need capital investment and that it should avoid formulating rules which might discourage States or financial international organizations from providing the necessary assistance. Thus, the *second part of paragraph 1* of article 20 is intended to follow the spirit of other provisions of the draft which encourage the predecessor and successor States to settle the question of the passing of State debts by agreement between themselves. Of course, it must be emphasized that such agreements

³⁴⁹ "Reconstruction of their economies by several new States has raised questions of the continuity of financial and economic arrangements made by the former colonial Powers or by their territorial administrations." (ILA, *op. cit.*, p. 102).

³⁵⁰ See paras. (25) to (28) of the commentary to article 11, above.

³⁵¹ See paras. (55) and (56) of this commentary.

must be validly concluded pursuant to the will freely expressed by both parties. To bring that consideration more sharply into focus, the second part of paragraph 1 has been drafted so as to spell out the necessary conditions under which such an agreement should be concluded. Thus, first, the State debt of the predecessor State must be "connected with its activity in the territory to which the succession of States relates." The language generally follows that found in other articles of the draft already adopted concerning succession in respect of State property (see, in particular, articles 10, 11, 13 and 14). Its purpose is clearly to exclude from consideration debts of the predecessor State having nothing to do with its activities as metropolitan Power in the dependent territory concerned. Secondly, the State debt of the predecessor State, connected with its activity in the territory concerned must be linked with "the property, rights and interests which pass to the newly independent State". If the successor State succeeds to certain property, rights and interests of the predecessor State, as provided for in article 11, it is only natural that an agreement on succession regarding State debts should take into account the corresponding obligations which may accompany such property, rights and interests. Thus articles 11 and 20 are closely connected in that respect. While the use of the criterion of "actual benefit" has generally been avoided, it can be seen that certain elements of that criterion have been usefully reflected here: the passing of debts may be settled by agreement in view of the passing of benefits (property, rights and interests) to which those debts are linked.

(62) While the parties to the agreement envisaged in paragraph 1 may freely agree on the provisions to be included therein, the Commission thought it necessary to provide a safeguard clause to ensure that such provisions do not ignore the financial capacity of the newly independent State to succeed to such debts or infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. Such a safeguard, which is included in *paragraph 2*, is particularly necessary in the case of an agreement such as is mentioned in paragraph 1, that is, one concluded between a former metropolitan Power and one of its former dependencies. By paragraph 2, it is intended to underline once again that the agreement must be concluded by the two parties on an equal footing. Thus agreements purporting to establish "special" or "preferential" ties between the predecessor and successor States (often termed "devolution agreements"), which in fact impose on the newly independent States terms that are ruinous to their economies, cannot be considered as the type of agreement envisaged in paragraph 1. The article presupposes—and paragraph 2 is intended to reinforce that supposition—that the agreements are to be negotiated in full respects for the principles of political self-determination and economic independence. Hence the express reference to the principle of the permanent sovereignty of every people over its wealth and natural resources and to the fundamental economic equilibria³⁵² of the newly independent State. It may be noted that in the English text of paragraph 2 it was considered appropriate to use the word "should" to

³⁵² In this connexion, attention may be drawn to the fact that the word "disequilibria" is found in article 60 of the Treaty instituting the European Coal and Steel Community (United Nations, *Treaty Series*, vol: 261, p. 191) and in article 3 (g), of the Treaty establishing the European Economic Community (*ibid.*, vol. 298, p. 16).

convey the intended meaning—that while the freedom of the parties to negotiate was not impaired, certain essential guidelines existed.

(63) The Commission would further recall certain decisions relating to other articles of the draft already adopted which bear upon article 20. The term "newly independent State" has already been defined in article 2, paragraph 1 (e) of the draft. Like article 11, article 20 is intended to apply to cases in which the newly independent State is formed from two or more dependent territories. Likewise, the article applies to cases in which a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.³⁵³ Finally, it will be recalled that article 11, concerning succession in respect of State property, did not include a specific reference to the fate of property acquired by the dependent territory in its own name and in its own right prior to the date of the succession of States. Similarly, the Commission has not thought it necessary to deal with the self-evident case of debts of the predecessor State owed to the dependent territory, which continue to be payable, after the date of the succession of States, to the newly independent State.

(64) Certain members of the Commission were unable to support the text of article 20 and expressed reservations and doubts thereon. When it was provisionally adopted by the Commission at its twenty-ninth session in 1977, one member expressed reservations on certain paragraphs of the commentary to the article as well.³⁵⁴ That member also proposed at that time an alternative text for the article,³⁵⁵ which received a measure of support from some members. The view was expressed that it was preferable, as a matter of principle, to admit the possibility that a State debt of the predecessor State might pass to the successor State in some way other than by an agreement between the two States, even though in State practice such passage is normally effected by agreement. Such a passing other than by agreement would still, it was said, be severely limited, in much the same manner as that spelled out in paragraph 1 of the adopted text, concerning the conditions for the conclusion of an agreement, and would indeed provide an incentive for the conclusion of

³⁵³ See para. (5) of the introductory commentary to section 2 of Part II, above.

³⁵⁴ The member concerned objected to the inclusion of paragraphs (39) to (50) of the 1977 commentary (see paragraphs (39) to (48) of the present commentary), particularly on the grounds that, in his view, they contained economic exposition and analysis which were not within the Commission's sphere of competence, and that some aspects of that exposition and analysis were debatable. That Member also considered it important to note that a number of States had dissented from elements of the Charter of Economic Rights and Duties of States and the Declaration on the establishment of a new International Economic Order quoted in paragraphs (26) and (27) of the commentary to article 11, to which reference is made in connexion with article 20, in footnote 350.

³⁵⁵ That text (A/CN.4/L.257) reads as follows:

"Article 22. Newly Independent States

"1. No debt contracted by the predecessor State on behalf or for the account of a territory which has become a newly independent State shall pass to the newly independent State unless the debt related to property, rights and interests of which the newly independent State is beneficiary and unless that passage of debt is in equitable proportion to the benefits that the newly independent State has derived or derives from the property, rights and interests in question.

"2. Any agreement concluded between the predecessor and the newly independent State for the implementation of the principles contained in the preceding paragraph shall pay due regard to the newly independent State's permanent sovereignty over its natural wealth and resources in accordance with international law."

agreements between predecessor and successor States. Concerning the question of permanent sovereignty over natural resources, preference was expressed for the terminology found in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.³⁵⁶ It was further believed that the text of article 20 as adopted could have the effect of discouraging loans to the remaining colonial territories. Another view expressed during the twenty-ninth session was that article 20 should have stated a certain number of legal rules: the basic principle of the non-passage of State debts of the predecessor State to the successor State and an exception to that rule based on equity, however limited. The provisions of the present paragraph 2 would then provide the procedures to be applied in the case of difficulties, namely, by agreement. According to that point of view, the article's major defects were that it did not allow for the slightest exception to the basic rule and that it mixed questions of principle with questions relating to the settlement of disputes, according a predominant place to the latter.

Article 21. *Uniting of States*

1. When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

Commentary

(1) Article 21, on the passing of the State debt in the case of uniting of States, corresponds to article 12 in part II relating to succession in respect of State property. It is not necessary, therefore to specify again the exact scope of the type of succession in question.³⁵⁷

(2) When two or more States unite and so form one successor State, it seems logical for the latter to succeed to the debt of the former just as it succeeds to their property. *Res transit cum suo onere*, the basic rule, is laid down in paragraph 1. This rule is generally accepted in legal theory. According to one writer, for instance, "when States merge to form a new State, their debts become the responsibility of that State."³⁵⁸

(3) In the practice of States, there seem to be only a few cases where the passing of the State debt upon a uniting of States was settled at the *International* level; questions relating to State debts have usually been regulated by the *internal* law of States. One example of an international arrangement is the union of Belgium and the Netherlands by the Act of 21 July 1814.³⁵⁹ Article 1 of the Act provided:

This union shall be intimate and complete so that the two countries form but one single State, governed by the Constitution already established in Holland, which will be modified by agreement in accordance with the new circumstances.

In view of the "intimate and complete" nature of the union thus achieved, article VI of the Act quite naturally concluded that:

Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces on the one hand and by the Belgian provinces on the other, shall be borne by the General Treasury of the Netherlands.

The Act of 21 July 1814 was later annexed to the General Act of the Congress of Vienna,³⁶⁰ and the article VI cited was invoked on a number of occasions to provide guidance for the apportionment of the debts between Holland and Belgium.

(4) A second example that may be cited is the unification of Italy—a somewhat ambiguous example, however, because learned opinion differs in describing the manner in which unity was achieved. As one writer sums it up:

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.³⁶¹

In a general way, the Kingdom of Italy acknowledged the debts of the formerly separate States and continued the practice that had already been instituted by the King of Sardinia. Thus the Treaty of Vienna of 3 October 1866,³⁶² under which "His Majesty the Emperor of Austria [agreed] to the union of the Lombardo-Venetian Kingdom with the Kingdom of Italy" (article III), included an article VI which provided as follows:

The Italian Government shall assume responsibility for: (1) that part of Monte Lombardo Veneto which was retained by Austria under the agreement concluded at Milan in 1860 in application of article 7 of the Treaty of Zurich;³⁶³ (2) the additional debts contracted by 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 Venetia in respect of the cost of non-transportable war materials. . . .

(5) Certain treaties relating to the uniting of Central American States may also be mentioned. The Treaty of 15 June 1897 concluded by Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua³⁶⁴ to form the Republic of Central America, as well as the Covenant of Union of Central America of 19 January 1921³⁶⁵ concluded by Costa Rica, El Salvador, Guatemala and Honduras after the dissolution of the Republic of Central America, contained some provisions relating to the treatment of debts. Although those treaties were more directly concerned with the allocation of debts among the component parts of the United States, there is no doubt that in its international relations the new State as a whole assumed the debts that had been owed by the various

³⁶⁰ *Ibid.*, p. 379. See also Feilchenfeld, *op. cit.*, pp. 123–124.

³⁶¹ D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), p. 171.

³⁶² G. F. Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1873), vol. XVIII, pp. 405–406.

³⁶³ The Treaty of Zurich of 10 November 1859, concluded between Austria and France, ceded Lombardy to France. The "new Government of Lombardy", under article 7 of the Treaty, was to assume three-fifths of the debt of Monte Lombardo Veneto (*ibid.*, 1860), vol. XVI, part II, p. 518.

³⁶⁴ *Ibid.* (Leipzig, Dieterich, 1905), 2nd series, vol. XXXII, p. 279.

³⁶⁵ League of Nations, *Treaty Series*, vol. V, p. 9.

³⁵⁶ Resolution 2200A (XXI) of the General Assembly, annex.

³⁵⁷ See paras. (1) and (2) of the commentary to article 12, above.

³⁵⁸ Fauchille, *op. cit.*, p. 380.

³⁵⁹ Act signed by the Secretary of State of H.R.H. the Prince of the Netherlands, in acceptance of the sovereignty of the Belgian provinces on the agreed bases, The Hague, 21 July 1814 (de Martens, ed., *Nouveau Recueil . . . (op. cit.)*, vol. II, p. 38).

predecessor States. The Treaty of 1897, according to which the union had "for its one object the maintenance in its international relations of a single entity" (article III), provided 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 (article XXXVII).

The 1921 Covenant stipulated that the Federal Government should administer the national finances, which should be distinct from those of the component States, and that the component States should "continue the administration of their present internal and external debts" (article V, para. (m)). It then went on to provide that

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.

(6) As indicated above, it is usually through the internal laws of States that questions relating to State debts have been regulated. Such laws often provide for the internal allocation of the State debt and thus are not directly relevant to the present article. Some examples, however, may be mentioned, because they assume that the State debt of the predecessor State passes to the successor State; otherwise no question of its allocation among component parts would arise.

(7) The union of Austria and Hungary was based essentially on two instruments: 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, and 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 1867.³⁶⁶ The Austrian Act provided, 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.

The Hungarian Act No. 12 of 1867 contained the following:

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. For this reason, 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.

(8) The Constitution of the Federation of Malaya (1957)³⁶⁷ contained a long article 167 entitled "Rights, liabilities and obligations", including the following provisions:

(1) ... all rights, liabilities and obligations of
(a) Her Majesty in respect of the Government of the Federation, and

(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.

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 according to 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 which, as from the date of uniting, fell within their respective spheres of competence. Article 167 continued:

(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.

(9) The Federation of Malaya was succeeded by Malaysia in 1963. The Malaysia Bill, which was annexed to the Agreement relating to Malaysia and came into force on 16 September 1963, contained in its part IV, relating to transitional and temporary provisions, a section 76 entitled "Succession to rights, liabilities and obligations", which read, *inter alia*:

(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.

(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day.³⁶⁸

Similar provisions may 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 (Rights, liabilities and obligations) stated:

(1) All rights, liabilities and obligations of Her Majesty in respect of the government of the colony of North Borneo shall on the

³⁶⁶ F.-R. Dareste and P. Dareste, *Les Constitutions modernes*, 3rd ed. (Paris, Challamel, 1910), vol. I, pp. 394 *et seq.* (for the Austrian Act) and pp. 403 *et seq.* (for the Hungarian Act).

³⁶⁷ *Malayan Constitutional Documents* (Kuala Lumpur, the Government Printer, 1959), p. 27.

³⁶⁸ United Nations, *Treaty Series*, vol. 750, p. 60.

commencement of this Constitution become rights, liabilities and obligations of the State.³⁶⁹

(10) The Provisional Constitution of the United Arab Republic, of 5 March 1958,³⁷⁰ although not very explicit as regards succession to debts of the two predecessor States, Egypt and Syria, provided in article 29 that:

The Government may not contract any loans, or 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 may be interpreted as giving the legislative authority of the United Arab Republic, to the exclusion of Syria and Egypt, sole power to contract loans. Furthermore, since article 70 provided for a single budget for the two regions, there may be grounds for agreeing with an eminent authority that "the United Arab Republic would seem to have been the only entity competent to service the debts of the two regions".³⁷¹

(11) Paragraph 2 of the present article 21 is a subsidiary provision of the basic rule enunciated in paragraph 1. It is intended to make it clear that, provided the requirement under paragraph 1 is met, the successor State may make internal arrangements regarding the ultimate allocation of the burden of servicing the State debt. Thus the successor State may allocate the whole burden of servicing a debt among its component parts, it may assume the whole burden itself or it may share the burden with its component parts, to the extent that such arrangements do not prejudice the application of the paramount rule stated in paragraph 1. As a rule of international law, however, the present article does not attempt to regulate the manner in which such internal arrangements are to be made. That is a matter to be left to the internal law of the successor State concerned. As explained in the commentary to article 12, the "internal law" referred to in paragraph 2 includes in particular the constitution of the State and any other kind of internal legal rules, written or unwritten, including those that effect the incorporation in internal law of international agreements.³⁷²

(12) Certain members of the Commission expressed the view that the allocation of the State debt of the successor State among its component parts should be made subject to the consent of the creditors of the debt concerned, since a change of the debt-servicing entity might be a matter of great concern to creditors. Other members, however, were opposed to the inclusion of such a requirement in paragraph 2, on the grounds that it might constitute interference in the domestic affairs of the successor State and that it would be impracticable in some cases to obtain the consent of all the creditors, who include, under article 16, sub-paragraph (b), private creditors. It was also pointed out that creditors were already protected under other articles, in particular those in section 1 of the present part. The Commission adopted the present text of

paragraph 2 as a compromise between those opposing views; the text makes it quite clear that the rule contained in paragraph 1 is the basic rule that should remain valid in all cases, and that the successor State should ultimately be responsible for the whole debt, whatever internal arrangement it may enter into regarding the allocation of the burden of servicing its debt.

(13) The Commission is aware of the view that paragraph 2 may not be necessary, since it relates to the purely domestic allocation of debt-servicing, the international aspect of the passing of debts being defined in paragraph 1. It has retained paragraph 2, however, because very often a component part of a successor State continues to be responsible for servicing the debt incurred by it as a State before it united with another State or States. If the possibility of internal arrangement were not expressly indicated, as it is in paragraph 2, the creditors—in particular the private creditors—would be placed in a very difficult position as regards finding out where to go to collect their debts.

Article 22. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

Article 23. Dissolution of a State

When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

Commentary to articles 22 and 23

(1) The topics of succession of States covered by articles 22 and 23 correspond to those dealt with in articles 13 and 14 respectively in part II; hence the use of similar introductory phrases in the corresponding articles to define their scope. Articles 22 and 23 both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. They differ, however, in that, while under article 22 the predecessor State continues its existence, under article 23 it ceases to exist after the separation of parts of its territory. The latter case is referred to as "dissolution of a State" in articles 14 and 23.³⁷³

(2) In establishing the rule for articles 22 and 23, the Commission believes that, unless there is a compelling reason to the contrary, the passing of the State debt in the two types of succession covered by these articles should be governed by a common basic rule, as are articles 13 and 14, relating to State property. It is on the basis of this

³⁶⁹ *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).

³⁷⁰ Text in E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly*, London, vol. 8, part 2 (April 1959), pp. 374–387.

³⁷¹ O'Connell, *State Succession . . . (op. cit.)*, p. 386. It may be noted that the arrears of contributions due to UNESCO from Egypt and Syria before their union came into being were treated as a liability of the United Arab Republic (*Materials on Succession of States in respect of Matters other than Treaties* (United Nations Publication, Sales No. E/F.77.V.9), p. 545).

³⁷² See para. (4) of the commentary to article 12, above.

³⁷³ See para. (1) of the commentary to articles 13 and 14, above.

assumption that State practice and legal doctrine will be examined in the following paragraphs.

(3) The practice of States offers few examples of separation of part or parts of the territory. Some cases may nevertheless be mentioned, one of them being the establishment of the Irish Free State. By a Treaty of 1921, Ireland obtained from the United Kingdom the status of a Dominion and became the Irish Free State. The Treaty apportioned debts between the predecessor State and the successor State on the following terms:

The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.³⁷⁴

(4) Another example is the separation of Singapore which, after joining the Federation of Malaya in 1963, withdrew from it and achieved independence in 1965. Article VIII of the Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State, signed at Kuala Lumpur on 7 August 1965, provides:

With regard to any agreement entered into between the Government of Singapore and any other country or corporate body which has been guaranteed by the Government of Malaysia, the Government of Singapore hereby undertakes to negotiate with such country or corporate body to enter into a fresh agreement releasing the Government of Malaysia of its liabilities and obligations under the said guarantee, and the Government of Singapore hereby undertakes to indemnify the Government of Malaysia fully for any liabilities, obligations or damage which it may suffer as a result of the said guarantee.³⁷⁵

(5) The two above-mentioned examples relate to cases where separation took place by agreement between the predecessor and successor States. However, it is far from certain that separation is always achieved by agreement. For example, the apportionment of State debts between Bangladesh and Pakistan does not seem to have been settled since the failure of the negotiations held at Dacca from 27 to 29 June 1974.³⁷⁶ This is one of the points that clearly distinguish cases of separation, covered by article 22, from cases of transfer of a part of a State's territory, dealt with in article 19. The latter article, it should be recalled, concerns the transfer of relatively small or unimportant territories, effected by theoretically peaceful procedures and, in principle, by agreement between the ceding and beneficiary States.

³⁷⁴ Article V of the Treaty of 6 December 1921 between Great Britain and Ireland (League of Nations, *Treaty Series*, vol. XXVI, p. 10).

³⁷⁵ United Nations, *Treaty Series*, vol. 563, p. 94. The Constitution of Malaysia (Singapore Amendment) Act, 1965, also contains some provisions relating to "succession to liabilities and obligations", including the following paragraph:

"9. All property, movable and immovable, and rights, liabilities and obligations which before Malaysia Day belonged to or were the responsibility of the Government of Singapore and which on that day or after became the property of or the responsibility of the Government of Malaysia shall on Singapore Day revert to and vest in or devolve upon and become once again the property of or the responsibility of Singapore." (*Ibid.*, p. 100)

³⁷⁶ Rousseau, *Droit international public* (*op. cit.*), p. 454. According to the same author, "Bangladesh claimed 56 per cent of all common property, while at the same time remaining very reticent regarding the apportionment of existing debts—a problem that it apparently did not wish to tackle until after settlement of the apportionment of assets, an approach that Pakistan is said to have refused". (*Ibid.*)

(6) With regard to dissolution of a State, covered by article 23, the following historical precedents may be cited: the dissolution of Great Colombia (1829–1831), the dissolution of the Union of Norway and Sweden (1905), the disappearance of the Austro-Hungarian Empire (1919); the disappearance of the Federation of Mali (1960), the dissolution of the United Arab Republic (1961), and the dissolution of the Federation of Rhodesia-Nyasaland (1963). Some of these cases are considered below, with a view to establishing how the parties concerned attempted to settle the passing of State debts.

(7) Great Colombia, which was formed in 1821 by the union of New Granada, Venezuela and Ecuador, was not to be long-lived. Within about 10 years, internal disputes had put an end to the union, whose dissolution was fully consummated in 1831.³⁷⁷ The successor States agreed to assume responsibility for the debts of the Union. New Granada and Ecuador first established the principle in the Treaty of Peace and Friendship concluded at Pasto on 8 December 1832. Article VII of the Treaty provided:

It has been agreed, and is hereby agreed, in the most solemn manner, and under the Regulations of the Laws of both States, that New Granada and Ecuador shall pay such share of the Debts, Domestic and Foreign, as may proportionably belong to them as integral parts which they formed, of the Republic of Colombia, which Republic recognized the said debts *in solidum*. Moreover, each State agrees to answer for the amount of which it may have disposed belonging to the said Republic.³⁷⁸

Reference may also be made to the Convention of Bogotá of 23 December 1834, concluded between New Granada and Venezuela, to which Ecuador subsequently acceded on 17 April 1857.³⁷⁹ These two instruments indicate that the successor States were to apportion the debts of Great Colombia among themselves in the following proportions: New Granada, 50 per cent; Venezuela, 28.5 per cent; Ecuador, 21.5 per cent.³⁸⁰

(8) The "Belgian-Dutch question" of 1830 had necessitated the intervention of the five Powers of the Holy Alliance, in the form of a conference that opened in London in 1830 and that culminated only in 1839, in the Treaty of London of 19 April of that year.³⁸¹ During the nine years of negotiations, a number of documents had to be prepared before the claims regarding the debts of the Kingdom of the Netherlands could be settled.

(9) One such document, the Twelfth Protocol of the London Conference, dated 27 January 1831, prepared by the five Powers, was the first to propose a fairly specific mode of settlement of the debts, which was to be included among the general principles to be applied in the draft treaty of London. The five Powers first sought to justify their intervention by asserting that "experience . . . had

³⁷⁷ See V.-L. Tapié, *Histoire de l'Amérique latine au XIXème siècle* (Paris, Montaigne, 1945). See in particular the discussion of the break-up of Great Colombia, pp. 57–60.

³⁷⁸ de Martens, ed., *Nouveau Recueil . . .* (*op. cit.*, 1838), vol. XIII, p. 63. [Quoted in English.]

³⁷⁹ Convention for the acknowledgement and division of the active and passive credits of Colombia (*British and Foreign State Papers, 1834–1835*) vol. XXIII (London, Ridgway, 1852), p. 1342. See also Feilchenfeld, *op. cit.*, pp. 296–298 (especially, p. 296, where the pertinent articles of the Convention are quoted).

³⁸⁰ Sánchez de Bustamante y Sirvén, *op. cit.*, p. 337; Accioli, *op. cit.*, p. 199; O'Connell, *State Succession . . .* (*op. cit.*), p. 388.

³⁸¹ See de Martens, ed., *Nouveau Recueil . . .* (*op. cit.*, 1842), vol. XVI, part II, p. 773. The five Powers of the Holy Alliance were Austria, France, Great Britain, Prussia and Russia.

only too often demonstrated to them the complete impossibility of the Parties directly concerned agreeing on such matters, if the benevolent solicitude of the five Courts did not facilitate agreement".³⁸² They cited the existence of relevant precedents that they had helped to establish and that had "in the past led to decisions based on principles which, far from being new, were those that have always governed the reciprocal relations of States and that have been cited and confirmed in special agreements concluded between the five Courts; those agreements cannot therefore be changed in any case without the participation of the Contracting Powers".³⁸³ One of the leading precedents relied upon by these five monarchies was apparently the above-mentioned Act of 21 July 1814³⁸⁴ by which Belgium and the Netherlands were united. Article VI of that Act provided that

Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces on the one hand and by the Belgian provinces on the other shall be borne by the General Treasury of the Netherlands.

From that provision the five Powers drew the conclusion of principle that, "upon the termination of the union, the community in question likewise should probably come to an end, and, as a further corollary of the principle, the debts which, under the system of the union, had been merged, might under the system of separation, be re-divided".³⁸⁵ Applying that principle in the case of the Netherlands, the five Powers concluded that "each country should first reassume exclusively responsibility for the debts it owed before the union", and that Belgium should in addition assume "*in fair proportion*, the debts contracted since the date of the said union and during the period of the union by the General Treasury of the Kingdom of the Netherlands, as they are shown in the budget of that Kingdom".³⁸⁶ That conclusion was incorporated in the "Bases for establishing the separation of Belgium and Holland" annexed to the Twelfth Protocol. Articles X and XI of those "bases" read as follows:

Article X. The debts of the Kingdom of the Netherlands for which the Royal Treasury is at present liable, namely (1) the outstanding debt on which interest is payable; (2) the deferred debt; (3) the various bonds of the Amortization Syndicate; and (4) the reimbursable annuity funds secured on State lands by special mortgages, shall be apportioned between Holland and Belgium in proportion to the average share of the direct, indirect and excise taxes of the Kingdom paid by each of the two countries during the years 1827, 1828 and 1829.

Article XI. Inasmuch as the average share in question makes Holland liable for 15/31 and Belgium liable for 16/31 of the aforesaid debts, it is understood that Belgium will continue to be liable for the payment of appropriate interest.³⁸⁷

These provisions were objected to by France, which considered that "His Majesty's Government has not found their bases equitable enough to be acceptable".³⁸⁸ The four courts to which the French communication was addressed replied that:

The principle established in Protocol No. 12, with regard to the debt, was as follows: When the Kingdom of the Netherlands was formed by the union of Holland with Belgium, the then existing debts of those two countries were merged by the Treaty of 1815 into a single whole and declared to be the national debt of the United Kingdom. It is therefore necessary and just that, when Holland and Belgium separate, each should resume responsibility for the debt for which it was responsible before their union and that these debts, which were united at the same time as the two countries, should likewise be separated.

Subsequent to the union, the United Kingdom has an additional debt which, upon the separation of the United Kingdom, must be *fairly* apportioned between the two States; the Protocol does not, however, specify what exactly the fair proportion should be and leaves this question to be settled later.³⁸⁹

(10) The Netherlands proved particularly satisfied and its plenipotentiaries were authorized to indicate their full and complete acceptance of all the basic articles designed to establish the separation of Belgium and Holland, which basic provisions derived from the London protocols of 20 and 27 January 1831.³⁹⁰ The Belgian point of view was reflected in a report dated 15 March 1831 to the Regent by the Belgian Minister for Foreign Affairs, which stated:

Protocols Nos. 12 and 13 dated 27 January . . . have shown in the most obvious manner the partiality, no doubt involuntary, of some of the plenipotentiaries in the Conference. These Protocols, dealing with the fixing of the boundaries, the armistice and, above all, the apportionment of the debts, arrangements which would consummate the ruin of Belgium, were restored . . . by a note of 22 February, the last act of the Diplomatic Committee.³⁹¹

Belgium thus rejected the provisions of the "Bases designed to establish the separation of Belgium and Holland". More precisely, it made its acceptance dependent on the facilities to be accorded it by the Powers in the acquisition, against payment, of the Grand Duchy of Luxembourg.

(11) The Twenty-fourth Protocol of the London Conference, dated 21 May 1831, clearly showed that "acceptance by the Belgian Congress of the bases for the separation of Belgium from Holland would be very largely facilitated if the five Courts consented to support Belgium in its wish to obtain, against payment, the Grand Duchy of Luxembourg".³⁹² As its wish could not be satisfied, Belgium refused to agree to the debt apportionment proposals that had been made to it. The Powers thereupon took it upon themselves to devise another formula for the apportionment of the debts; that was the object of the Twenty-fifth Protocol, dated 26 June 1831, of the London Conference. The new protocol contained a draft treaty consisting of 18 articles, article XII of which stated:

The debts shall be apportioned in such a way that each of the two countries shall be liable for all the debts which originally, before the union, encumbered the territories composing them, and in such a way that debts which were jointly contracted shall be divided up in a just proportion.³⁹³

That was in fact only a reaffirmation, not specified in figures, of the principle of the apportionment of debts contained in the Twelfth Protocol, of 27 January 1831.

³⁸² *Ibid.* (1836), vol. X, p. 164.

³⁸³ *Ibid.*, p. 165.

³⁸⁴ See para. (3) of the commentary to article 21, above.

³⁸⁵ de Martens, ed., *Nouveau Recueil* . . . (*op. cit.*, 1836), vol. X, p. 165.

³⁸⁶ *Ibid.*, pp. 165-166.

³⁸⁷ *Ibid.*, p. 172.

³⁸⁸ Twentieth Protocol of the London Conference, dated 17 March 1831 (annex A). Communication to the Conference by the plenipotentiary of France, Paris, 1 March 1831 (*ibid.*, p. 228).

³⁸⁹ *Idem* (annex B). The plenipotentiaries of the four Courts to the plenipotentiary of France (*ibid.*, p. 233).

³⁹⁰ Eleventh Protocol of the London Conference, dated 20 January 1831, determining the boundaries of Holland (*ibid.*, p. 158), and Eighteenth Protocol, dated 18 February 1831 (*ibid.*, p. 196).

³⁹¹ *Ibid.*, p. 222.

³⁹² *Ibid.*, p. 269.

³⁹³ *Ibid.*, p. 290.

Unlike the latter, however, the new protocol did not specify the debts for which the parties were liable. This time it was the Kingdom of the Netherlands that rejected the proposals of the Conference,³⁹⁴ and Belgium that agreed to them.³⁹⁵

(12) Before the Conference adjourned on 1 October 1832, it made several unsuccessful proposals and counter-proposals.³⁹⁶ Not until seven years later did the Belgian-Netherlands Treaty of 9 April 1839 devise a solution to the problem of the succession to debts arising out of the separation of Belgium and Holland.

(13) The Belgian-Dutch dispute concerning succession to the State debts of the Netherlands was finally settled by the Treaty of 19 April 1839, article 13 of the annex to which contained the following provisions:

1. As from 1 January 1839, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 5 million Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of

³⁹⁴ See Twenty-eighth Protocol of the London Conference, dated 25 July 1831 (annex A), "The Government of the Netherlands to the Conference", The Hague, 12 July 1831 (*ibid.*, 1837, vol. XI, pp. 212-222, and particularly p. 221).

³⁹⁵ See Twenty-seventh Protocol of the London Conference, dated 12 July 1831 (annex), "The Belgian Government to the Conference", Brussels, 9 July 1831 (*ibid.*, p. 210).

³⁹⁶ These proposals and counter-proposals included those made in two protocols and a treaty:

(a) The Forty-fourth Protocol of the London Conference, dated 26 September 1831 (annex A), Proposals by the London Conference, item 3 of which comprised 12 articles (articles VII-XVIII), of which the first three provided:

"VII. Belgium, including the Grand Duchy of Luxembourg, shall be liable for the debts which it had lawfully contracted before the establishment of the Kingdom of the Netherlands.

"Debts lawfully contracted from the time of the establishment of the Kingdom until 1 October 1830 shall be equally apportioned.

"VIII. Expenditures by the Treasury of the Netherlands for special items which remain the property of one of the two Contracting Parties shall be charged to it, and the amount shall be deducted from the debt allocated to the other Party.

"IX. The expenditures referred to in the preceding article include the amortization of the debt, both outstanding and deferred, in the proportion of the original debts, in accordance with article VII." (*Ibid.*, p. 291.)

These proposals, which were the subject of strong criticism by both the States concerned, were not adopted.

(b) The Forty-ninth Protocol of the London Conference, dated 14 October 1831 (annex A), Articles concerning the separation of Belgium from Holland, of which the first two paragraphs of a long article XIII read as follows:

"1. As from 1 January 1832, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 8,400,000 Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

"2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 8,400,000 Netherlands florins of annuity bonds, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow either now or in future, any distinction to be made between this portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt." (*Ibid.*, pp. 328-329.)

Belgium agreed to this provision (*ibid.*, pp. 350-351).

(c) The treaty for the final separation of Belgium from Holland, signed at London by the five Courts and by Belgium on 15 November 1831 (*ibid.*, p. 390), used the wording of provisions of the Forty-ninth Protocol reproduced above. This time too, however, it was not accepted by Holland (see Fifty-third Protocol of the London Conference, dated 4 January 1832, annex A (*ibid.*), vol. XII, pp. 285 *et seq.*).

the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 5 million Netherlands florins in annuity payments, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow, either now or in future, any distinction to be made between the portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt.

4. By the creation of the said sum of 5 million florins of annuities, Belgium shall be discharged vis-à-vis Holland of any obligation resulting from the apportionment of the public debts of the Kingdom of the Netherlands.³⁹⁷

The five Powers of the Holy Alliance, under whose auspices the 1839 Treaty was signed, guaranteed its provisions in two conventions of the same date signed by them and by Belgium and Holland. It was stated in those instruments that the articles of the Belgian-Dutch Treaty "are deemed to have the same force and value as they would have if they had been included textually in the present instrument, and are consequently placed under the guarantee of Their Majesties".³⁹⁸

(14) The dissolution of the Union of Norway and Sweden was effected by several conventions signed at Stockholm on 26 October 1905.³⁹⁹ The treatment of debts was decided by the Agreement of 23 March 1906 relating to the settlement of economic questions arising in connexion with the dissolution of the union between Norway and Sweden,⁴⁰⁰ which is commonly interpreted to mean that each State continued to be liable for its debts.⁴⁰¹ The Agreement provided:

Article 1. Norway shall pay to Sweden the share applicable to the first half of 1905 of the appropriations voted by Norway out of the common budget for the foreign relations of Sweden and Norway in respect of that year, into the Cabinet Fund, and also, out of the appropriations voted by Norway for contingent and unforeseen expenditures of the Cabinet Fund for the same year, the share attributable to Norway of the cost-of-living allowances paid to the agents and officials of the Ministry of Foreign Relations for the first half of 1905.

Article 2. Norway shall pay to Sweden the share applicable to the period 1 January-31 October 1905 of the appropriations voted by Norway out of the common budget for that year, into the Consulates Fund, and also the share attributable to Norway of the following expenditures incurred in 1904 and not accounted for in the appropriations for that year.

(a) the actual service expenditures of the consulates for the whole of 1904; and

(b) the office expenses actually attributed to the remunerated consulates, subject to production of documentary evidence, for the second half of 1904.⁴⁰²

These provisions, the purpose of which was to make Norway assume its share of common budget expendi-

³⁹⁷ *Ibid.* (1842), vol. XVI, part II, pp. 782-783.

³⁹⁸ Article 2 of the London Treaty of 19 April 1839, signed by the five Courts and the Netherlands (*ibid.*, p. 773), and article 1 of the London Treaty of 19 April 1839, signed by the five Courts and Belgium (*ibid.*, p. 790).

³⁹⁹ See L. Jordan, *La séparation de la Suède et de la Norvège* (Paris, Pedone, 1906) [thesis]; Fauchille, *op. cit.*, p. 234.

⁴⁰⁰ Descamps and Renault, *Recueil . . . XX^e siècle, 1906 (op. cit.)*, pp. 858-862.

⁴⁰¹ Thus Fauchille (*op. cit.*, p. 389) writes:

"After Sweden and Norway had dissolved their real union in 1905, a convention between the two countries, dated 23 March 1906, left each of them responsible for its personal debts."

⁴⁰² Descamps and Renault, *Recueil . . . XX^e siècle, 1906 (op. cit.)*, pp. 858-859.

tures, become clearer if it is remembered that, by a duplication of functions, the King of Sweden was also the King of Norway, and that the Swedish institutions were exclusively responsible for the diplomatic and consular representation of the Union. In this connexion, it should be noted that the cause of the break between the two States was Norway's wish to have its own consular service.⁴⁰³ From the foregoing considerations, it may be inferred that the consequences of the dissolution of the Swedish-Norwegian Union were, first, the continued liability of each of the two States for its own debts and, secondly, an apportionment of the common debts between the two successor States.

(15) The Federation of which Northern Rhodesia, Southern Rhodesia and Nyasaland had been members since 1953 was dissolved in 1963 by an Order in Council of the United Kingdom Government. The Order also apportioned the federal debt among the three territories in the following proportions: Southern Rhodesia, 52 per cent; Northern Rhodesia, 37 per cent; Nyasaland, 11 per cent. The apportionment was made on the basis of the share of the federal income allocated to each territory.⁴⁰⁴ This apportionment of the debts, as made by the United Kingdom Government's Order in Council, was challenged both as to its principle and as to its procedure. It was first pointed out that, "since the dissolution was an exercise of Britain's sovereign power, Britain should assume responsibility."⁴⁰⁵ This observation was all the more pertinent as the debts thus apportioned among the successor States by a British act of authority included debts contracted, under the administering Power's guarantee, with IBRD. This explains the statement by Northern Rhodesia that "it had at no time agreed to the allocation laid down in the Order, and had only reluctantly acquiesced in the settlement."⁴⁰⁶ Zambia, formerly Northern Rhodesia, later dropped its claim, because of the aid granted to it by the United Kingdom Government.⁴⁰⁷

(16) One of the cases considered above, the dissolution of Great Colombia, gave rise to two arbitral awards almost 50 years after the apportionment among the successor States of the debts of the predecessor State. These were the *Sarah Campbell* and *W. Ackers-Cage* cases,⁴⁰⁸ taken up by the Mixed Commission of Caracas set up between Great Britain and Venezuela under an agreement of 21 September 1868, in which two claimants—Alexander Campbell (later, his widow Sarah Campbell) and W. Ackers-Cage—sought to obtain from Venezuela payment of a debt owing to them by Great Colombia. Sturup, the umpire, in his award of 1 October 1869, held that "the two claims should be paid by the Republic. However, since they both form part of the country's external debt, it would be unjust to require that they be paid in full."⁴⁰⁹

(17) Two authors who commented on this award considered that "the responsibility of Venezuela for the debts

of the former Republic of Colombia, from which it had originated, was not and could not be contested" because, in their opinion (citing Bonfils and Fauchille), it could be regarded as a rule of international law that "where a State ceases to exist by breaking up or dividing into several new States, the new States should each bear, in an equitable proportion, a share of the debts of the original State as a whole".⁴¹⁰ Another author took the same view, adding pertinently that "the umpire Sturup, simply took account of the resources of the successor State in imposing an equitable reduction of the amount of the claims".⁴¹¹

(18) In connexion with the dissolution of a State in general, the following rule has been suggested:

If a State ceases to exist by breaking up and dividing into several new States, each of the latter shall in equitable proportion assume responsibility for a share of the debts of the original State as a whole, and each of them shall also assume exclusive responsibility for the debts contracted in the exclusive interest of its territory.⁴¹²

(19) A comparable formula is offered by an authority on the subject, article 49 of whose codification of international law provides that:

If a State should divide into two or more new States, none of which is to be considered as the continuation of the former State, that former State is deemed to have ceased to exist and the new States replace it with the status of new persons.⁴¹³

He, too, recommends the equitable apportionment of the debts of the extinct predecessor State, citing as an example "the division of the Netherlands into two kingdoms: Holland and Belgium", although he considers that "the former Netherlands was in a way continued by Holland particularly as regards the colonies".⁴¹⁴

(20) From the foregoing survey, two conclusions may be drawn that are worth noting in the context of articles 22 and 23. The first relates to the classification of the type of State succession exemplified by the precedents cited. In choosing historical examples of the practice of States with a view to their classification as cases of separation-secession and dissolution respectively, the Commission has mainly taken into account the fact that, in a case of the first type, the predecessor State survives the transfer of territory, whereas in a case of the second type it ceases to exist. In the first case, the problem of the apportionment of debts arises between a predecessor State and one or more successor States, whereas in the second it affects successor States *inter se*. Yet even this apparently very dependable criterion of the State's disappearance or survival cannot ultimately provide sure guidance, for it raises, in particular, the thorny problems of the State's continuity and identity.

(21) In the case of the disappearance of the Kingdom of the Netherlands in 1830, which the Commission has considered, not without some hesitation, as one of the examples of dissolution of a State, the predecessor State—the Belgian-Dutch monarchical entity—seems genuinely to have disappeared and to have been replaced by two new successor States, Belgium and Holland, each of which assumed responsibility for one half of the debts of the predecessor State. It might be said that it was actually the mode of settlement of the apportionment of the debts

⁴⁰³ Académie diplomatique internationale, *Dictionnaire diplomatique*, ed. A.-F. Frangulis (Paris, Lang Blanchong, 1933), vol. II, p. 233.

⁴⁰⁴ O'Connell, *State Succession* . . . (*op. cit.*), p. 393.

⁴⁰⁵ *Ibid.*, p. 394.

⁴⁰⁶ *Ibid.*, p. 393.

⁴⁰⁷ *Ibid.*, foot-note 6.

⁴⁰⁸ A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pedone, 1923), vol. II, pp. 552–556.

⁴⁰⁹ *Ibid.*, pp. 554–555.

⁴¹⁰ *Ibid.*, p. 555.

⁴¹¹ Rousseau, *Droit international public* (*op. cit.*), p. 431.

⁴¹² Fauchille, *op. cit.*, p. 380.

⁴¹³ J.-G. Bluntschli, *Das moderne Völkerrecht*, 3rd ed. (Nördlingen, Beck, 1878), pp. 81 and 82.

⁴¹⁴ *Ibid.*

that confirmed the nature of the event that had occurred in the Dutch monarchy and made it possible to describe it as "dissolution of a State". It is also possible, on the other hand, to regard the Netherlands example as a case of secession, and to hold, like one of the authors cited above, that "from a legal point of view, the independence of Belgium was nothing more than a secession of a province".⁴¹⁵ That approach might have proved seriously prejudicial to Holland's interests had it been acted upon, precisely in so far as it was not apparently demonstrated that the secessionist province was legally bound to participate—let alone in equal proportion—in servicing the debt of the dismembered State. But that approach was not, in fact, adopted by the London Conference, or even by the parties themselves, least of all by Belgium. Both States regarded their separation as the dissolution of a union, and each claimed for itself the title of successor State to a predecessor State that had ceased to exist. That was the treatment adopted in the above-mentioned Treaty of London of 19 April 1839, concluded between the five Powers and the Netherlands, article 3 of which provided that:

The Union which existed between Holland and Belgium under the Treaty of Vienna of 31 May 1815 is recognized by His Majesty the King of the Netherlands, Grand Duke of Luxembourg, as being dissolved*.*⁴¹⁶

(22) There are other cases concerning which opinions differ as to whether they should be regarded as falling under article 22 or under article 23. In any event, it is clear that there is a relationship between the two types of succession, and that the solutions adopted in the two cases should at least be analogous.

(23) The second conclusion concerns the nature of the problems arising in connexion with succession of States in respect of debts. In cases of separation of a part of the territory of a State as well as of dissolution of a State, the problems posed by the devolution of the State debt involve, in the final analysis, an endeavour to adjust the interests of the States concerned. Such interests are often substantial and almost always conflicting, and their reconciliation will in many cases call for difficult negotiations between the States directly affected by the succession. Only these States really know what are their own interests, and are often the best qualified to defend them, and in any event they alone know how far they can go in making concessions. These considerations are most strikingly illustrated in the already quoted case of 1830/1839, where the Netherlands and Belgium refused to submit to the many settlement proposals made by third States, which happened to be the major Powers at that time. The solution was worked out by the States concerned themselves, although a certain kinship is discernible between the various types of settlement proposed to them and the solutions they ultimately adopted. While it is undeniably more than desirable—and indeed necessary—to leave the parties concerned the widest latitude in seeking an agreement acceptable to each of them, nevertheless this "face-to-face" confrontation might in some situations prove prejudicial to the interests of the weaker party.

(24) In the light of the foregoing remarks, the best solution in the two types of succession envisaged under articles 22 and 23 would be to adopt a common residual

rule to be applied in cases where the States concerned cannot reach agreement on the devolution of the debt of the predecessor State. Furthermore, the historical precedents analysed above, together with the theoretical considerations amply developed throughout the present draft articles, lead the Commission to conclude that such a rule should be based on equity.

(25) *Paragraph 1 of article 22* as well as *article 23*, thus state that, unless the States concerned otherwise agree, "an equitable proportion of the State debt of the predecessor State" shall pass to the successor State or States, "taking into account all relevant circumstances". The States concerned are "the predecessor State and the successor State" in the case of article 22, and "the successor States" in the case of article 23, where the predecessor State disappears. It should be noted that in article 23 the Commission has omitted the word "concerned", which appears after the words "the successor States" in article 14, because of the different situation covered by article 23, which involves the passing of a debt rather than of property. Such debt cannot be imposed on one of the successor States by agreement between the other successor States alone.

(26) Regarding the phrase "unless . . . otherwise agree", the Commission wishes to point out that it is by no means intended to imply that the parties may agree on a solution that is not equitable. As demonstrated by State practice, an equitable or "just" apportionment of debts should always be the guiding principle for negotiations. In the opinion of certain members, however, paragraph 1 of article 22, as drafted, could be interpreted as enabling the predecessor State to enter into an agreement that would not provide for an equitable allocation of the State debt. Moreover, this provision appears to contradict that of article 18, paragraph 2, which allows creditors to deny the effect of such an agreement. It is accordingly suggested that the Commission re-examine article 18, paragraph 2, and its relationship with article 22, paragraph 1, at the second reading.

(27) With regard to the expression "taking into account all relevant circumstances", used in articles 22 and 23, the Commission adopted that formula despite the fact that it did not conform to the one already used in article 19, paragraph 2, namely, "taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt". Although the latter phrase could theoretically be considered as including "all relevant circumstances", the Commission preferred the new expression for articles 22 and 23 in order to avoid a division of opinion among its members as to whether those articles should expressly mention, as one of the factors to be taken into account, the "tax-paying capacity" or "debt-servicing capacity", which would best convey the meaning of the French term "*capacité contributive*". Some members considered such capacity as one of the most important factors in dealing with the passing of State debts. Others took the view that it should nowhere be mentioned because, if that factor were to be singled out, there might be a danger of excluding others that could be equally important. In addition, the term "*capacité contributive*" was thought to be too vague to be uniformly interpreted. The expression "taking into account all relevant circumstances" should therefore be understood to embrace all the factors relevant to a given situation, including "*capacité contributive*", both actual and potential, and the "property, rights and interests" passing to the successor State in relation to the State debt

⁴¹⁵ Feilchenfeld, *op. cit.*, p. 208.

⁴¹⁶ de Martens, ed., *Nouveau Recueil . . . (op. cit.)*, vol. XVI, p. 770.

in question. Other factors, too, might deserve particular consideration in certain cases, their relative importance varying according to the specific situation.

(28) In adopting the expression "taking into account all relevant circumstances" for articles 22 and 23, the Commission was well aware of the need to maintain uniformity of terminology throughout the draft articles. It did not, however, undertake a review of similar expressions already adopted in other articles, since that would be a task for the second reading of the draft articles as a whole.

(29) *Paragraph 2 of article 22* is identical with paragraph 2 of article 13, the purpose of which is to assimilate cases of separation of a part of the territory of a State that unites with another independent State, to those in which a part of the territory of a State separates and forms a new State. The rationale for such assimilation is given in the commentary to article 13, in the context of succession in respect of State property.⁴¹⁷ The Commission finds no reason to deal with such cases differently in the context of succession to State debts.

ADDENDUM

STATE ARCHIVES

Introduction

53. At its twenty-eighth session in 1976, when the Commission considered the eighth report of the Special Rapporteur dealing with State property, some members expressed the hope that he would supplement his draft articles concerning State property, which were drafted in abstract terms, by some articles specifically relating to State archives. The Commission, reflecting that hope, stated in its 1976 report that "the Special Rapporteur may . . . submit a report containing a special study on archives, in order that the Commission may complete its work on the succession of States in the matter of State property."⁴¹⁸ In its 1978 report the Commission again referred to the question, stating that it "may consider, at its thirty-first session, . . . provisions concerning archives, on which the Special Rapporteur is expected to submit a report"⁴¹⁹ Pursuant to this plan of work, the Special Rapporteur submitted at the present session an eleventh report (A/CN.4/322 and Corr.1 and Add.1-2) devoted to the question of succession of States in respect of State archives, containing six draft articles.

⁴¹⁷ See para. (16) of the commentary to articles 13 and 14, above.

⁴¹⁸ *Yearbook . . . 1976*, vol. II (Part Two), p. 126, document A/31/10, para. 103. It should be noted that various questions relating to succession of States to archives had been dealt with by the Special Rapporteur in some of his earlier reports, notably the third report (*Yearbook . . . 1970*, vol. II, p. 132, document A/CN.4/226), the fourth report (*Yearbook . . . 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1), the sixth report (*Yearbook . . . 1973*, vol. II, p. 3, document A/CN.4/267), and the seventh report (*Yearbook . . . 1974*, vol. II (Part One), p. 91, document A/CN.4/282).

⁴¹⁹ *Yearbook . . . 1978*, vol. II (Part Two), p. 110, document A/33/10, para. 122.

⁴²⁰ The texts of the remaining four draft articles are reproduced below for the information of the General Assembly.

"Article B. Transfer of a part of the territory of one State to another State

"Where a part of the territory of one State is transferred by that State to another State:

"(1) The passing of the State archives connected with the administration and history of the territory to which the succession of States

54. The Commission, at its current session, focused its attention on the consideration of two of those draft articles, i.e. articles A and C, which were originally entitled, respectively, "Transfer of State archives" and "Newly independent States".⁴²⁰ Furthermore, in con-

relates shall be settled by agreement between the predecessor State and the successor State.

"(2) In the absence of agreement:

"(a) The following archives pass to the successor State:

"(i) archives of every kind belonging to the territory to which the succession of States relates,

"(ii) the State archives that concern exclusively or principally the territory to which the succession of States relates, if they were constituted in the said territory;

"(b) The following archives remain with the predecessor State: the State archives concerning exclusively or principally the territory to which the State succession relates, if they were constituted in the territory of the predecessor State.

"(3) The state to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives."

"Article D. Uniting of States

"1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall, subject to the provisions of paragraph 2, pass to the successor State.

"2. The allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State."

"Article E. Separation of part or parts of the territory of a State

"1. Where a part or parts of the territory of a State separate from that State and form a State, the transfer of the State archives of the predecessor State to the successor State shall be settled by agreement between the predecessor State and the successor State.

"2. In the absence of an agreement:

"(a) The State archives of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates pass to the successor State;

"(b) The State archives of the predecessor State, other than those referred to in paragraph 2 (a) above, pass to the successor State in an equitable proportion.

"3. Each of the two States shall, for the use of the other State and at its request, make an appropriate reproduction of the State archives which it has retained, or which have passed to it, as the case may be.

"4. The provisions of paragraphs 2 and 3 above are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

"5. The provisions of paragraphs 1 to 4 above apply where a part of the territory of a State separates from that State and unites with another State."

"Article F. Dissolution of a State

1. If a predecessor State dissolves and disappears and the parts of its territory form two or more States, the transfer of the State archives to the different successor States shall be settled by agreement between them.

"2. In the absence of an agreement:

"(a) The State archives of all kinds of the predecessor State, wheresoever they may be, pass to the successor State if they relate exclusively or principally to the territory of that successor State, which shall be responsible for making an appropriate reproduction thereof for the use of the other successor States, and at their request and expense.

"(b) State archives which are indivisible or which relate equally to the territories of two or more successor States pass to the successor State in whose territory they are situated, the other successor States concerned being equitably compensated, and the successor State to which they pass shall be responsible for making an appropriate reproduction thereof for the use of the other successor States concerned and at their request.

"(c) State archives of the type referred to in paragraph (b) above which are kept outside the territory of the dissolved predecessor State pass to one of the successor States concerned according to the conditions laid down in paragraph (b)."

sidering article A, it concentrated on that aspect which concerned the definition of State archives, leaving aside the question of drafting one or more general provisions applicable to all types of succession of States.

55. The Commission adopted texts for articles A and B (corresponding to articles A and C originally proposed by the Special Rapporteur), which could conveniently be integrated into the set of draft articles as a whole. Depending upon the decision whether or not "State property" includes "State archives", these provisions may be inserted in part II of the draft, dealing with State property, or be placed after part III, as a separate part IV. The Commission deemed it appropriate to present these two draft articles to the General Assembly and to Governments in the form of an addendum to the set of 23 draft articles adopted on first reading.

General commentary

(1) The Commission considers that, whether or not State archives are treated as a type of State property, they constitute a very special case in the context of succession of States. The principle of the transfer of State property taken *in abstracto* applies to all property, whether movable or immovable, and is readily applicable to concrete situations involving the transfer of such property as administrative premises or buildings of the State, barracks, arsenals, dams, military installations, all kinds of research centres, factories, manufacturing facilities, railway equipment, including both rolling stock and fixed installations, airfields, including their movable and immovable equipment and installations, claims outstanding, funds, currency, etc. By virtue of their nature, all these forms of State property are susceptible of appropriation and, hence, of assignment to the successor State, as appropriate, in accordance with the rules on succession of States. Such is not necessarily the case with archives, which, by virtue of their physical nature, their contents, and the function which they perform, may seem to be of interest, at one and the same time, both to the predecessor State and to the successor State. Obviously, a State building situated in the territory to which the succession of States relates can only pass to the successor State or, where there is more than one successor State, to one of them, subject to compensation awarded to the others. Similarly, monetary reserves, such as gold, for example, can be transferred *physically* to the successor State, or apportioned between the predecessor State and the successor State, or among several successors, if one or the other solution is agreed upon by the parties. There is nothing in the physical nature of State property of this kind that would stand in the way of any solution that is agreed upon by the States concerned.

(2) Archives, by contrast, may prove to be indispensable both to the successor State and to the predecessor State, and owing to their nature they cannot be divided or split up. However, State archives are objects which have the peculiarity of being reproducible, which is not true of the other immovable and movable property involved in the succession of States. Of all State property, archives alone are capable of being duplicated, which means that both the right of the successor State to recover the archives and the interest of the predecessor State in their use can be satisfied.

(3) This point should be stressed even more in the contemporary setting where the technological revolution has made it possible to reproduce documents of almost

any kind with extreme speed and convenience.

(4) Archives, jealously preserved, are the essential instrument for the administration of a community. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the "ins and outs" of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. According to a group of experts convened by UNESCO in March 1976,

Archives are an essential part of the heritage of any national community. Not only do they provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights.⁴²¹

(5) The destructive effects of wars have seriously impaired the integrity of archival collections. In some cases, the importance of documents is such that the victor hastens to transfer these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the spoliation of its records. All, or almost all, annexation treaties in Europe since the Middle Ages have required the conquered to restore the archives belonging to or concerning the ceded territory. Without being under any delusion as to the draconian practice of the victors who carried off archives and recklessly disrupted established collections, legal doctrine considered clauses calling for the handing over of archives to the annexing State as implicit in the few treaties from which they had been omitted.⁴²² These practices have been followed in all periods and in all countries. The fact is that archives handed over to the successor State—forcibly, if necessary—served primarily as evidence and as "title deeds" to the annexed territory; they were used as instruments for the administration of the territory, and are so used even more today.

(6) Reflecting the importance of archives in domestic affairs as well as in international relations, disputes have never ceased to occur regarding State archives and numerous agreements have been concluded for their settlement.⁴²³

(7) From an analysis of State practice, as reflected in such agreements, one can draw a number of conclusions, as one writer has done,⁴²⁴ which can be summarized as follows:

⁴²¹ UNESCO, "Final report of consultation group to prepare a report on the possibility of transferring documents from archives constituted within the territory of other countries" (CC-76/WS/9), p. 2. The meeting was held in co-operation with the International Council on Archives.

⁴²² L. Jacob, *La clause de livraison des archives publiques dans les traités d'annexion* (Paris, Giard et Brière, 1915) [thesis], *passim*, and in particular pp. 40 and 49.

⁴²³ For a non-exhaustive table of treaties and conventions containing provisions relating to the passing of archives in cases of succession of States since 1600, see A/CN.4/322 (and Corr.1) and Add.1 and 2, sect. D.

⁴²⁴ See C. Kecskeméti, "Les contentieux archivistiques: étude préliminaire sur les principes et les critères à retenir lors des négociations", UNESCO document PGI-77/WS/1, reproduced in: Dix-Septième Conférence internationale de la Table ronde des archives, "Constitution et reconstitution des patrimoines archivistiques nationaux", 1977, document 2. This study eventually constituted the substance of the UNESCO document entitled "Report of the Director-General on the study of problems involved in the transfer of documents from archives in the territory of certain countries to the country of their origin" (document 20 C/102, of 24 August 1978).

(a) Archival clauses are very common in treaties on the cession of territories concluded between European Powers and are almost always absent in cases of decolonization.

(b) The removal of archives is a universal and timeless phenomenon. In almost all cases, they are returned sooner or later to their rightful owners, except, it seems, in cases of decolonization. But time has not yet run its full course or produced its effect in this field.

(c) Archives of an administrative or technical nature concerning the territory affected by the succession of States pass to the successor State in all types of State succession and, generally, without much difficulty.

(d) Archives of an historical nature pass to the successor State, depending to some extent on the circumstances; archivists cannot always explain their transfer to the successor State nor, in the converse case, can jurists explain why they are kept by the predecessor State.

(8) With regard to the first conclusion, practically all treaties on the transfer of territory concluded in Europe since the Middle Ages contain special, and often very precise, clauses concerning the treatment of the archives of the territories to which the succession of States relates.⁴²⁵ The types of State succession dealt with in such treaties are, by and large, according to the typology of succession established by the Commission, the transfer of part of the territory of one State to another State, and the separation of one or more parts of the territory of a State.

(9) In modern cases of decolonization, on the other hand, very few treaty provisions exist regarding the treatment of archives, despite the large number of newly independent States. The absence of archival clauses from agreements relating to the independence of colonial territories seems the more surprising as these agreements, of which there are many, govern succession not only to immovable but also to movable property, i.e. property of the same type as the archives themselves.⁴²⁶

(10) There may be many reasons for this. For example, decolonization cannot be total and instantaneous *ab initio*; rather, at least to begin with, it is purely nominal and only gradually acquires more substance and reality, so that the question of archives seldom receives priority treatment during the early, almost inevitably superficial, stage of decolonization. Newly independent States are plunged straightaway into day-to-day problems, and have to cope with economic or other priorities which absorb all their attention and prevent them from perceiving immediately the importance of archives for their own development. Moreover, the under-development inherited in all fields by newly independent States is also reflected precisely in an apparent lack of interest in the exercise of any right to the recovery of archives. Lastly, the power relationship existing between the former administering Power and the newly independent State most often enables the former to evade the question of the passing of archives and to impose unilateral solutions in this matter.

(11) In view of the above-mentioned historical background, the Commission wishes to emphasize the importance of close co-operation among States for settling archival disputes, taking into account especially the relevant recommendations of international organizations such as UNESCO, which reflect the contemporary demands of States concerning their right to archives and their cultural heritage.⁴²⁷ The predecessor and successor States should be under a duty to negotiate in good faith and with unimpeachable determination to reach a satisfactory settlement of such disputes. As the Director-General of UNESCO has said:

Because the patrimonial character of archives as State property derives from the basic sovereignty of the State itself, problems involved in the ownership and transfer of State archives are fundamentally legal in character. Such problems should therefore be resolved primarily through bilateral or multilateral negotiations and agreements between the States involved.⁴²⁸

Article A. State archives

For the purposes of the present articles, "State archives" means the collection of documents of all kinds which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been preserved by it as State archives.

Commentary

(1) *Article A* defines the term "State archives" as used in the present articles. It means "the collection of documents of all kinds" which fulfils two conditions. First, the collection of documents must have "belonged to the predecessor State according to its internal law", and second, it must have "been preserved by [the predecessor State] as State archives". The first condition thus follows the formula of *renvoi* to internal law adopted for article 5, defining the term "State property". The second

⁴²⁵ Jacob, *op. cit.*

⁴²⁶ There are very many treaties relating to the transfer of judicial archives in cases of decolonization. However, such cases involve the transfer of judicial records of litigation still under adjudication in courts of appeal or cassation situated in the territory of the former administering Power and involving nationals of the newly independent State. The predecessor State cannot continue to adjudicate cases henceforward falling under the judicial sovereignty of the successor State. Many agreements on this subject could be cited. See, for example, as regards France and the newly independent territories: Agreement concerning the transitional provisions in respect of justice between France and the Central African Republic of 12 July 1960 (*Journal officiel de la République française, Lois et décrets* (Paris), 30 July 1960, 92nd year, No. 176, p. 7043, and *Materials on Succession of States in respect of Matters other than Treaties* (*op. cit.*), p. 150); Agreement between France and Chad of the same date (*Journal officiel de la République française* (*op. cit.*), p. 7044, and *Materials* . . . (*op. cit.*), p. 157); Agreement between France and the Congo of the same date (*Journal officiel* . . . (*op. cit.*), p. 7043, and *Materials* . . . (*op. cit.*), p. 163); Agreement between France and Gabon of 15 July 1960 (*Journal officiel* . . . (*op. cit.*), p. 7048, and *Materials* . . . (*op. cit.*), p. 182); Agreement between France and Madagascar of 2 April 1960 (*Journal officiel* . . . (*op. cit.*), 2 July 1960, 92nd year, No. 153, p. 5968, and *Materials* . . . (*op. cit.*), p. 290); Agreement between France and the Federation of Mali of 4 April 1960 (*Journal officiel* . . . (*op. cit.*), p. 5969, and *Materials* . . . (*op. cit.*), p. 315); exchange of letters between France and Upper Volta of 24 April 1961 relating to the transfer of records pertaining to cases pending in the Conseil d'Etat and the Court of Cassation (*Journal officiel* . . . (*op. cit.*), 5-6 February 1962, 94th year, No. 30, p. 1315, and *Materials* (*op. cit.*), p. 439); exchange of letters between France and Dahomey of 24 April 1961 (*Journal officiel* . . . (*op. cit.*), p. 1285, and *Materials* . . . (*op. cit.*), p. 128; exchange of letters between France and Mauritania of 19 June 1961 (*Journal officiel* . . . (*op. cit.*), p. 1335, and *Materials* . . .

(*op. cit.*), p. 343); exchange of letters between France and Niger of 24 April 1961 (*Journal officiel* . . . (*op. cit.*), p. 1306, and *Materials* . . . (*op. cit.*), p. 372); exchange of letters between France and the Ivory Coast of 24 April 1961 (*Journal officiel* . . . (*op. cit.*), p. 1269, and *Materials* . . . (*op. cit.*), p. 231); and others.

⁴²⁷ Further on this point, see paras. 27 *et seq.* of the commentary to article B, below.

⁴²⁸ UNESCO, document 20 C/102 (*loc. cit.*), para. 19.

condition, however, is not qualified by the words "according to its internal law". By detaching this second element from the internal law of a State, the Commission attempted to avoid an undesirable situation where certain predecessor States could exclude the bulk of public papers of recent origin – the "living archives" – from the application of the present articles simply because they are not designated under their domestic law as State archives. It should be pointed out that in a number of countries such "living archives" are not classified as "State archives" until a certain time, for example 20 or 30 years, has elapsed.

(2) Although in archival science "archives" are generally taken to mean "(a) the documentary material amassed by institutions or natural or legal persons in the course of their activities and deliberately preserved; (b) the institution which looks after this documentary material; (c) the premises which house it",⁴²⁹ the present articles deal with the "collection of documents of all kinds", corresponding to only (a) of those three categories. The other categories, namely the custodial institutions and the premises, are considered as immovable property and thus fall into part II of the present draft.

(3) The word "documents" (of all kinds) should be understood in its widest sense. An archival document is anything which contains "authentic data which may serve scientific, official and practical purposes", according to the reply of Yugoslavia to the questionnaire drawn up by the International Round Table Conference on Archives.⁴³⁰ Such documents may be in written form or unwritten, or may be in a variety of material, such as paper, parchment, fabric, stone, wood, glass, film, etc.

(4) Of course, the preservation of written sources remains the very basis for the constitution of State archives, but the criterion of the physical appearance of the object, and even that of its origin, play a part in the definition of archival documents. Engravings, drawings and plans which include no "writing" may be archival items. Numismatic collections are sometimes an integral part of an archival collection. Quite apart from historic collections of paper money, or samples or dies or specimens of bank notes or stamps, there are even collections of coins in national archival collections or national libraries. This is the case in Romania, Italy, Portugal, England (where the Public Record Office owns a collection of stamps and counterfeit coins) and France (where the Bibliothèque nationale, in Paris, houses a large numismatic collection from the Cabinet des médailles). Iconographic documents, which are normally kept in museums, are sometimes kept in national archival institutions, most frequently because they belong to archival collections. Iconographic documents which have to do with important persons or political events are filed and cared for as part of the national archives. This is the case in England, where the Public Record Office has a large collection of iconographic documents as well as a large series of technical drawings from the Patent Office; in Italy, where the Archivio centrale dello Stato keeps photographs of all political, scientific, and ecclesiastical notables; and in Argentina, where the Archivo gráfico

fulfils the same function. Photographic prints are part of the archives themselves in certain countries. Thus, in Poland, the national archives receive prints from State photographic agencies. Some sound documents and cinematographic films are considered to be "archives" under the law of many countries (for example, France, Sweden, Czechoslovakia) and are therefore allocated under certain conditions either to the State archival administration, or to libraries or museums, or to other institutions. In cases where they are allocated to the State archival administration, sound documents must be considered an integral part of the archives and must be treated in the same way as the latter in the case of succession of States. In the United States, commercial films are subject to copyright and are registered with the Library of Congress, whereas cinematographic productions by the army and certain American public institutions are placed in the State archives. In Finland, a committee chaired by the director of the national archives is responsible for the establishment and preservation of cinematographic archives.⁴³¹

(5) The term "documents of all kinds" is intended to cover documents of whatever subject-matter—diplomatic, political, administrative, military, civil, ecclesiastical, historical, geographical, legislative, judicial, financial, fiscal, cadastral, etc.; of whatever nature—handwritten or printed documents, drawings, photographs, their originals or copies, etc.; of whatever material—paper, parchment, stone, wood, ivory, film, wax, etc.; and of whatever ownership.

(6) The term "documents of all kinds", however, excludes *objets d'art*, which may also have cultural and historical value. The passing of such objects is covered either by the provisions relating to State property or dealt with as the question of their return or restitution, rather than as a problem of State succession.

(7) Various wordings have been used in diplomatic instruments to refer to archives falling under the present article. Examples are "archives, registers, plans, title-deeds and documents of every kind";⁴³² "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories";⁴³³ "all title-deeds, plans, cadastral and other registers and papers";⁴³⁴ "any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded";⁴³⁵ "all documents exclusively referring to the sovereignty re-

⁴³¹ *Ibid.*, pp. 30–31, for other examples.

⁴³² This expression appears in several clauses of the Treaty of Versailles of 28 June 1919: part III, sect. I, art. 38, concerning Germany and Belgium; sect. V, art. 52, concerning Germany and France in respect of Alsace-Lorraine; sect. VIII, art. 158, concerning Germany and Japan in respect of Shantung (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 29–30, 42 and 81); as well as in the Treaty of Saint-Germain-en-Laye of 10 September 1919: art. 93, concerning Austria (*ibid.*, p. 361); and in the Treaty of Trianon of 4 June 1920: art. 77, concerning Hungary (*ibid.*, vol. 113, p. 518).

⁴³³ Article 3 of the Treaty of Peace between the German Empire and France signed at Frankfurt on 10 May 1871 (de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1874), vol. XIX, p. 689).

⁴³⁴ Article 8 of the Additional Agreement of the Treaty of Peace signed at Frankfurt on 11 December 1871 (*ibid.*, [1875], vol. XX, p. 854).

⁴³⁵ Article 1, para. 3, of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (*Supplement to the American Journal of International Law* (New York, Oxford University Press, 1917), vol. II, p. 55).

⁴²⁹ France, Direction des archives de France, *Actes de la Septième Conférence internationale de la Table ronde des archives, Le concept d'archives et les frontières de l'archivistique* (Paris, Imprimerie nationale, 1963), p. 9.

⁴³⁰ *Ibid.*, p. 10.

linquished or ceded . . . , the official archives and records, executive as well as judicial”,⁴³⁶ “documents, deeds and archives . . . , registers of births, marriages and deaths, land registers, cadastral papers . . .”,⁴³⁷ and so forth.

(8) A most detailed definition of “archives” is to be found in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia,⁴³⁸ concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses documents relating to all the public services, to the various parts of the population, and to categories of property situations or private juridical relations. Article 2 reads as follows:

The expression “archives and documents of an administrative character” shall be construed as covering the documents of the central administration and those of the local public administrative authorities.

The following [in particular shall be covered] . . . :

Documents . . . such as cadastral registers, maps and plans; blue-prints, drawings, drafts, statistical and other similar documents of technical administration, concerning *inter alia* the public works, railways, mines, public waterways, seaports and naval dockyards;

Documents of interest either to the population as a whole or to part of the population, such as those dealing with births, marriages and deaths, statistics, registers or other documentary evidence of diplomas or certificates testifying to ability to practice certain professions;

Documents concerning certain categories of property, situations or private juridical relations, such as authenticated deeds, judicial files, including court deposits in money or other securities . . . ;

The expression “historical archives and documents” shall be construed as covering not only the material from archives of historical interest properly speaking but also documents, acts, plans and drafts concerning monuments of historical and cultural interest.

(9) It should be noted that no absolute distinction exists between “archives” and “libraries”. While archives are generally thought of as documents forming part of an organic whole and libraries as composed of works which are considered to be isolated or individual units, it is nevertheless true that archival documents are frequently received in libraries and conversely library items are sometimes taken into the archives. The inclusion of library documents in archives is not confined to rare or out-of-print books which may be said to be “isolated units”, or to manuscripts, which, by their nature, are “isolated units”. Conversely, libraries acquire or receive as gifts or legacies the archives of important persons or statesmen. There are therefore certain areas in which archives and libraries overlap, and these are extended by the system of the statutory deposit of copies of printed works (including the Press) in certain countries, and by the fact that the archival administration sometimes acts as the author or publisher of official publications.

(10) Similarly, “archives” and “museums” cannot be placed in completely separate categories; some collections of archives are housed in museums and various museum pieces are found in archives. According to Y. Pérotin:

. . . in England, it is considered normal that archival documents connected with museographical collections should follow the latter and conversely that certain objects (such as chests) should be treated in the same way as papers; . . . local museums own archival documents that have been bought or received as gifts, or come from learned societies . . . In the Netherlands, historical atlases are cited as an example of documents legitimately kept in museums, while dies of seals are kept in the archives. In the Land of Westphalia, reference is made to chests and other objects which by their nature belong to the archives in the USSR, collections of manuscript documents provisionally kept in the national museums are supervised by the Archives Administration; the major autonomous “archive museums”, established by special decision (Gorky, Mendeleev, etc.) are not exempt.

. . . in Portugal, the Viseu regional museum keeps some of the parchments from the cathedral chapter of the See, and the remainder are in the district archives or in Lisbon in the Torre do Tombo. . . . In Turkey, . . . the archives of the palace of the former sultans are kept in the Topkapi-Sarayi museum with part of the records of the religious courts, whereas the provincial counterparts of those records are, in exactly nineteen cases, kept in museums.⁴³⁹

(11) During the consideration of article A by the Commission, several members expressed reservations concerning the text as drafted. The Commission, in provisionally adopting article A, wishes to make it clear that it has not attempted to establish the definition of State archives in its final form; rather, the text of the article should be understood to be a first step to that end. The Commission wishes to draw the attention of Governments particularly to the present article and to invite their comments, so that it may have as many suggestions and comments as possible on which to base any further work on this subject.

Article B. Newly independent State

1. When the successor State is a newly independent State:

(a) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

⁴³⁶ Article VIII of the Treaty of Peace between Spain and the United States of America, signed at Paris on 10 December 1898 (text in Malloy, *op. cit.*, p. 1693).

⁴³⁷ Article 8 of the frontier treaty between the Netherlands and the Federal Republic of Germany signed at the Hague on 8 April 1960 (United Nations, *Treaty Series*, vol. 508, p. 154).

⁴³⁸ Agreement signed at Rome on 23 December 1950 between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (*ibid.*, vol. 171, p. 291).

⁴³⁹ *Le concept d'archives . . .* (*op. cit.*), pp. 45–46.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

Commentary

(1) The present article principally envisages, like articles 11 and 20, the case where a newly independent State appears on the international scene as a result of decolonization. The Commission adopted this article relating to newly independent States before dealing with other types of succession and submits it to the General Assembly because it considers that the problem of succession in respect of archives is particularly acute at present in the case of decolonization and that the views of Governments are very much needed for the Commission to pursue the question of archives further.

(2) The Commission has already had occasion to clarify the notion of a "newly independent State" several times within the framework of the typology used in the present draft. Reference should be made in particular to the definition in article 2, paragraph 1 (e) and the commentaries to that paragraph,⁴⁴⁰ as well as to articles 11 and 20.⁴⁴¹

(3) The present article is closely modelled on article 11, though certain new elements have been added in view of the uniqueness of State archives as a category of matters which pass at a succession of States.

(4) *Paragraph 1 (a)* deals with "archives"—not necessarily "State archives"—which had belonged to the territory to which the succession of States relates before it became dependent and which became State archives of the predecessor State during its dependency. Since no reason can be found for deviating from the rule enunciated in article 11, paragraph 1 (a), concerning movable property satisfying the same conditions, paragraph 1 (a) of the present article uses the same wording, except the word "archives", as that adopted for the former provision.

(5) By the use of the word "archives" rather than "State archives" at the beginning of *paragraph 1 (a)*, it is intended to cover archives which belonged to the territory in question, whatever the political status it had enjoyed or under whatever ownership the archives had been kept in the pre-colonial period—whether by the central Government, local governments or tribes, religious missions, private enterprises or individuals.

(6) Such historical archives of the pre-colonial period are not the archives of the predecessor State, but the archives of the territory itself, which has constituted them in the course of its history or has acquired them with its own funds or in some other manner. They must consequently revert to the newly independent State, quite apart from any question of succession of States, if they are still within its territory at the time of its accession to

independence, or can be claimed by it if they have been removed from the territory by the colonial Power.

(7) Examples of the passing of historical archives may be found in some treaties. Italy was obliged to return the archives it had removed from Ethiopia during its annexation when, after the Second World War, its colonization was terminated. Article 37 of the Treaty of Peace with Italy of 10 February 1947 provides that:

... Italy shall restore all . . . archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935.⁴⁴²

In the case of Viet Nam, a Franco-Vietnamese agreement in the matter of archives, signed on 15 June 1950, provided in its article 7 that the archives constituted by the Imperial Government and its Kinh Luoc⁴⁴³ and preserved at the Central Archives before the French occupation were to revert to the Government of Viet Nam.

(8) In the case of Algeria, the archives relating to its pre-colonial history had been carefully catalogued, added to and preserved in Algiers by the French administering authority until immediately before independence, when they were taken to France (Nantes, Paris, and, more particularly, a special archives depot at Aix-en-Provence). These archives consisted of what is commonly known as the "Arabic collection", the "Turkish collection" and the "Spanish collection". As a result of negotiations between the two Governments, some registers of the pay of Janissaries, forming part of the documents in the Turkish collection, and microfilms of part of the "Spanish collection" were returned in 1966. By a Franco-Algerian exchange of letters of 23 December 1966, the Algerian Government obtained the restitution of "450 original registers in the Turkish and Arabic languages relating to the administration of Algeria before 1830", i.e. before the French colonial occupation. Under the terms of this exchange of letters, the National Library of Algiers was to receive before July 1967, free of charge, microfilms of documents in Spanish, which had been moved from Algeria to Aix-en-Provence immediately before independence and which constituted the "Spanish collection" of Algeria relating to the Spanish occupation of Algerian coastal regions. The same exchange of letters provided that questions concerning archives not settled by that instrument would form the subject of subsequent consultations. Thus Algeria raised the problem of its historical archives again in 1974. In April 1975, on the occasion of the visit to Algeria of the President of the French Republic, 153 boxes of Algerian historical archives forming part of the "Arabic collection" were returned by the French Government.⁴⁴⁴

(9) The historical documents of the Netherlands relating to Indonesia were the subject of negotiations between the former administering Power and the newly inde-

⁴⁴² United Nations, *Treaty Series*, vol. 49, p. 142. On the basis of that article (and article 75) of the Treaty of Peace, Ethiopia and Italy concluded an Agreement concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, signed at Addis Ababa on 5 March 1956, which had three annexes, A, B and C, listing the archives and objects of historical value that had been or were to be returned to Ethiopia by Italy (*ibid.*, vol. 267, pp. 204–216).

⁴⁴³ The "Kinh Luoc" were governors or prefects of the Emperor of Indo-China before the French occupation of the Indo-Chinese peninsula.

⁴⁴⁴ See A/CN.4/322 and Add.1 and 2, paras. 168, 169 and 171.

⁴⁴⁰ See para. (6) of the commentary to article 2, above.

⁴⁴¹ See paras. (1)–(3) of the commentary to article 11, and paras. (1)–(2) of the commentary to article 20, above.

pendent State within the framework of co-operation in the field of cultural and historical property. The relevant agreement concluded between the two countries in 1976 provides, *inter alia*:

That it is desirable to make cultural objects such as ethnographical and archival material available for exhibitions and study in the other country in order to fill the gaps in the already existing collections of cultural objects in both countries, with a view to promoting mutual understanding and appreciation of each other's cultural heritage and history;

That in general principle, archives ought to be kept by the administration that originated them.⁴⁴⁵

(10) The rule enunciated in *paragraph 1 (a)* was stressed in the proceedings of an international round table conference on archives, which state that:

It appears undeniable that the metropolitan country should return to States that achieve independence, in the first place, the archives which antedate the colonial régime, which are without question the property of the territory It is regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered indispensable.⁴⁴⁶

(11) *Paragraph 1 (b)* deals with what is sometimes called "administrative" archives and provides that they shall also pass to the newly independent State. The Commission, avoiding the use of that expression, which is not sufficiently precise to be used as a legal term, decided to refer to such category of archives as "the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory".

(12) In the case of the decolonization of Libya, General Assembly resolution 388 A (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", expressed the wish of the United Nations that the newly independent State should possess at least the administrative archives most indispensable to current administration. Accordingly, article I, paragraph 2 (a), of the resolution provided for the immediate transfer to Libya of "the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution".⁴⁴⁷

(13) The international conference of archivists mentioned above stated in this connexion:

It seems undeniable that [the former administering Powers] have . . . the duty to hand over all documents which facilitate the continuity of the administrative work and the preservation of the interests of the local population Consequently, titles of ownership of the State and of semi-public institutions, documents concerning public buildings, railways, roads and bridges, etc., land survey documents, census records, records of births, marriages and deaths, etc., will normally be handed over with the territory itself. This assumes the regular transfer of local administrative archives to the new authorities. It is sometimes regrettable that the conditions under which the transfer of powers from one authority to the other occurred have not always been such as to

ensure the regularity of this transfer of archives, which may be regarded as indispensable.⁴⁴⁸

(14) *Paragraph 2* of article B concerns those parts of State archives which, though not falling under paragraph 1 are "of interest" to the territory to which the succession of States relates. The paragraph provides that the passing of such documents, or their appropriate reproduction, shall be determined by agreement between the predecessor State and the newly independent State. Such agreement, however, is subject to the condition that each of the parties must "benefit as widely and equitably as possible" from the documents in question.

(15) One of the categories of State archives covered by *paragraph 2* are the documents accumulated by the administering Power during the colonial period, relating to the *imperium* or *dominium* of that Power and to its colonial policy generally in the territory concerned. The former metropolitan country is usually careful to remove all such documents before the independence of the territory, and many considerations of policy and expediency prevent it from transferring them to the newly independent State.

(16) The same international conference of archivists stated:

There are apparently legal grounds for distinguishing in the matter of archives between sovereignty collections and administrative collections: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country, whose history they directly concern.⁴⁴⁹

An author expresses the same opinion:

Emancipation raises a new problem. The right of new States to possess the archives essential to the defence of their rights, to the fulfilment of their obligations, to the continuity of the administration of the populations, remains unquestionable. But there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States.⁴⁵⁰

(17) Nevertheless, it is undeniable that some of the documents connected with the *imperium* or *dominium* of the former administering Power are "of interest" also (and sometimes even primarily) to the newly independent State. They are, for instance, the documents relating to the conclusion of treaties applicable to the territory concerned, or to the diplomatic relations between the administering Power and third States with respect to the territory concerned. While it would be unrealistic for the newly independent State to expect the immediate and complete transfer of documents connected with the *imperium* or *dominium* of the predecessor State, it would be quite inequitable for the former State to be deprived of access to at least those of such documents in which it shares interest.

(18) No simple rule of passing or non-passing, therefore, would be satisfactory in the case of such documents in State archives. The Commission considers that the best solution would be for the States concerned to settle the matter by an agreement based on the principle of mutual

⁴⁴⁵ A/32/203, pp. 5-6.

⁴⁴⁶ France, Direction des archives de France, *Actes de la Sixième Conférence internationale de la Table ronde des archives. Les archives dans la vie internationale* (Paris, Imprimerie nationale, 1963), pp. 43-44.

⁴⁴⁷ In the case of Eritrea, however, the General Assembly of the United Nations adopted certain provisions of which some are not wholly in accord with those that the Organization had one year earlier adopted with regard to Libya. Article II, paragraph 2, of resolution 530 (VI) of 29 January 1952, entitled "Economic and financial provisions relating to Eritrea", permitted Italy to hand over at its convenience to the provisional administering Power either the originals or copies of documents and archives.

⁴⁴⁸ France, *Les archives dans la vie internationale* (op. cit.), pp. 43-44.

⁴⁴⁹ *Ibid.*, p. 44.

⁴⁵⁰ C. Laroche, "Les archives françaises d'outre-mer", *Comptes rendus mensuels des séances de l'Académie des sciences d'outre-mer, Séances des 4 et 18 mars 1966* (Paris), t. XXVI, vol. III (March 1966), p. 130.

benefit and equity. In negotiating such an agreement due account should be taken of the need to preserve the unity of archival collections, and of the modern technology which has made rapid reproduction of documents possible through microfilming or photocopying. It should also be borne in mind that almost all countries have laws under which all public political documents, including the most secret ones, become accessible to the public after a certain time. If any person is legally entitled to consult documents relating to sovereign activities after the lapse of a period of 15, 20 or 30 years, there cannot be any reason why the newly independent State directly interested in documents relating to its territory should not be given the right to obtain them in microfilm or photocopies, if need be at its own expense.

(19) It was in conformity with such a rule that the French-Algerian negotiations were conducted on the questions of political as well as historical archives in 1974-1975. The two States exchanged diplomatic correspondence on 22 April and 20 May 1975, which shows that the French Government regarded it as "entirely in conformity with current practice of co-operation among historians to envisage the microfilming" of France's archives of sovereignty concerning the colonization of Algeria.⁴⁵¹

(20) Paragraph 3 deals with two specific types of documents in State archives, stipulating that the predecessor State must provide the newly independent State with the "best available evidence" of them. One type of document includes those "which bear upon title to the territory of the newly independent State or its boundaries", and the other, those "which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article".

(21) The "best available evidence" means either the original documents or reproductions of them. Which of the two is the "best evidence" depends upon circumstances.⁴⁵²

(22) The first type of document covered by paragraph 3 is often intermingled with other documents of the *imperium* or *dominium* of the administering Power relating to the territory concerned. The documents in the archives which bear upon title to such territory or its boundaries are, however, of vital importance to the very identity of the newly independent State. The need for evidence of such documents is especially crucial when the latter State is in dispute or litigation with a third State concerning the title to part of its territory or its boundaries. The Commission considers, therefore, that the predecessor State has a duty to transmit to the newly independent State the "best evidence" of such documents available to it.⁴⁵³

⁴⁵¹ Letter dated 20 May 1975 addressed by Mr. Sauvagnargues, French Minister of Foreign Affairs, to Mr. Bedjaoui, Ambassador of Algeria to France, in reply to his letter of 22 April 1975. See A/CN.4/322 and Add.1 and 2, para. 156.

⁴⁵² See J. B. Saunders, *Words and Phrases Legally Defined*, 2nd ed. (London, Butterworth, 1969), vol. 2, p. 192.

⁴⁵³ It may be noted that the Cartographic Seminar of African countries and France adopted a recommendation in which it welcomed the statement by the Director of the National Geographic Institute on the recognition of State sovereignty over all cartographic archives and proposed that such archives should be transferred to States on request and that documents relating to frontiers should be handed over simultaneously to the States concerned (Cartographic Seminar of African Countries and France, Paris, 21 May-3 June 1975, *General Report*, recommendation No. 2, "Basic cartography").

(23) As to the second type of document, the words "documents . . . which pass . . . pursuant to other provisions of the present article" are intended to cover all types of document which pass to the successor State by the direct application of paragraphs 1 and 2 and the first part of paragraph 3, as well as indirectly by the application of paragraphs 4 and 5.

(24) One example of this type of document may be found in documents relating to the interpretation of treaties applicable to the territory concerned concluded by the administering Power. It should be noted that the hesitation of newly independent States in notifying their succession to certain treaties is sometimes due to their uncertainty about the application of those treaties to their territory—or even about their contents.

(25) Paragraphs 4 and 5 reflect the decision which the Commission adopted in regard to article 11, to assimilate to the case of a newly independent State falling under paragraphs 1 to 3 of article B situations in which a newly independent State is formed from two or more dependent territories, or a dependent territory becomes part of the territory of an already independent State other than the State which was responsible for its international relations.

(26) The texts of paragraphs 4 and 5 are much simpler than the corresponding provisions (paragraphs 2 and 3) of article 11, and the Commission may reconsider the texts of the latter provisions on second reading.

(27) Paragraph 6 refers to certain inalienable rights of the peoples of the predecessor State and the newly independent State, providing that agreements concluded between those States in regard to State archives of the former State "shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage". The paragraph is thus intended to lay down three major rights which must be respected by such States when they negotiate the settlement of any question regarding State archives of the predecessor State.

(28) These rights have been stressed in various international forums, in particular in the recent proceedings of UNESCO.

(29) At its eighteenth session, held in Paris in October-November 1974, the General Conference of UNESCO adopted the following resolution:

The General Conference,

Bearing in mind that a great number of Member States of UNESCO have been in the past for longer or shorter duration under foreign domination, administration and occupation,

Considering that archives constituted within the territory of these States have, as a result, been removed from that territory.

Mindful of the fact that the archives in question are of great importance for the general, cultural, political and economic history of the countries which were under foreign occupation, administration and domination,

Recalling recommendation 13 of the Intergovernmental Conference on the Planning of National Documentation, Library and Archives Infrastructures, held in September 1974, and desirous of extending its scope,

1. *Invites* the Member States of UNESCO to give favourable consideration to the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements;

...⁴⁵⁴

⁴⁵⁴ UNESCO, *Records of the General Conference, Eighteenth Session, Resolutions* (Paris, 1974), pp. 68-69, resolution 4.212.

(30) UNESCO's concern with problems of archives as such has been combined with an equal concern for archives considered as important parts of the cultural heritage of nations. UNESCO and its committees and groups of experts have at all times considered archives as "an essential part of the heritage of any national community"—a heritage which they are helping to reconstitute and whose restitution or return to the country of origin they are seeking to promote. In their view, historical documents, including manuscripts, are "cultural property" forming part of the cultural heritage of peoples.⁴⁵⁵

(31) In 1977, pursuant to a resolution adopted by the General Conference of UNESCO at its nineteenth session;⁴⁵⁶ the Director General made a plea for the return of an irreplaceable cultural heritage to those who created it, as follows:

The vicissitudes of history have . . . robbed many peoples of a priceless portion of this inheritance in which their enduring identity finds its embodiment.

The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better.

These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish.

This is a legitimate claim . . .

I solemnly call upon the Governments of the Organization's member States to conclude bilateral agreements for the return of cultural property to the countries from which it has been taken; to promote long-term loans, deposits, sales and donations between institutions concerned in order to encourage a fairer international exchange of cultural property . . .

I call on universities, libraries . . . that possess the most important collections, to share generously the objects in their keeping with the countries which created them and which sometimes no longer possess a single example.

I also call on institutions possessing several similar objects or records to part with at least one and return it to its country of origin, so that the young will not grow up without ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors.

⁴⁵⁵ See documents of the nineteenth session of the General Conference of UNESCO (Nairobi, October–November 1976), in particular, "Report by the Director-General on the Study on the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements" (document 19 C/94 of 6 August 1976); the report by the Director-General at the following session of the General Conference (document 20 C/102 (*loc. cit.*)); report of the Committee of Experts on the setting up of an intergovernmental committee to promote the restitution or return of cultural property (Dakar, 20–23 March 1978) (document CC-78/CONF.609/3); and Statutes of the Intergovernmental Committee for the promotion of the return of cultural property to its country of origin or its restitution in the case of illegal appropriation (UNESCO, *Records of the General Conference, Twentieth Session, Resolutions* (Paris, 1978), pp. 92–93, resolution 4/7.6/5, annex).

⁴⁵⁶ *Ibid.*, *Nineteenth Session, Resolutions* (Paris, 1976), p. 48, resolution 4.128.

The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.⁴⁵⁷

(32) The protection and restoration of cultural and historical archives and works of art, with a view to the preservation and future development of cultural values have received a great deal of attention in the United Nations, as evidenced in General Assembly resolutions 3206 A (XXVII) of 18 December 1972, 3148 (XXVIII) of 14 December 1973, 3187 (XXVIII) of 18 December 1973, 3391 (XXX) of 19 November 1975 and 31/40 of 30 November 1976. The resolution of 30 November 1976 contains the following passages:

The General Assembly,

Convinced that the promotion of national culture enhances a people's ability to understand the culture and civilization of other peoples and thus has a most favourable impact on international co-operation,

Convinced also that the protection by all means of national culture and heritage is an integral part of the process of preservation and future development of cultural values,

3. *Affirms* that the restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts, documents and any other cultural or artistic treasures constitutes a step forward towards the strengthening of international co-operation and the preservation and future development of cultural values.

(33) The Fourth Conference of Heads of State or Government of the Non-Aligned Countries, held at Algiers from 5 to 9 September 1973, adopted a Declaration on the Preservation and Development of National Cultures which stresses "the need to reassert indigenous cultural identity and eliminate the harmful consequences of the colonial era and call for the preservation of their national culture and traditions".⁴⁵⁸

(34) At the following Conference, which took place at Colombo from 16 to 19 August 1976, two resolutions on the subject were adopted by the Heads of State or Government of the Non-Aligned Countries.⁴⁵⁹ Resolution No. 17, on the "Restitution of Art Treasures and Ancient Manuscripts to the Countries from which they have been looted", contains the following passages:

The fifth Conference . . .

2. *Reaffirms* the terms of United Nations General Assembly resolution 3187 (XXVIII) and General Assembly resolution 3391 (XXX) concerning the restitution of works of art and manuscripts to the countries from which they have been looted,

3. *Requests* urgently all States in possession of works of art and manuscripts to restore them promptly to their countries of origin,

4. *Requests* the Panel of Experts appointed by UNESCO which is entrusted with the task of restoring those works of art and manuscripts to their original owners to take the necessary measures to that effect.

(35) Lastly, the seventeenth International Round Table Conference on Archives, held in October 1977 at Cagliari, adopted a resolution reaffirming the right of peoples to their cultural heritage and to information about their history which reads, in part:

⁴⁵⁷ *The UNESCO Courier* (Paris), 31st year, July 1978, pp. 4–5.

⁴⁵⁸ Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, "Economic Declaration", sect. XIV (A.9330, pp. 73–74).

⁴⁵⁹ Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries, annex IV, resolutions Nos. 17 and 24 (A.31/197, pp. 136 and 148).

... The Round Table reaffirms the right of each State to recover archives which are part of its heritage of archives which are currently kept outside its territory, as well as the right of each national group to access, under specified conditions, to the sources wheresoever preserved, concerning its history, and to the copying of these sources.

Considering the large number of archival disputes and, in particular, those resulting from decolonization,

...
Considering that this settlement should be effected by means of bilateral or plurilateral negotiations,

The Round Table recommends that:

(a) The opening of negotiations should be encouraged between all parties concerned, first, regarding the problems relating to the ownership of the archives and, secondly, regarding the right of access and the right to copies;

...

The Round Table recognizes the legitimate right of the public authorities and of the citizens of the countries which formed part of larger political units or which were administered by foreign Powers to be informed of their own history. The legitimate right to information exists *per se*, independently of the right of ownership in the archives.

...⁴⁶⁰

⁴⁶⁰ International Council on Archives, *Bulletin*, No. 9 (December 1977), p. 7.

Chapter III

STATE RESPONSIBILITY

A. Introduction

I. HISTORICAL REVIEW OF THE WORK

56. The object of the current work of the International Law Commission on State responsibility is to codify the rules governing State responsibility as a general and independent topic. The work is proceeding on the basis of two decisions of the Commission: (a) not to limit its study of the topic to a particular area, such as responsibility for injuries to the person or property of aliens, or indeed any other area; (b) in codifying the rules governing international responsibility, not to engage in the definition and codification of the "primary" rules whose breach entails responsibility for an internationally wrongful act.

57. The historical aspects of the circumstances with which the Commission came to resume the study of the topic of "State responsibility" from this new standpoint have been described in previous reports of the Commission.⁴⁶¹ Following the work of the Subcommittee on State Responsibility, the members of the Commission expressed agreement, in 1963, on the following general conclusions: (a) that, for the purposes of codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there could nevertheless be no question of neglecting the experience and material gathered in certain particular sectors, especially that of responsibility for injuries to the person or property of aliens; and (c) that careful attention should be paid to the possible repercussions which recent developments in international law might have had on State responsibility.

58. These conclusions having been approved by the Sixth Committee, the Commission give fresh impetus to the work of codifying the topic, in accordance with the recommendations of the General Assembly. In 1967, having before it a note on State responsibility submitted by Mr. Roberto Ago, Special Rapporteur,⁴⁶² the Commission, as newly constituted, confirmed the instructions given him in 1963.⁴⁶³ In 1969 and 1970, the Commission discussed the Special Rapporteur's first⁴⁶⁴ and second⁴⁶⁵ reports in detail. That general examination enabled the Commission to establish a plan for the study of the topic, the successive stages for the execution of the plan and the criteria to be adopted for the different parts of the draft. At the same time, the Commission reached a

⁴⁶¹ See, in particular, *Yearbook . . . 1969*, vol. II, pp. 229 *et seq.*, document A/7610/Rev.1, chap. IV.

⁴⁶² *Yearbook . . . 1967*, vol. II, p. 325, document A/CN.4/196.

⁴⁶³ *Ibid.*, p. 368, document A/6709/Rev.1, para. 42.

⁴⁶⁴ *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1. In 1971, the Special Rapporteur submitted a second addendum (A/CN.4/217/Add.2) to his first report (*Yearbook . . . 1971*, vol. II (Part One), p. 193).

⁴⁶⁵ *Yearbook . . . 1970*, vol. II, p. 177, document A/CN.4/233.

series of conclusions as to the method, substance and terminology essential for the continuation of its work on State responsibility.⁴⁶⁶

59. It is on the basis of these directives, which were generally approved by the members of the Sixth Committee and adopted by the General Assembly, that the Commission is now preparing the draft articles under consideration. In its resolutions 3315 (XXIX) of 14 December 1974, 3495 (XXX) of 15 December 1975, and 31/97 of 15 December 1976, the General Assembly recommended that the Commission should continue its work on State responsibility on a high priority basis, with a view to completing the preparation of a first set of draft articles on the responsibility of States for internationally wrongful acts. In resolution 32/151 of 19 December 1977, the General Assembly recommended that the Commission should continue its work on State responsibility on a high priority basis, taking into account the resolutions of the General Assembly adopted at previous sessions, with a view to completing, within the current term of office of the members of the Commission, at least the first reading of the set of articles constituting part I of the draft on responsibility of States for internationally wrongful acts. Finally, resolution 33/139, adopted by the General Assembly on 19 December 1978, recommends that the Commission should continue its work on State responsibility with the aim of completing at least the first reading of the set of articles constituting part I of the draft on responsibility of States for internationally wrongful acts, within the current term of office of the members of the Commission, taking into account the views expressed in debates of the General Assembly and the observations of Governments.⁴⁶⁷

2. SCOPE OF THE DRAFT

60. The draft articles under study—which are cast in a form that will permit them to be used as the basis for the conclusion of a convention if so decided⁴⁶⁸—thus relate solely to the *responsibility of States*⁴⁶⁹ for internationally

⁴⁶⁶ See *Yearbook . . . 1969*, vol. II, p. 233, document A/7610/Rev.1, paras. 80–84 and *Yearbook . . . 1970*, vol. II, pp. 307–309, document A/8010/Rev.1, paras. 70–83.

⁴⁶⁷ In paragraph 8 of section I of resolution 33/139, the General Assembly endorsed the Commission's decision to request Governments to transmit their observations and comments on the provisions of chapters I, II and III of part I of the draft articles on State responsibility for internationally wrongful acts.

⁴⁶⁸ The question of the final form to be given to the codification of State responsibility will obviously have to be settled later, when the Commission has completed the draft. The Commission will then formulate, in accordance with its Statute, the recommendation it considers appropriate.

⁴⁶⁹ The Commission does not underestimate the importance of studying questions relating to the responsibility of subjects of international law other than States, but the overriding need for clarity in the examination of the topic and the organic nature of the draft clearly make it necessary to defer consideration of these other questions.

wrongful acts. The Commission fully recognizes the importance not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any injurious consequences arising out of certain activities not prohibited by international law (especially those which, because of their nature, present certain risks). The Commission takes the view, however, that the latter category of questions cannot be treated jointly with the former. A joint examination of the two subjects could only make both of them more difficult to grasp. To be obliged to bear any injurious consequences of an activity which is itself lawful, and to be obliged to face the consequences (not necessarily limited to compensation) of the breach of a legal obligation, are not comparable situations. It is only because of the relative poverty of legal language that the same term is sometimes used to designate both.

61. The limitation of the present draft articles to responsibility of States for internationally wrongful acts does not of course mean that the Commission might not also make a study of the topic of international liability for injurious consequences arising out of certain acts not prohibited by international law, as recommended by the General Assembly.⁴⁷⁰ It merely means that the Commission intends to study this topic separately from that of responsibility for internationally wrongful acts, so that two matters which, in spite of certain appearances, are quite distinct will not be dealt with in one and the same draft. The Commission nevertheless thought it appropriate, in defining the principle stated in article 1 of the present draft on responsibility of States for internationally wrongful acts, to adopt a formulation which, while indicating that the internationally wrongful act is a source of international responsibility, cannot be interpreted as automatically ruling out the existence of another possible source of "responsibility". At the same time, while reserving the question of the final title of the draft for later consideration, the Commission wishes to emphasize that the expression "State responsibility", which appears in the title of the draft, is to be understood as meaning only "responsibility of States for internationally wrongful acts".

62. It should also be pointed out once again that the purpose of the present draft articles is not to define the rules imposing on States, in one sector or another of inter-State relations, obligations whose breach can be a source of responsibility and which, in a certain sense, may be described as "primary". On the contrary, in preparing the present draft the Commission is undertaking to define

other rules which, in contradistinction to the primary rules, may be described as "secondary", in as much as they are aimed at determining the legal consequences of failure to fulfil obligations established by the "primary" rules. Only these "secondary" rules fall within the actual sphere of responsibility for internationally wrongful acts. A strict distinction in this respect is essential if the topic of international responsibility for internationally wrongful acts is to be placed in its proper perspective and viewed as a whole.

63. This does not mean, of course, that the content, nature and scope of the obligations imposed on the State by the "primary" rules of international law are of no significance in determining the rules governing responsibility for internationally wrongful acts. As the Commission has had occasion to note, it is certainly necessary to establish a distinction on these bases between different categories of international obligations when studying the objective element of the internationally wrongful act. To be able to assess the gravity of the internationally wrongful act and to determine the consequences attributable to that act, it is unquestionably necessary to take into consideration the fact that the importance attached by the international community to the fulfilment of some obligations—for example, those concerning the maintenance of peace and security—will be of quite a different order from the importance it attaches to the fulfilment of other obligations, precisely because of the content of the former. Some obligations must also be distinguished from others according to their nature if it is to be possible to determine in each case whether or not an international obligation has actually been breached and, if so, the moment when the breach occurred (and when the resulting international responsibility can therefore be invoked) and the duration of commission of the breach. The present draft therefore brings out these different aspects of international obligations whenever necessary for the purpose of codifying the rules governing international responsibility for internationally wrongful acts. The essential fact nevertheless remains that it is one thing to state a rule and the content of the obligation it imposes, and another to determine whether that obligation has been breached and what the consequences of the breach must be. Only this second aspect comes within the actual sphere of the international responsibility that is the subject-matter of the present draft. To foster any confusion on this point would be to erect an obstacle that might once again frustrate the hope of successfully codifying the topic.

64. The draft articles are thus concerned only with the determination of the rules governing the international responsibility of the State for internationally wrongful acts, that is to say, the rules that govern all the new legal relationships which an internationally wrongful act on the part of a State may give rise to in different cases. They codify the rules governing the responsibility of States for internationally wrongful acts "in general", not simply in certain particular sectors. The international responsibility of the State is made up of a set of legal situations which result from the breach of any international obligation, whether imposed by the rules governing one particular matter or by those governing another.

65. The Commission wishes to emphasize that international responsibility is one of the topics in which development of the law can play a particularly important

⁴⁷⁰ In 1974, the Commission did in fact place the subject "International liability for injurious consequences arising out of acts not prohibited by international law" on its general programme of work as a separate topic, as recommended in paragraph 3 (c) of General Assembly resolution 3071 (XXVIII) of 30 November 1973. Furthermore, bearing in mind the recommendations contained in subsequent General Assembly resolutions, the Commission considered in 1977 that the topic in question should be placed on its active programme at the earliest possible time (*Yearbook . . . 1977*, vol. II (Part Two), p. 129, document A/32/10, para. 108). Following the recommendation made by the General Assembly in paragraph 7 of its resolution 32/151 of 19 December 1977, the Commission took a series of steps at its thirtieth session, including the appointment of a special rapporteur, with a view to beginning consideration of the issues raised by the study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law (see below, para. 206).

part, especially as regards the distinction between different categories of international offences and the content and degrees of responsibility. The roles to be assigned, respectively, to the progressive development and to the codification of already accepted principles cannot, however, be planned in advance. They will depend on the specific solutions adopted for the various problems.

3. GENERAL STRUCTURE OF THE DRAFT

66. The general structure of the present draft was described at length in the Commission's report on the work of its twenty-seventh session.⁴⁷¹ Under the general plan adopted by the Commission, *the origin of international responsibility* forms the subject of part 1 of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. *Part 2* will deal with the *content, forms and degrees of international responsibility*, that is to say, with determination of the consequences that an internationally wrongful act of a State may have under international law in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may perhaps decide to add to the draft a *part 3* concerning the "implementation" ("mise en oeuvre") of international responsibility and the *settlement of disputes*. The Commission also considered that it would be better to postpone a decision on the question whether the draft articles on State responsibility for internationally wrongful acts should begin with an article giving definitions or an article enumerating the matters excluded from the scope of the draft. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure of the draft. It is always advisable to avoid definitions or initial formulations which may prejudice solutions to be adopted later.

67. Subject to subsequent decisions of the Commission, part 1 of the draft (The origin of international responsibility) is in principle divided into five chapters. *Chapter I (General principles)* is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements, subjective and objective, of an internationally wrongful act. *Chapter II (The "act of the State" under international law)* is concerned with the subjective element of the internationally wrongful act, that is to say, with determination of the conditions in which particular conduct must be considered as an "act of the State" under international law. *Chapter III (Breach of an international obligation)* deals with the various aspects of the objective element of the internationally wrongful act constituted by the breach of an international obligation. *Chapter IV (Implication of a State in the internationally wrongful act of another State)* covers the cases in which a State participates in the commission by another State of an international offence and the cases in which responsibility is placed on a State

other than the State which committed the internationally wrongful act. Lastly, *Chapter V (Circumstances precluding wrongfulness)* defines the circumstances which may have the effect of precluding wrongfulness: prior consent of the injured State; legitimate application of counter-measures in respect of an internationally wrongful act; *force majeure* and fortuitous event; distress; state of emergency; and self-defence.

4. PROGRESS OF THE WORK

68. In 1973, at its twenty-fifth session, the Commission began the preparation of the draft articles on first reading. At that session, on the basis of proposals made by the Special Rapporteur in the relevant sections of his third report⁴⁷² it adopted articles 1 to 4 of chapter I (General principles) and the first two articles (articles 5 and 6) of chapter II (The "act of the State" under international law) of *part 1* of the draft.⁴⁷³ In 1974, at its twenty-sixth session, the Commission continued its examination of the provisions of *chapter II* and, on the basis of proposals contained in other sections of the Special Rapporteur's third report,⁴⁷⁴ adopted articles 7 to 9 of that chapter.⁴⁷⁵ At its twenty-seventh session, in 1975, the Commission completed its examination of *chapter II*, i.e. of the provisions relating to the conditions for attribution to the State, as a subject of international law, of an act capable of constituting a source of international responsibility, by adopting, on the basis of the proposals made by the Special Rapporteur in his fourth report,⁴⁷⁶ articles 10 to 15⁴⁷⁷. In 1976, at its twenty-eighth session, the Commission began consideration of the various issues raised in chapter III (Breach of an international obligation) and, on the basis of the proposals contained in the Special Rapporteur's fifth report⁴⁷⁸ adopted draft articles 16 to 19, concerning, respectively, the general requirement for the existence of a breach of an international obligation, the irrelevance for that purpose of the origin of the international obligation breached, the requirement that the international obligation be in force for the State for a breach of the obligation to occur, and the distinction to be made between international crimes

⁴⁷¹ See *Yearbook . . . 1975*, vol. II, pp. 55 *et seq.*, document A/10010/Rev.1, paras. 38-51.

⁴⁷² *Yearbook . . . 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3. The sections of chapter I and sections 1 to 3 of chapter II of the third report were considered by the Commission at its 1202nd-1213th and 1215th meetings (*Yearbook . . . 1973*, vol. I, pp. 5-59 and 65-66).

⁴⁷³ *Yearbook . . . 1973*, vol. II, pp. 173 *et seq.*, document A/9010/Rev.1, chap. II, sect. B. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1225th and 1226th meetings (*ibid.*, vol. I, pp. 117-121).

⁴⁷⁴ Sections 4 to 6 of chapter II of the third report (see foot-note 472 above). These sections were considered by the Commission at its 1251st-1253rd and 1255th-1263rd meetings (*Yearbook . . . 1974*, vol. I, pp. 5-61).

⁴⁷⁵ See *Yearbook . . . 1974*, vol. II (Part One), p. 277, document A/9610/Rev.1, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1278th meeting (*ibid.*, vol. I, pp. 151-154).

⁴⁷⁶ *Yearbook . . . 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1. The Commission considered the sections contained in the Special Rapporteur's report at its 1303rd-1317th meetings (*Yearbook . . . 1975*, vol. I, pp. 3-72).

⁴⁷⁷ *Yearbook . . . 1975*, vol. II, p. 61 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1345th meeting (*ibid.*, vol. I, pp. 214-218).

⁴⁷⁸ Chapter III, sections 1 to 4 of the fifth report (*Yearbook . . . 1976*, vol. II (Part One), pp. 3 *et seq.*, document A/CN.4/291 and Add.1-2). The Commission considered these sections at its 1361st-1376th meetings (*ibid.*, vol. I, pp. 6-91).

and international delicts on the basis of the importance for the international community as a whole of the subject-matter of the international obligation breached.⁴⁷⁹ At its twenty-ninth session, in 1977, the Commission continued its examination of the provisions of chapter III and, on the basis of proposals contained in the Special Rapporteur's sixth report,⁴⁸⁰ adopted articles 20 to 22 of that chapter, dealing with the effects of the nature of an international obligation on the conditions for its breach and, more particularly, with the breach of an international obligation requiring the adoption of a particular course of conduct, the breach of an international obligation requiring the achievement of a specified result, and the force of the "exhaustion of local remedies" requirement in regard to the commission of a breach of an international obligation of result whose specific purpose is to guarantee a particular treatment to aliens.⁴⁸¹ In 1978, at its thirtieth session, the Commission completed consideration of the questions outstanding in connexion with chapter III, and then took up the first group of questions relating to chapter IV of the draft. At that stage it adopted, on the basis of proposals made in the Special Rapporteur's seventh report,⁴⁸² articles 23 to 26 of chapter III of the draft, concerning the conditions in which there is a breach of an international obligation requiring prevention of the occurrence of a given event and determination of the moment and duration of a breach of an international obligation (*tempus commissi delicti*) in cases in which the act of the State committing the breach is instantaneous or extends in time, and in the particular case in which there is a breach of an obligation to prevent an event; and article 27 of chapter IV, which deals with the implication of a State in the internationally wrongful act of another State, in the case of aid or assistance rendered by the first State to the second State for the commission of an internationally wrongful act.⁴⁸³ The texts of those articles and the commentaries thereto were reproduced in the Commission's reports on the work of the sessions mentioned.

69. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/318 and Add.1-4).⁴⁸⁴ The report deals first with the case discussed in chapter IV that was still outstanding, namely, the case of responsibility of a State for the internationally wrongful act of another State. It then takes up, in chapter V, i.e., the last chapter of the first part of the draft, the

various circumstances which may have the effect of precluding the wrongfulness of an act of the State not in conformity with what is required of it by an international obligation. Mr. Roberto Ago having in the meantime taken up his new duties as Judge of the International Court of Justice, the President of the Court was approached in order that Mr. Ago might be able to introduce his eighth report and comment thereon in the Commission, so as to ensure continuity in the preparation of the draft articles under consideration. The Court having agreed that Mr. Ago could continue to participate, in his individual and personal capacity, in the work of the Commission, the latter at its 1531st meeting, decided, on the recommendation of the Enlarged Bureau, to invite Mr. Ago to attend the Commission's meetings to introduce and comment on his eighth report. The Commission wishes to express its deep gratitude to Mr. Ago for the exceptional contribution he has once again made to codification of the topic of State responsibility by drafting the report and introducing it to the Commission.

70. The Commission was thus able at the thirty-first session (1532nd to 1538th, 1540th, 1542nd to 1545th and 1569th to 1573rd meetings) to examine the section of the above-mentioned eighth report which completes chapter IV of the draft, and the sections of chapter V relating to consent of the injured State, legitimate application of a sanction, *force majeure* and fortuitous event. At its 1567th and 1579th meetings, the Commission considered the texts of articles 28 to 32 proposed by the Drafting Committee and adopted the texts of those articles on first reading.

71. At its next session, the Commission intends to conclude its study of the circumstances precluding wrongfulness considered in the eighth report which are still outstanding, namely, state of emergency and self-defence, and thus complete on first reading part 1 of the draft articles on State responsibility for internationally wrongful acts within the present term of office of the members of the Commission, as recommended by the General Assembly in its resolution 33/139, of 19 December 1978.

72. The Commission will then be in a position to continue its study of the subject and to take up part 2 of the draft, dealing with the content, forms and degrees of international responsibility.

73. In order to continue its consideration of the subject—and in view of the former Special Rapporteur's election as a Judge of the International Court of Justice—the Commission at the thirty-first session appointed Mr. Willem Riphagen Special Rapporteur for the topic of "State responsibility."

74. At the end of its twenty-ninth session, the Commission received a Secretariat document entitled "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine". This document was prepared by the Codification Division of the United Nations Office of Legal Affairs as part of the research on the subject undertaken at the request of the Commission and the former Special Rapporteur.⁴⁸⁵

⁴⁷⁹ *Yearbook . . . 1976*, vol. II (Part Two), p. 75 *et seq.*, document A/31/10, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1401st to 1403rd meetings (*ibid.*, vol. I, pp. 235-253).

⁴⁸⁰ Chapter III, sections 5 to 7 of the sixth report (*Yearbook . . . 1977*, vol. II (Part One), pp. 4 *et seq.*, document A/CN.4/302 and Add. 1-3). The Commission considered these sections at its 1454th-1457th, 1460th-1461st, 1463rd and 1465th-1468th meetings (*ibid.*, vol. I, pp. 215-233, 240-248, 250-255 and 259-277).

⁴⁸¹ *Yearbook . . . 1977*, vol. II (Part Two), pp. 11 *et seq.*, document A/32/10, chap. II, sect. B.2). The Commission adopted the texts proposed by the Drafting Committee for those articles at its 1462nd and 1469th meetings (*ibid.*, vol. I, pp. 249-250 and 278-282).

⁴⁸² Chapter III, sections 8 and 9, and chapter IV, section 1 of the seventh report (*Yearbook . . . 1978*, vol. II (Part One), document A/CN.4/307 and Add. 1 and 2). The Commission considered these sections at its 1476th-1482nd and 1516th-1519th meetings (*ibid.*, vol. I, pp. 4-38 and 223-241).

⁴⁸³ *Yearbook . . . 1978*, vol. II (Part Two), pp. 99 *et seq.*, document A/33/10, chap. III, sect. B.2. The Commission adopted the texts proposed by the Drafting Committee for these articles at its 1513th and 1524th meetings (*ibid.*, vol. I, pp. 206-209 and 269-270).

⁴⁸⁴ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

⁴⁸⁵ The Commission decided that this document, the provisional mimeographed version of which was circulated in 1977 under the symbol ST/LEG/13, would be published as document A/CN.4/315 in *Yearbook . . . 1978*, vol. II (Part One). It is hereinafter referred to as "Secretariat Survey".

B. Draft articles on State responsibility⁴⁸⁶

75. The texts of articles 1 to 32, adopted by the Commission at its twenty-fifth, at its thirtieth and at the current sessions, together with the texts of articles 28 to 32 and the commentaries thereto, adopted by the Commission at the current session, are reproduced below for the information of the General Assembly.

I. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

CHAPTER I

GENERAL PRINCIPLES

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

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

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

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

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

There is an internationally wrongful act of a State when:

- (a) conduct consisting of an action or omission is attributable to the State under international law; and
- (b) that conduct constitutes a breach of an international obligation of the State.

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

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

CHAPTER II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

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

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

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

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the

constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

- (a) it is established that such person or group of persons was in fact acting on behalf of that State; or
- (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11. Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12. Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

⁴⁸⁶ As stated above (para. 60), the draft articles relate only to the responsibility of States for internationally wrongful acts. The question of the final title of the draft will be considered by the Commission at a later date.

Article 13. Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration, shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Article 17. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18. Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Article 19. International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22. Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

CHAPTER IV

IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act,

carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Article 28. Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29. Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 30. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

Article 31. Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

2. TEXT OF ARTICLES 28 TO 32, WITH COMMENTARIES THERETO,
ADOPTED BY THE COMMISSION AT ITS THIRTY-FIRST SESSION

Article 28. Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act.

Commentary

(1) It will be recalled that article 1 of the present draft provides that "every internationally wrongful act of a State entails the international responsibility of that State", that is to say, every internationally wrongful act of a State in principle entails the responsibility of that State, and only of that State, to which the act in question is attributable under the articles of chapter II of the draft. The same principle is restated in article 2 of the draft, which provides that "every State is subject to the possibility of being held to have committed an internationally wrongful act *entailing its international responsibility**". However, care was taken in the commentary to article 1 to emphasize from the outset that this was only a basic rule referring to the normal situation and that most members of the Commission were fully aware that there might "*be special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed**".⁴⁸⁷ The commentary therefore indicated that the Commission would postpone consideration of those cases, which had not been taken into account in formulating the general rule solely because of their exceptional character. The cases which the Commission then had in mind are those dealt with in the present article, which is intended precisely to specify those exceptional cases in which an internationally wrongful act committed by a State entails the responsibility of a State other than that to which the act is attributable under the articles of chapter II of the draft. Its purpose is to establish when and under what conditions international law too must recognize the existence of responsibility for the act of another, which sometimes precludes the responsibility of the State to which the act is attributable but may in other cases exist alongside that responsibility.

(2) It goes without saying that the necessary premise for the existence of the international responsibility of a State for an internationally wrongful act committed by another State is, first of all, the existence of the act itself. The requirements for the existence of an internationally wrongful act committed by that other State must therefore be fulfilled, i.e., there must be conduct of commission or omission attributable to that State, it must be conduct not in conformity with what is required of that State by an international obligation incumbent upon it, and the international wrongfulness of the act must not be precluded by any of the circumstances which have that effect. Only when it has been established that these requirements

have been fulfilled may it be asked whether, in the case in point, the general rule in article 1 is to be applied, thus placing responsibility for the act on the State to which the act is attributable, or whether special circumstances bring into operation the rule in the present article, which exceptionally places responsibility for the act in question on a different State instead of or in addition to the State which committed the act.

(3) The path which the Commission followed in identifying the cases in which it considers the phenomenon of responsibility for the act of another to have its appointed place in international law as well as long and complicated. It had to consider in turn all the cases in respect of which the applicability of the principle of vicarious responsibility or, as it is often termed, "indirect" or "mediate" responsibility, has been invoked by writers or envisaged in practice, as well as all the arguments advanced in support of the principle. The Commission began with the cases in which it felt that the applicability of the principle should be firmly rejected. The first case taken into consideration in this connexion was that of the possible *responsibility of a State for internationally wrongful acts committed in its territory by organs of another State*.⁴⁸⁸ The Commission decided that the mere fact that such conduct took place in the territory of a State did not constitute sufficient grounds for attributing responsibility for the acts in question to that State. The responsibility which a State may incur *on the occasion* of an internationally wrongful act committed, to the detriment of a third State, by organs of another State acting freely in that capacity in the territory of the first State is certainly not a vicarious responsibility. The Commission has indicated clearly, in draft article 12, paragraph 1, that an act of that nature is not attributable to the State in whose territory the act occurred, but only to the State to which the organs committing the act on foreign soil belong. Moreover, if the State to which the organs belong acted, through them, in complete freedom of decision and without being subjected to control and direction, or coercion, by another party, it is difficult to see why it alone should not bear the responsibility for its act. As for the State in whose territory the act occurred, although it too may incur responsibility, any such responsibility arises not from the conduct engaged in on its soil by foreign organs but from the fact, attributable to its own organs, that the preventive or punitive measures called for in the circumstances were not taken. That is the meaning of draft article 12, paragraph 2. Both responsibilities are therefore responsibilities incurred by the two States, each for its own act.⁴⁸⁹

(4) The second case taken into consideration by the Commission was that of the possible responsibility of a *State for internationally wrongful acts committed by another State which it represents in a general and obli-*

⁴⁸⁸ This possibility was put forward, but not very convincingly, by F. Klein, who referred to some very old cases. See F. Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), pp. 265 *et seq.* and 299 *et seq.* The cases in question were mentioned in the commentary to draft article 12 (see *Yearbook . . . 1975*, vol. II, pp. 83 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2).

⁴⁸⁹ All contemporary writers who have dealt with the question agree on this point. See A. Verdross, "Theorie der mittelbaren Staatenhaftung", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), vol. I, No. 4 (new series) (May 1948), pp. 405 *et seq.*; G. Dahm, *Völkerrecht*, (Stuttgart, Kohlhammer, 1961), vol. III, pp. 203-204; R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), pp. 602-603.

⁴⁸⁷ *Yearbook . . . 1973*, vol. II, p. 176, document A/9010/Rev.1, chap. II, sect. B, para. (11) of the commentary to article 1.

gatory manner. One view which predominated in doctrine in the past is that there the "representing" State should in general be internationally responsible for internationally wrongful acts committed by the "represented" State.⁴⁹⁰ In this connexion, the Commission first of all emphasized, and in this it agrees with the most recent doctrine, that contrary to what the proponents of this view contended, there is no "need" to make the representing State responsible for internationally wrongful acts committed by the represented State—a "need" which, according to them, results from the risk of losing all possibility of invoking the consequences of those wrongful acts. Just because, owing to the fact that State A represents State B, third States injured by State B can no longer approach it directly in order to claim reparation from it for its wrongful act, it in no way follows that they can no longer demand such reparation from it and cannot invoke its responsibility. The mere existence of the international representation relationship between A and B has no consequences for third States, except to oblige them to conduct their relations with the represented State through the representing State; there is nothing to prevent those States from demanding of the represented State, through the representing State, some form of reparation. Nor is there anything to prevent the represented State from making such reparation through the representing State. It cannot therefore be deduced, from the mere fact that States which are injured by an internationally wrongful act committed by a State which has entrusted another State with representing it internationally, address their claims for reparation for the injury to that other State, that in so doing they are invoking the responsibility of the representing rather than the represented State. On the contrary, if they address themselves to it solely in its capacity as the representative of another State,⁴⁹¹ it must be presumed that they are invoking the responsibility of the represented State and not a responsibility incumbent on the representing State in respect of the act of the represented State.

(5) That being so, the Commission then wondered

⁴⁹⁰ This argument was put forward for the first time by D. Anzilotti, in *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), (reprinted in: S.I.O.I. (Società italiana per l'organizzazione internazionale), *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. 1, pp. 146–147). Its principal proponents, with slight differences, include E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915) (reprinted: New York, Banks Law Publishing, 1928), pp. 201–202; C. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, p. 105; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), p. 281; Verdross, *loc. cit.*, pp. 408 *et seq.* The theory was also accepted by most of the members of the Institute of International Law in 1927 (see the report of L. Strisower and the debate on it, *Annuaire de l'Institut de droit international*, 1927–I (Paris), vol. 33, pp. 488 *et seq.* and 547 *et seq.*, and *ibid.*, 1927–III, pp. 147 *et seq.*), and was expressed in rule IX, para. 2, of the resolution adopted at Lausanne in 1927 on "International responsibility of States for injuries on their territory to the person or property of foreigners" (*Yearbook . . . 1936*, vol. II, p. 228, document A/CN.4/96, annex 8). The influence of the theory is also to be seen in article III of the draft convention on the same topic prepared by Harvard Law School in 1929 (*ibid.*, p. 229, annex 9).

⁴⁹¹ The situation might be different if they addressed themselves to it in another capacity. There are many cases in which a State that represents another State in a general and obligatory manner internationally also has the right to intervene in the internal activities of the represented State. The State in question might then be called upon to answer for internationally wrongful acts committed by the other State in the exercise of its activities, not however because it represents that State, but because it controls it and because the freedom of decision and action of that other State is limited, to the benefit of the first State.

whether, as one writer maintained,⁴⁹² international law did not impose on a State which undertakes the *general and obligatory representation* of another State an obligation to answer for the wrongful acts of the latter as a *quid pro quo* for having "hemmed it in", as it were, by cutting off direct contacts between it and third States. In support of this argument, the writer in question found it appropriate to refer to a passage in the award made on 1 May 1925 by Mr. Huber, the arbitrator in the *British claims in the Spanish Zone of Morocco* case, between Great Britain and Spain, in which it is stated that "the responsibility of the protecting State arises from the fact that it alone represents the protected territory in its international relations" and that the protecting State is answerable "in place of the protected State".⁴⁹³ However, a close scrutiny of the award shows that the real concern of the arbitrator was simply to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for internationally wrongful acts committed by the protected State should not ultimately be erased, to the detriment of the State which suffered from those wrongful acts. He therefore viewed as the means of obviating that danger the acceptance by the protecting State of the obligation to answer in place of the protected State.⁴⁹⁴ To justify such acceptance, the arbitrator based himself, in reality, not so much on the fact that the protecting State undertakes the international "representation" of the protected State, but mainly on the fact that, in most cases, the protecting State places virtually total constraint on the independence of the protected State.

(6) The Commission also considered the fact that some of the replies by States to point X of the request for information addressed to them by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) were occasionally quoted in support of the theory that the representing State is responsible for internationally wrongful acts committed by the represented State. Point X was worded as follows: "Responsibility of the State in the case of a subordinate or protected State, a federal State and other unions of States". While it is true that two or three of the replies (in particular, those of Austria and Japan) are to the effect that in the cases mentioned responsibility devolves upon the States representing the offending State, those replies give no reasons for the view advanced, make no distinction between the various cases, and seem far from convincing technically. There are other, much more detailed replies, such as that of Denmark, which expressly rule out the thesis of indirect responsibility as a counterpart of representation, even though that thesis predominated in the legal literature of the time. These replies make a very clear distinction between cases in which the representing State is answerable for an act committed by one of its organs and cases in which the represented State must be answerable, even if the claim is addressed to it through the representing State, because the act was committed by its own organs.⁴⁹⁵ The 1930 Codification

⁴⁹² Verdross, *loc. cit.*, pp. 408 *et seq.*

⁴⁹³ United Nations, *Reports of International Arbitral Awards*, vol. II, (United Nations publication, Sales No. 1949.V.1), p. 648.

⁴⁹⁴ *Ibid.*, pp. 648–649.

⁴⁹⁵ See League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), pp. 121 *et seq.*

Conference unfortunately did not have time to discuss the question of responsibility for the act of another. Moreover, in the practice of the years following the Conference, no case is known in which the international responsibility of a State for an act of another State was invoked on the basis of its capacity as the representative of that other State, although cases are known in which such a responsibility is asserted on entirely different grounds.⁴⁹⁶

(7) The Commission therefore concluded that international jurisprudence and State practice furnished no proof whatsoever of the soundness of the assertion that a State, having undertaken the general and obligatory representation of another State, is for that reason alone internationally responsible for the wrongful acts of the State represented. Nor did the Commission consider that it would be useful, *de jure condendo*, to establish the principle of such responsibility. It is difficult to see why the relationship of representation, if not accompanied by a situation of the "subordination" of one State to another, should give rise to a responsibility of the representing State for the wrongful acts of the represented State. And if, on the other hand, what matters for the purposes of responsibility is not the existence of the relationship of representation but that of the situation of "subordination" which the latter conceals, it is that situation which should be directly discussed as a possible basis of responsibility for the act of another. Modern doctrine is, moreover, in overwhelming agreement that the representing State should not, as such, be answerable for the internationally wrongful acts of the represented State.⁴⁹⁷

⁴⁹⁶ Attention may be drawn to the attitude of the Government of Italy in the Phosphates in Morocco case (Italy v. France). In the application instituting proceedings, that Government asserted that the case involved an unlawful act owing to which

"France has incurred international responsibility of two kinds, namely: indirect responsibility as the State protecting Morocco, and personal and direct responsibility resulting from action taken by the French authorities, or with their co-operation, purely for the sake of French interests." (*P.C.I.J.*, Series C, No. 84, p. 13). [Translation by the Secretariat.]

The Rome Government therefore requested the Court to notify its application to the Government of the French Republic, both as such and as protector of Morocco (*ibid.*, p. 14). It made no mention of France's capacity at that time as the representative of Morocco; the only ground mentioned for the indirect responsibility of France was the fact that it was the State protecting Morocco. Nor did either party make any mention in the subsequent proceedings of the relationship of representation which existed between France and Morocco.

⁴⁹⁷ See in particular R. Ago, *La responsabilità indiretta nel diritto internazionale* (Padua, CEDAM, 1934), pp. 30 *et seq.*; A. P. Sereni, *La rappresentanza nel diritto internazionale* (Padua, CEDAM, 1936), pp. 417 *et seq.*; F. Klein, *op. cit.*, pp. 71 *et seq.*; G. Barile, "Note a teorie sulla responsabilità indiretta degli Stati", *Annuario di diritto comparato e di studi legislativi* (Rome), 3rd series (special), vol. XXII, No. 3 (1948), pp. 435 *et seq.*; M. V. Polak, "Die Haftung des Bundesstaates für seine Gliedstaaten", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), new series, vol. I, No. 4 (May 1948), p. 384; A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), pp. 262-263; R. Quadri, *op. cit.*, p. 600.

It is true that to this day there are still some writers who speak of indirect responsibility of the representing State for wrongful acts of the represented State, but it should be noted that these writers do not mention the objections that have been raised to Anzilotti's theory and do not explain how they might be overcome (see, for example, P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 26-27; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 214 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1960), vol. I, pp. 334-335; F. Berber, *Lehrbuch* (Munich, Beck's, 1977), vol. III, pp. 17-18), or else

(8) The third case considered by the Commission was that in which a State would be held *responsible for internationally wrongful acts of another State because the latter was in a relationship of "subordination" to it or "dependence" upon it*. According to one school of thought, the "dominant" State should automatically be held internationally responsible for internationally wrongful acts of the "dependent" State, because in practice it is impossible for third States injured by those wrongful acts to employ means of "enforcement" against the dependent State, should the latter not spontaneously comply with the obligations arising out of such cases of wrongfulness. If that were not so, they would run the risk of also damaging the interests or rights of the "dominant" State and obliging it, in accordance with the right-duty conferred on it by its relationship with the dependent State, to intervene to "protect" that State.⁴⁹⁸ The dominant State thus serves as a shield against any implementation of the international responsibility of the dependent State, and the third State will, according to this theory, hold the dominant State responsible for all internationally wrongful acts committed by the dependent State. Introduced towards the end of the last century to account for the responsibility of a protecting State for the wrongful acts of the protected State, this theory was later invoked to provide a basis for the responsibility of a federal State for the wrongful acts of member States that had retained a separate international personality and a limited international capacity, and the responsibility of a "suzerain" State for the wrongful acts of "vassal" States—and indeed, the responsibility of any

they clearly have exclusively in mind the relationship of subordination which usually accompanies the relationship of general and obligatory representation.

The position of L. B. Sohn and R. R. Baxter on this point is particularly revealing. In the draft convention which they prepared for Harvard Law School in 1961, Sohn and Baxter use, in para. 1(c) of article 17, a wording similar to that which had appeared in the 1929 Harvard Law School draft. According to that article, a State would be responsible, *inter alia*, for acts committed by "the government of any protectorate, colony, dependency, or other territory of a State, for the international relations of which that State is responsible" (*Yearbook . . . 1969*, vol. II, p. 146 document A/CN.4/217 and Add.1, annex VII). In the commentary to that article, Sohn and Baxter state that a distinction must be drawn between the case referred to in article 17, para. 1 (c) and the case of

"representation of the foreign interests of one State by another, as Liechtenstein's foreign relations are conducted by Switzerland or as a neutral State protects the interests of a belligerent nation in time of war. In this event, the State conducting foreign relations for another country acts in a representative capacity, rather than as the principal, as in the cases previously considered. The relationship involved in representation of foreign interests also implies no political dependence of the State so represented on the State performing this function. Responsibility accordingly attaches to that international person the organ, agency, official, or employee of which has caused an injury to an alien, even though the claim may have to be presented to that State through the diplomatic representatives of a nation representing the interests of the responsible State." (F. V. Garcia Amador, L. B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y., Oceana, 1974), pp. 255-256).

⁴⁹⁸ This view has been termed the "protection doctrine" ("Schutztheorie"). Among its leading exponents are: P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, Kern's), Supplement 2 to vol. X (1917), pp. 103 *et seq.*; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, Kohlhammer, 1920), vol. III, 3rd part, pp. 112 *et seq.*; A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), pp. 192 *et seq.*; Klein, *op. cit.*, pp. 129 *et seq.*

State in a position of "domination" in relation to another State.⁴⁹⁹

(9) Despite the scholarly credentials of some of their proponents, the ideas reported above did not seem convincing to the Commission. In the first place, scarcely a trace of them is to be found in statements of position by States⁵⁰⁰ or in the reasoning of international judges and arbitrators. Secondly, even considering the matter solely *de jure condendo*, the Commission noted that the arguments advanced were based on a concern to obviate the disadvantages which might arise if the dependent State, being held responsible for its own internationally wrongful acts, should refuse to acknowledge that responsibility, so that the third State which had suffered from those wrongful acts would be impelled to take coercive measures against it. But it does not seem clear how those disadvantages would be avoided merely because responsibility for the internationally wrongful acts in question was attributed to the "dominant" State. Being itself held responsible, the dominant State would become the direct target of the coercive measures taken against it if it refused to fulfil the obligations arising out of the responsibility it had incurred owing to the act of the subordinate State. This would mean a more direct intrusion into its juridical sphere.

(10) The fourth—and by far the most realistic—of the cases considered by the Commission was that of a *State which, having in some capacity direction or control over a more or less extensive field of activity of another State, would be held internationally responsible for a wrongful act committed by the other State in the field subject to such direction or control*. This case could arise in several types of relationship between States: (a) international dependency relationships, especially "suzerainty" and international protectorate; (b) relationships between a federal State and member States of the federation which

have retained their own international personality; (c) relationships between an occupying State and an occupied State in cases of territorial occupation. The Commission considered them successively.

(11) For historical reasons, the attention of internationalists has been mainly directed, in the relatively recent past, to cases involving *international dependency relationships*, such as "suzerainty" (or, conversely, "vassalage"), *international protectorate*, *League of Nations type A mandate*. Although relationships of this kind are now disappearing, it seemed useful to the Commission to consider these cases, since they are of more than historical interest: the case of a State having direction or control over a field of activity of another State can very well arise in the context of other still current types of relationship between States. The principles affirmed a few decades ago in the cases mentioned could therefore apply *mutatis mutandis*, to cases arising at the present time.

(12) For the purposes of the matters covered by this article, the Commission did not attach much importance to the well-known cases concerning responsibility for internationally wrongful acts committed by organs of "vassal" States of the Ottoman Empire. The injured States sometimes regarded the "vassal" States as mere provinces of the Ottoman Empire, possessing no international personality. Hence the fact that they addressed themselves to the Ottoman Empire to demand reparation for the wrongful acts committed by organs of the "vassals" does not mean that they intended to invoke the responsibility of a State for the wrongful acts of another subject of international law. Conversely, in other cases the injured States declared their conviction that the "vassal" States with which they maintained direct diplomatic relations were acting independently of any interference by the Ottoman Empire. The very existence of a dependency relationship was thus called in question, and naturally no attempt was made to invoke the responsibility of the Porte for the wrongful acts committed by the organs of the "vassal" States. A statement of position which is worth citing, however, is that of the Ottoman Empire in the *Strousberg* case.⁵⁰¹ Rejecting all responsibility for the wrongful act committed by the organs of the Principality of the Danube, the Porte claimed that the act had occurred in a sphere in which the Principality acted with full autonomy and without any control over it by the Porte.⁵⁰² Assuming that it admitted that it regarded the Principality as possessing separate international personality, it is interesting to note that the Porte did not consider that sufficient to preclude its own international responsibility. It found it necessary to specify that the wrongful act had occurred in a sphere in which Turkey did not interfere.

(13) With regard to the responsibility of the protecting State or Mandatory for internationally wrongful acts committed by organs of protected States or States under mandate, the Commission found, on the other hand, that there had been many cases in which an international tribunal had been called upon to decide the question, and that in most of them the international responsibility of the protecting State or Mandatory had been recognized. It was obliged to note, however, that it was sometimes not easy to establish clearly what, in each case, had been the reasoning which had led the judges or arbitrators to

⁴⁹⁹ As a kind of variant of the idea of holding the dominant State responsible for internationally wrongful acts of the dependent State on the basis of the right-duty of the former to protect the latter, Verdross introduces the idea of "intrusion" ("Eingriff"). He argues that the taking of coercive measures (and in particular of reprisals — unarmed, of course) against a subordinate State would be an inadmissible "intrusion" into the juridical sphere of the "superior" State in cases where the "subordinate" State actually forms part of the "superior" State. This applies, in his view, to the relationship between a member State and a federal State and to that between a vassal State and a suzerain State (because the territory and citizens of the one also form part of the territory and citizenry of the other) (Verdross, *loc. cit.*, pp. 415 *et seq.*).

⁵⁰⁰ At first sight, it would appear that a statement of position in favour of the latter argument is to be found in the letter dated 1 September 1871 from Chancellor Bismarck to the German Chargé d'Affaires in Constantinople concerning the case involving the German national Strousberg, who had suffered injury as a result of breach of contract by the Government of the Principalities of the Danube (later Romania), vassals of the Ottoman Empire. The reason given by the Chancellor for addressing himself to the Sublime Porte with a view to its securing performance of the contract by the authorities of the Principality was, precisely, that any coercive measures taken against the Principalities would constitute an intrusion upon the rights of the Porte ("Eingriff in ihre Rechte") and, as such, would provoke protests by the Porte itself. On closer scrutiny, however, it can be seen that the German Chancellor considered the Principalities a kind of province of the Ottoman Empire, possessing purely internal autonomy and lacking, at that time, a separate international personality. Consequently, as far as Bismarck was concerned, this particular case did not fall into the category of those in which the question of the responsibility of one subject of international law for the act of another subject may arise. See Bismarck's letter in J. Wythlik, "Eine Stellungnahme des Reichskanzlers Bismarck zu dem Problem der mittelbaren Staatenhaftung", *Zeitschrift für öffentliches Recht* (Vienna), vol. XXI (1941), No. 3-4, pp. 273 *et seq.*

⁵⁰¹ See foot-note 500 above.

⁵⁰² See Wythlik, *loc. cit.*, pp. 279-280.

affirm that responsibility. This applies, for example, to the *Studer* case, in which the United States of America invoked the responsibility of Great Britain, as the protecting Power of the Sultanate of Johore, for a wrongful act committed by the authorities of the Sultanate.⁵⁰³ Similarly, in the award in the *British claims in the Spanish Zone of Morocco* case, rendered by the arbitrator, Huber, on 1 May 1925, and in the judgement of the Permanent Court of International Justice, of 30 August 1924, in the *Mavrommatis Palestine Concessions* case, it would seem at first sight that the authorities concerned meant to affirm the responsibility of the protecting State for a wrongful act committed by the protected entity, and of the Mandatory for an act committed by the mandated entity. It would also appear that this responsibility was based on the circumstance that the protecting State and mandatory Power had general representation of the "subordinate" State or community.⁵⁰⁴ More careful study reveals, however, that in the former case the arbitrator took the view that the protecting State had ultimately become the true sovereign of the protected territory,⁵⁰⁵ and that in the latter case the wrongful act took the form of a breach of an obligation incumbent on the mandatory Power, actually committed by its own organs (or at least with their concurrence).⁵⁰⁶ The responsibility attributed in these two cases, to the protecting State and the Mandatory respectively, was thus responsibility for their own act rather than for the act of another.

(14) On the other hand, the award in the *Brown* case, rendered on 23 November 1923 by the Arbitral Tribunal constituted by Great Britain and the United States of America under the Special Agreement of 18 August

⁵⁰³ The case was referred to an arbitral tribunal, which rendered its award on 19 March 1925. As to the matter with which we are concerned, the arbitral tribunal merely observed that:

"The British Government appears in this proceeding by virtue of its assumption of responsibility internationally for the Government of Johore under the provisions of a treaty made in 1885." (United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 150).

⁵⁰⁴ With regard to the award in the *British claims in the Spanish Zone of Morocco* case, see the passages quoted above (para. (5) of the commentary to this article). The following is the relevant passage from the judgment in the *Mavrommatis* case:

"The powers accorded under Article 11 to the Administration of Palestine must, as has been seen, be exercised 'subject to any international obligations accepted by the Mandatory'. This qualification was a necessary one, for the international obligations of the Mandatory are not, *ipso facto*, international obligations of Palestine. Since Article 11 of the Mandate gives the Palestine Administration a wide measure of autonomy, it was necessary to make absolutely certain that the powers granted could not be exercised in a manner incompatible with certain international engagements of the Mandatory. The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of Palestine are handled by it." (Judgment No. 2, 1924, *P.C.I.J.*, Series A, No. 2, p. 23).

⁵⁰⁵ Immediately after stating that "the responsibility of the protecting State arises from the fact that it alone represents the protected territory in its international relations" (it should be noted that he said "the protected territory" and not "the protégé" or "the protected State"), he went on: "The responsibility for events which may affect international law and which occur in a given territory goes hand in hand with the right to exercise, to the exclusion of other States, the prerogatives of sovereignty. Since the situation of the protecting State vis-à-vis other countries is the same as that of a sovereign State, its responsibility must be the same." (United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 649.)

⁵⁰⁶ *P.C.I.J.*, Series A, No. 2, p. 23.

1910⁵⁰⁷ is, in the view of most of the members of the Commission, not only a valid precedent, but one of great significance as regards the essential aspects of the question. The United States brought a claim for compensation against Great Britain, as the Power which had had suzerainty over the South African Republic before the war and the British annexation of South Africa, for the denial of justice suffered by an American engineer, Robert Brown, as a result of what amounted to a conspiracy between the three branches of the Government of the Republic: the legislature, the executive and the judiciary. The Arbitral Tribunal agreed that there had been a denial of justice, but held that Great Britain could not thereby have incurred international responsibility, whether as the successor State to the South African Republic or—and this is the point of interest to us—as the "suzerain" Power at the time when the denial of justice occurred. The Tribunal's reasoning on that subject focused on the following two points: (a) although Great Britain had at that time had a peculiar status and responsibility vis-à-vis the South African Republic, its "suzerainty" had involved only rather loose control over the Republic's relations with foreign Powers and had not entailed any interference in nor control over internal activities, legislative, executive or judicial; (b) accordingly, the conditions under which Great Britain could have been held responsible for an act such as a denial of justice, committed against a foreign national in the framework of such internal activities, were not fulfilled. In the Commission's view, it may therefore be deduced that, in the opinion of the Tribunal, indirect responsibility can and should be attributed to a State for an internationally wrongful act committed by another State which is linked to it by a relationship of dependence, when the wrongful act complained of has been committed in an area of activity in respect of which the dominant State has effective power of control over the dependent State, and in that case only.

(15) The Commission also considered that, in the context of an analysis of international jurisprudence and practice concerning determination of the State answerable for an internationally wrongful act committed within the framework of a legal relationship of international dependence, it should once again recall Denmark's reply to point X of the request for information from the Preparatory Committee for the 1930 Conference for the Codification of International Law. That reply which was, in fact, the most thorough and best grounded of all those received by the Committee, expressly stated that:

The reply depends upon the nature of the relations between the two States, *the extent and character of the control exercised by one State over the administration of the other State, and the degree of autonomy left to the subordinate or protected State.*⁵⁰⁸

The Danish Government clearly based its views on the same criteria as had been applied by the Anglo-American Tribunal in its decision in the *Brown* case. To sum up, it may be said that, while the few precedents provided by arbitral awards or statements of the views of Governments which relate to classical, and largely outdated, situations of dependence relationships are neither numerous nor, for good reason, recent, they are nevertheless very clear and very definite. Moreover, a point which

⁵⁰⁷ United Nations, *Reports of International Arbitral Awards*, vol. VI (*op. cit.*), pp. 120 *et seq.*

⁵⁰⁸ League of Nations, *Bases of discussion . . . (op. cit.)*, p. 122.

should not be overlooked is that there are no other such precedents which can be said, after careful study, to provide support for different solutions.

(16) The Commission also noted that it was at the end of the nineteenth century that the idea first appeared in the literature that international responsibility arising out of an internationally wrongful act can be attributed to a State only if that State committed it in a sphere of action in which it had complete freedom of decision and that, in so far as the State was subject to the control of another State and its freedom of decision was thereby restricted for the benefit of another State, it is that other State which must be held responsible.⁵⁰⁹ The Commission noted that that idea was later taken up and developed with a number of variations: in 1928 by C. Eagleton⁵¹⁰ (who does not, however, specify how the responsibility of the "dominant" State is to be described in such cases), and in 1934 by R. Ago, who saw in the principle thus set forth the real basis for the responsibility of a State for an act attributable as such to another State.⁵¹¹ Lastly, the Commission took note of the fact that in subsequent years many writers, while using different formulae, recognized that it was the interference or control attributed to one State in or over the external or internal activity of another State that gave rise to responsibility on the part of the former State for internationally wrongful acts committed by the latter.⁵¹²

(17) On the basis of the foregoing, the majority of the Commission thus reached the conclusion that where, for one reason or another, a situation of "international" dependence is established between two States, responsibility for wrongful acts committed by the "dependent" State must be attributed to what is called the "dominant" State, in so far as the wrongful act was committed by the

dependent State in a sphere of activity in which, without losing its separate international personality, it was subjected to the direction or control of the superior State. One member of the Commission dissociated himself from this conclusion, being convinced that, in the circumstances envisaged, "dependent" States were not really subjects of international law. While not contesting the fact that responsibility for wrongful acts committed by the "dependent" State devolved on the "dominant" State, he regarded it as responsibility for the State's "own" act, not for the act of "another".⁵¹³

(18) Having considered the aspects of the problem relating to international relations of "dependence", the Commission turned its attention to the relationship between *federal States and member States*, with particular reference to cases of federation in which the member States retain, from the standpoint of international law, a personality separate from that of the federal State.⁵¹⁴ Although rather rare, such cases do exist and others seem very likely to occur in the future. A large majority of the Commission thus found that, within the limits of the sphere of activity in which the member State possesses its own international personality, namely, the sphere in which it has international rights and obligations, it may sometimes enjoy complete autonomy with respect to the federal State. There would then seem to be no reason why the member state should not be responsible for breaches of its international obligations committed by its organs. However, it may also happen that in the sector in which it possesses its own international personality, the activities of the member State are subject to the direction or control of the federal State. And it is also possible that, in acting within the limits of this sector of activity, the member State may violate international obligations incumbent on it. The members of the Commission—with the exception of one of them⁵¹⁵—thus took the view that, as in the case of relationships of dependence, the federal State should be responsible for internationally wrongful acts attributable to the member State if they were committed in a sphere of activity subject to the control or direction of the federal State.

(19) Lastly, the Commission examined a situation in which it is more likely that a State may today come to exercise direction or control over a sphere of activity of another State. This, as has been said above, is the situation which arises in the event of *total or partial occupation of the territory of one State by another State*. The Commission took the view that this was the kind of situation in which the question would most frequently arise of the responsibility of a State for acts committed by another State in a sphere in which the freedom of decision and action of the latter State was limited to the benefit of

⁵⁰⁹ In 1883, de Martens wrote:

"Logic and equity would require that States which are in this dependent situation should be responsible for their actions towards foreign Governments only in proportion to their freedom of action. The actions of the Egyptian Khedive or of the Bey of Tunis should entail a measure of responsibility for the European Powers under whose tutelage they stand" (*Traité de droit international*, trans. A. Léo (Paris, Maresq aîné, 1883), vol. 1, p. 379).

⁵¹⁰ According to this writer:

"If one state controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting state for the subordinated state is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or, conversely, the actual amount of control left to the respondent state". (C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), p. 43).

⁵¹¹ According to this writer:

"The ground for attributing responsibility to a State for the wrongful act of another State lies in the fact that the wrongful act was committed by a subject of international law in the exercise of an activity in a sphere of action within which that subject is not free to act as it chooses, in accordance with rules established by itself, and that it cannot pursue goals of its own but must act according to rules established by another subject and must pursue goals laid down by the latter." (Ago, *op. cit.*, p. 59).

⁵¹² See M. Scerni, "Responsabilità degli Stati", *Nuovo Digesto Italiano* (Turin), vol. XI (1939), pp. 474-475; Barile, *loc. cit.*, pp. 443 *et seq.*; H. Rolin, "Les principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1950-II* (Paris, Sirey, 1951) vol. 77, p. 446; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 364; E. Vitta, "Responsabilità degli Stati", *Novissimo Digesto Italiano* (Turin), vol. XV (1968), p. 734; According to Verdross (*loc. cit.*, p. 413) and Ross (*op. cit.*, pp. 261-262), this theory does not justify all cases of responsibility, but would be applicable in cases of protectorate where the protecting State does not undertake the representation of the protected State.

⁵¹³ The act of the "dependent" would then be assimilable to that of a "territorial governmental entity" which, according to article 7, para. 1, of the draft, is an act attributable to the State.

⁵¹⁴ If the member State has no international personality it falls, for the purposes of these articles, into the category of "territorial governmental entities" referred to in article 7, para. 1, of the draft. Consequently, the federal State will indeed be responsible for the conduct of organs of the member State, but this will be responsibility for its own act.

⁵¹⁵ According to that member of the Commission, a member State which has retained a limited degree of international personality is solely responsible for any breach of an international obligation committed by it, since the organization of the federal State cannot be considered as entailing the member State's submission to the power of direction or control of the federal State.

the former. Admittedly, territorial occupation does not normally have its origin, like a protectorate or a mandate, in an international agreement, or, like the relationship between a suzerain State and a vassal State or between a federal State and a member State possessing residual international personality, in provisions of internal law; but, despite that, the relationship unquestionably has some features resembling those which mark, for instance, the relationship between a protecting State and the protected State. Military occupation in itself, even if it extends to the entire territory, does not bring about any change in sovereignty over the occupied territory and does not affect the international personality of the State subjected to occupation. Nevertheless, the occupying State, like a protecting State, has to exercise in the occupied territory certain elements of its own governmental authority: to safeguard the security of its armed forces and provide for its own needs in general, or to meet the needs of the population of the occupied territory and maintain law and order—an area in which the exercise of those elements is in fact required, under certain conditions, by the usages and customs of war and by international conventional law. Here too, the governmental machinery of the occupied State does not normally cease to exist, but survives and continues to operate in the territory, even if it is subject to conditions and restrictions which vary greatly from case to case; this was demonstrated by the experience of the Second World War. The interference in the international activities of the occupied State has the effect of confining those activities within widely varying limits, going so far in some cases of total and particularly ruthless occupation as to put an end to them altogether. Interference in internal activities is always present, even if it too varies in extent from case to case. Consequently, there will be some areas of activity which, because they do not affect the interests of the occupying State, will be left to the free decision of the local authorities; it follows that the occupied State will continue to incur international responsibility for any internationally wrongful acts committed in the areas of activity in question. Conversely, the occupying State will sometimes entrust to units of its own governmental machinery the exercise of certain functions provided for in the juridical order of the occupied State, for which it is unwilling or unable to employ units of the machinery of the occupied State. The occupying State will then have to assume international responsibility for any internationally wrongful acts committed by organs of its own with which it has replaced corresponding organs of the occupied State, and this will obviously be responsibility for its own act. Thus here too there will be very extensive sectors of activity that will continue to be entrusted to organs of the occupied State, of its territorial governmental entities, of its other governmental entities, and so on, which will, however, act in accordance with the directions and under the control of the authorities of the occupying State.⁵¹⁶ It is precisely in connexion with these sectors of

⁵¹⁶ For instance, the instructions of 10 November 1943 to the Allied Commission for Italy provided that:

“The relationship of the Control Commission to the Italian Government and to Italian administration in liberated areas is one of *supervision and guidance** rather than one of direct administration as in the case of the Allied Military Government.”

Direct administration was exercised by its Allied Military Government only in areas near the front line (M. M. Whiteman, *Digest of International Law*, (Washington, D.C., U.S. Government Printing Office, 1963), vol. 1, pp. 990.)

activity that it seemed to the Commission, if only from the standpoint of pure logic, that the phenomenon of responsibility for the act of another must necessarily be taken into account. Moreover, the few cases which are known to have arisen in practice confirm the soundness of this deduction.

(20) In this connexion, the Commission gave attention, among the older cases, to those in which the Italian Government held the French Empire responsible, as the Power then in military occupation of the territory of the Papal State, for acts deemed to be internationally wrongful that were committed by papal organs. In one of the most significant cases, the Turin Government noted that, if the Court in Rome no longer had control over its actions and was no longer in a position to answer for their consequences, responsibility for the conduct of papal organs could rest only with the French State, and “the mere fact that the French Government disapproved of the actions taken did not suffice to relieve it of the responsibility which such actions entailed for it”.⁵¹⁷ The Commission also noted that another statement of position, more recent but still prior to the Second World War, was to be found in the judgment rendered on 1 March 1927 by the Alexandria Court of Appeal in the *Fink* case. The petitioner, a German national, claimed compensation from the Egyptian Government for damage suffered as a result of the sequestration of his business and its subsequent liquidation by the British military authorities occupying Egypt. The liquidation, which Fink considered catastrophic, occurred after his senior employees had been invited by the Egyptian police to surrender and had been taken in charge by the military authorities. The Court ruled that the conduct of the Egyptian authorities, even if it had been wrongful, could not have entailed the responsibility of Egypt because the police, who had invited Fink’s senior employees to surrender, had been subject to the directions and under the control of the occupying Power.⁵¹⁸ It follows by implication from this negative conclusion that, in the view of the Court, which did not have to rule on this other

Article 1 of the Agreement on Control Machinery in Austria concluded on 28 June 1946 between the Governments of France, the United Kingdom, the United States of America and the United of Soviet Socialist Republics, provided that:

“(a) The Austrian Government and all subordinate Austrian authorities shall carry out *such directions** as they may receive from the Allied Commission . . .” (United Nations, *Treaty Series*, vol. 138, p. 86).

⁵¹⁷ S.I.O.I.—C.N.R., *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st Series (1861–1887), vol. II, pp. 875–876. The conduct against which the complaint was laid consisted of unlawful actions with regard to Italian vessels in the ports of Latium and other similar actions.

⁵¹⁸ The considerations of the Court were as follows:

“It is clear from this simple account of the facts that the only intervention by the Egyptian Government was the invitation by the local police to the petitioner’s senior employees to surrender to the military authorities.

“In the first place, this invitation was more in the nature of a friendly act, designed to prevent the employees from being arrested *manu militari* and taken through the streets of Cairo in that way.

“In addition, *the local authorities, in assisting the occupation forces, have always acted on behalf of the latter in accordance with the principles of international law**, which were universally respected even during the last war, and *the local authorities cannot be held responsible for collaboration imposed by circumstances**.”

“The only acts causing actionable damage, namely, the sequestration and liquidation of the business, were carried out exclusively by the British military authorities.” (*Journal du droit international* (Paris), 55th year, No. 1 (January–February 1928), p. 196.)

aspect, any responsibility for acts committed by the Egyptian authorities must be placed on the occupying State, obviously as responsibility for the act of another.

(21) As for cases in more recent times, two acts which occurred during the German occupation of Rome seem particularly relevant to the problem under consideration. On 2 May 1944, the German military police, who were occupying Rome, forcibly entered a building forming part of the Basilica of St. Mary Major, where they made arrests. That action was an obvious international offence, since the extraterritoriality of the property of the Holy See in Rome was guaranteed by an obligation expressly set forth in the Lateran Treaty and that obligation, because of its typically localized and territory-linked character, was binding not only on Italy, but also on any State exercising its authority in exceptional circumstances in Rome. The responsibility of Germany which the Holy See asserted on that occasion was thus, without any possible doubt, a responsibility incurred by the German State for an act of its organs, and of its organs alone—hence, from every standpoint a direct responsibility. Three months earlier, however, on 3 February 1944, it was the Italian police who forcibly entered St. Paul's without the Walls, where they committed acts of depredation and made arrests. But as it was common knowledge that the Italian police in Rome operated under the control of the occupying Power, the Holy See addressed its protest not to any Italian authorities but to the German authorities, asserting the responsibility of the occupying Power in that instance too. However, in doing so, it attributed to Germany international responsibility for offences committed by non-German organs in a sector of activity that was subject to the control of the German occupation authorities—responsibility which must therefore be qualified as responsibility for the act of another.⁵¹⁹

(22) Lastly, a statement of position particularly relevant to the question under consideration was noted in the decision rendered on 15 September 1951 by the Franco-

⁵¹⁹ On these matters, see R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", Istituto di Diritto internazionale e straniero della Università di Milano, *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 154 *et seq.* Situations of which the Napoleonic era had already provided examples re-emerged during the Second World War: situations of what are called "puppet" States or Governments, i.e. States or Governments set up in a given territory on the initiative of the occupying Power and closely dependent on the State which brought them into existence. This subject was discussed in the report of the International Law Commission on the work of its thirtieth session. On that occasion, the Commission observed that

"In such situations, it is possible that in certain circumstances the dominant State will be called upon to answer for an internationally wrongful act committed by the 'puppet' or dependent State." (*Yearbook . . . 1978*, vol. II (Part Two), p. 100, document A/33/10, chap. III, sect. B.2, para. (7) of commentary to article 27).

The Commission had therefore concluded that the problems of international responsibility arising out of the conduct of organs of a "puppet" State could, like those arising out of the conduct of organs of any dependent State, fall within the notion of responsibility "for the act of another".

Reverting more specifically to the question at its present session, the Commission distinguished between the case in which the puppet State would, in fact, be deprived of international personality and would thus be only a sort of "territorial governmental entity" of the occupying State, within the meaning of article 7, paragraph 1 of the draft, and the other case, in which it would have its own international personality. In the first case, the occupying State would be responsible for internationally wrongful acts committed by the puppet State or Government as its "own acts", attributable to itself. In the second case, it would be responsible for the "acts of another", in that the acts took place in a sphere of activity under its direction or control.

Italian Conciliation Commission established under article 83 of the Treaty of Peace with Italy (1947) in the *Duc de Guise* case. In that case, the French Government called on Italy to return a property owned by French citizens which had been requisitioned under the decrees issued on 21 November 1944 and 4 January 1945 by the (Italian) High Commissioner for Sicily, which at that time was under military occupation by the allied and Associated Powers. The Commission allowed the French claim, observing, *inter alia*, that:

It is immaterial in the present case that on 21 November 1944 the Allied and Associated Powers exercised administrative *control** in Sicily, seeing that no evidence has been brought to show either intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees of 1944 and 1945.⁵²⁰

The decision therefore expressly affirms that the occupied State remains responsible for internationally wrongful acts committed by it without any interference or control by the occupying State. It must obviously be deduced, *a contrario*, that if such interference occurs and such control is established over the activity in connexion with which the international offence takes place, responsibility passes to the occupying State, which is then answerable for the act of the occupied State.

(23) The writers on international law who have studied the question of the responsibility of a State for internationally wrongful acts committed by other States have seldom asked themselves whether a problem of this kind could arise in cases of military occupation by a State of the territory or part of the territory of another State. Those who have done so, however, have agreed that responsibility for the act of another could also arise in such instances.⁵²¹ Moreover, the Commission did not fail to notice that many authors assert that international responsibility for the wrongful act of another State may arise not only in cases of *de jure* dependence of one State on another but also in cases of *de facto* dependence.⁵²² It goes without saying, therefore, that in the view of those authors as well, the occupying State should answer for wrongful acts committed by the occupied State in an area of activity in which the latter is subject to the former State's power of direction and/or control.

(24) On the basis of these elements, the Commission—with the exception of the member whose dissenting opinion on certain issues has already been mentioned—expressed the view that the occupying State too could find itself in the situation of being internationally responsible for a wrongful act committed by the occupied State, on two conditions: (a) that the occupied State continued to exist as a separate subject of international law; and (b) that the internationally wrongful act was committed by the occupied State in an area of activity in which that State was subject to the direction or control of the occupying State. In this connexion, it seemed irrelevant to the Commission, with the exception of one member, whether the occupation of the territory was complete or

⁵²⁰ *International Law Reports—1951*, ed. H. Lauterpacht (London, Butterworth, 1957), p. 426.

⁵²¹ See Ago, "L'occupazione bellica . . ." (*loc. cit.*), pp. 163 *et seq.*; Verdross, *Völkerrecht*, 5th ed., (Vienna, Springer, 1964), p. 390. Ross recognizes the responsibility of the occupying State for acts committed by organs of the occupied State, but in his opinion, it would be responsibility for an act of its own (*op. cit.*, p. 260).

⁵²² See, for example, Strupp, *loc. cit.*, pp. 112–133; Klein, *op. cit.*, p. 111; Barile, *loc. cit.*, p. 446; I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Kepler, 1963), p. 235.

partial or whether it was effected lawfully or not, since the occupied State's position of subjection to the occupying State's power of direction or control could occur on the same terms.⁵²³

(25) Having thus completed its analysis of the principal examples of cases in which, despite their diversity, it is apparent, in the opinion of almost all the members of the Commission, that a State can be required under international law to answer for an act committed by another State, the common feature of those cases being the latter State's subjection to the former State's power of direction or control, the Commission took up another case, namely that of a State which exercises coercion against another State to secure the commission by the latter, against its will, of a breach of an international obligation to a third State. Reference has already been made to this case in the commentary to article 27, in order to distinguish it from the case of "participation" in the internationally wrongful act of another State.⁵²⁴ There, the Commission stated that in the case of "coercion" to commit an international offence,

... the commission of the wrongful act remains exclusively the act of the State subjected to coercion. The State applying the coercion remains entirely foreign to the commission of the offence; it carries out none of the actions constituting the offence and provides no aid or practical assistance in its commission . . . There can be no question of attributing to the State that exercises the coercion a share in the wrongful act committed by another State under the effect of that coercion. That would be justified only if the State in question had taken an active part in performing the act, but that is not the case here. . . .⁵²⁵

At the same time, the Commission ruled out the possibility of the act being a separate offence by the coercing State against a third State injured by the State coerced.⁵²⁶ The Commission added, however, that this did not mean that the State which exercised coercion to induce another State to commit an internationally wrongful act should be regarded as totally uninvolved in the act or that it should not have to suffer any of the consequences of the act; nor did it mean that the internationally wrongful act committed by the coerced State could be treated in the same manner as an internationally wrongful act committed by a State acting in the free exercise of its sovereignty. In the case under consideration here, the coerced State behaves as a State deprived of its sovereign capacity of decision. In the opinion of the Commission, the condition of that

⁵²³ According to the member in question, a distinction would on the other hand have to be drawn between the case in which the occupation as such was wrongful and the case in which it was not; in the latter case, he would be reluctant even to use the word "occupation", at least without an appropriate adjective such as "liberating" or "friendly". In cases where the occupation was effected wrongfully, the occupied State, according to the same member of the Commission, would find its own State organization replaced entirely by that of the occupying State, which would then be logically responsible for wrongful acts committed in the occupied territory as acts attributable to itself. In cases where the occupation was effected lawfully, however, as in the case of reaction to aggression, the wrongful acts committed by organs of the "occupied" State would always be attributable to that State, which would be exclusively responsible for them. No exception to the rule established in draft article 1 would then be necessary.

⁵²⁴ See paragraphs (8) to (11) of the commentary to article 27, *Yearbook . . . 1978*, vol. II (Part Two), pp. 101-102, document A/33/10, chap. III, sect B. 2.

⁵²⁵ *Ibid.*, p. 101, para. (10) of the commentary.

⁵²⁶ Apart, of course, from the possible existence of an internationally wrongful act by the coercing State against the State coerced (or even against other members of the international community) in the event of the use of coercion being internationally wrongful in itself (*ibid.*, para. (9) of the commentary).

State was similar to that of a dependent State or a State under territorial occupation, and for that reason the Commission indicated that it would examine, in the context of article 28, whether the relationship established between the coercing State and the State which is coerced into committing a wrongful act is a relationship liable to give rise to a case of responsibility of a State for an act of another State.⁵²⁷

(26) In preparing the present article, the Commission thus resumed its consideration of the question; all except one of its members⁵²⁸ held that it was necessary to recognize the existence of the international responsibility of the coercing State for the wrongful act committed by the State which suffered the coercion. In their opinion, that responsibility was therefore responsibility for an act of another State. In other words, the Commission is of the opinion that a State which commits an internationally wrongful act under coercion by another State is in fact in a situation similar to that of a State which in one area of its activity is subject to the direction or control of another State. Since in this latter case the State is not acting in the free exercise of its sovereignty, it is not acting with complete freedom of decision and action. The coercing State compels the other State to take the course of committing an international offence which in other circumstances it would probably not commit. The only difference between this and what happens in a relationship of dependence or in a case of territorial occupation is that here the State's position of "dependence" is purely occasional and not permanent. But the fact remains that the State engaging in the occasional conduct adopted under coercion, like the State engaging in conduct adopted in an area of activity permanently subject to the direction or control of another State, does in fact act without freedom of decision. To conclude, viewed from this angle the situation is the same, and so the Commission considered that the consequences in the matter of responsibility should also be the same.

(27) The Commission considered it useful to report two practical cases in support of its conclusions. The first is the *Shuster* case, which dates back to 1911. At that time the Persian Government, under coercion as a result of the occupation of part of its territory by Tsarist troops, broke the contract it had concluded with Shuster, an American financier, whom it had engaged as an economic adviser to reorganize the State finances. The Persian Government reluctantly dismissed Mr. Shuster and took it upon itself to compensate the victim of its action, thus avoiding an international dispute. However, as commentators on the incident pointed out at the time, it was only that spontaneous grant of compensation by the Persian Government which prevented the United States Government from invoking the indirect international responsibility of the St. Petersburg Government, since the action of the Persian authorities had been taken under

⁵²⁷ *Ibid.*, pp. 101-102, para. (11) of the commentary.

⁵²⁸ In the opinion of that member, the State to which the internationally wrongful act is attributable is answerable, and is alone answerable, for the internationally wrongful act it committed under the coercion of another State. If the coercion is unlawful, there will be an internationally wrongful act and responsibility will lie with the coercing State vis-à-vis the State coerced (or, as the case may be, vis-à-vis the international community as a whole); but the coercing State will be answerable only for the coercion, and not additionally for the wrongful act committed by the State coerced. No exception would therefore have to be stipulated, even as regards the cases envisaged in this paragraph, to the rule established in article 1 of the draft.

coercion by the latter Government.⁵²⁹ The second is the *Romano-Americana Company* case, concerning a United States company which suffered loss as a result of the destruction, in 1916, of its oil storage and other facilities in Romanian territory. The facilities were destroyed on the orders of the Romanian Government, then at war with Germany, which was preparing to invade the country. After the war, the United States Government, believing that the Romanian authorities had been "compelled" by the British authorities to take the measure in question, first addressed its claim on behalf of *Romano-Americana* to the Government in London, with a view to obtaining compensation from it for the wrong suffered by its national.⁵³⁰ However, the British Government denied all responsibility on the ground that no compulsion had been exerted in that case, either by it or by the other Allied Governments, which it asserted had simply urged the Romanian Government, in its own interest and for the sake of the common cause, to take an action which it had carried out in complete freedom and for which it had itself been bound to bear the responsibility in case of damage to third parties.⁵³¹ Thereupon the United States Government finally agreed to address its claim to the Romanian Government, which in turn agreed to assume responsibility for the acts committed by its own organs in 1916. It should be emphasized that the only point on which there was disagreement at any time between Washington and London was whether or not, in this particular case, there had been any "compulsion" exerted on Romania by the United Kingdom. The two Governments seem clearly to have agreed that, if any compulsion or coercion really had been exerted in the case in question, the Government exerting it would have had

⁵²⁹ See in particular C. L. Bouvé, "Russia's liability in tort for Persia's breach of contract", *American Journal of International Law* (Washington, D.C.), vol. 6, No. 2 (April 1912), pp. 389 *et seq.*

⁵³⁰ In support of its action, the United States Government argued that the circumstances of the case revealed

"... a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, *compelled** a weaker Ally to acquiesce in an operation which it carried out in the territory of that Ally" (note from the United States Embassy in London dated 16 February 1925, in G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, p. 702).

⁵³¹ See the note from the British Foreign Office dated 5 July 1928:

"In the opinion of His Majesty's Government the facts of the case establish beyond any question that the destruction of the property of the *Romano-Americana Company* was carried out under the direct orders of the Roumanian Government, and was therefore in law and in fact the act of that Government

"His Majesty's Government do not deny that, in company with the French and Russian Governments, they urged the Roumanian Government, through their accredited representative in Bucharest, to make the fullest use of the powers assumed by them early in the campaign to prevent the enemy from obtaining the means of prolonging a war disastrous alike to all involved in it at that time, but I must reaffirm that they could not and did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause

"His Majesty's Government have every reason for believing that the Roumanian Government would be willing to offer the same terms of settlement to the *Romano-Americana Company* as have already been accepted by the British, French, Dutch and Belgian companies and by those Roumanian corporations such as the *Astra Romana* and the *Steaua Company*, in which the shares are mainly held by non-Roumanian shareholders. His Majesty's Government therefore must decline to accept any responsibility whatever for the compensation which may be due to the *Romano-Americana Company* arising out of the destruction of their properties in Roumania in 1916". (*Ibid.*, p. 704.)

to answer for the act committed by the Government which had been forced to act against its will.

(28) Furthermore, the Commission decided that the responsibility of the coercing State for the wrongful act committed under the effect of its coercion by the organs of the other State cannot be described as responsibility for its own act.⁵³² In the case under consideration, the organs of the State coerced act in the exercise of elements of the governmental authority of that State on the basis of a decision taken by it, regardless of the conditions in which the decision was taken. The act they commit is attributable to their State alone, and not to the coercing State. Nor can the responsibility of the latter State be construed as responsibility for the wrongful act constituted by the use of coercion. This is so not merely because there might be cases in which the use of coercion is not in itself wrongful⁵³³ but mainly because, even when it is wrongful, it constitutes an offence against the State suffering the coercion (or, as the case might be, against the international community as a whole). The State having committed this wrongful act will, of course, have to be answerable for it, but the act will not for all that be identical with the act committed by the coerced State against a third State. The responsibility of the coercing State for the internationally wrongful act committed by the State coerced can therefore only be described as responsibility for the internationally wrongful act of another State.

(29) Having reached this conclusion, the Commission set about establishing what should be the nature of the coercion exerted by a State against another State in order for the wrongful act committed by the latter under the effect of that coercion to generate the international responsibility of the former State. The Commission wondered, in particular, whether such coercion should necessarily be constituted by the use or threat of armed force or whether it could take other forms, particularly the form of economic pressure. After careful consideration, it came to the conclusion that for the purposes of the present article, "coercion" is not necessarily limited to the threat or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it—any measure making it extremely difficult for that State to act differently from what is required by the coercing State. Some members of the Commission suggested establishing a link between the notion of coercion used in the present article and that in article 52 of the Vienna Convention on the Law of

⁵³² The view that an act committed by a State under coercion by another State is to be considered as an act of the coercing State has been advanced by Ross, *op. cit.*, p. 260; Quadri, *op. cit.*, p. 603; Verdross, "Theorie . . .", (*loc. cit.*), pp. 413 *et seq.*; J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), vol. VI, pp. 712 *et seq.*

⁵³³ In the commentary to article 27, the Commission stated in this connexion:

"There is no doubt that in present-day international law, just as in the United Nations system, coercion that includes the use or threat of use of armed force is, save in exceptional cases, an international offence of the utmost gravity As to the other forms of pressure, and in particular economic pressure, it is well known that opinions still differ; some simply assimilate these pressures to the internationally prohibited forms of coercion, while others see them as measures which, although reprehensible, are not internationally wrongful." (*Yearbook . . . 1978*, vol. II (Part Two), p. 101, document A/33/10, chap. III, sect. B. 2, para. (8) of the commentary to article 27.)

Treaties,⁵³⁴ but it was finally agreed that the notion of coercion in the latter article might be narrower in scope than it should be in the present context.

(30) The Commission did not identify any other cases in which, under general international law, there would be grounds for holding a State responsible for an internationally wrongful act committed by another State. An extension of the rule to other cases could of course be envisaged under *international treaty law*.⁵³⁵ Leaving aside the question whether it would not be more appropriate, in that instance, to speak of one State guaranteeing another against the economic consequences of any international responsibility incurred by the latter, the Commission wishes to emphasize that what at first sight appears to be a single case actually comprises two different ones. The agreement derogating partly or wholly from general international law could be an agreement between State A—which would assume responsibility for certain acts that might be committed by State B—and State C, the presumed victim of the acts covered by the provisions of the agreement. If such were the case, it is obvious that State C could claim reparation from State A for offences committed to its detriment by State B, and that State A could not evade the treaty obligation it had accepted in that connexion.⁵³⁶ However, there is clearly no need to provide for this case here, since the articles of the present draft can always be derogated from by treaty, provided they do not contain rules of *jus cogens*. Secondly, the agreement concluded in derogation of general international law could be an agreement between State A and State B, the latter State being the presumed author of an offence to the detriment of State C. Obviously, such an agreement—and the resulting extension of cases of responsibility for the act of another to cases not provided for under general international law—could operate only with the consent of State C, since the latter would not be bound by an agreement which for it would be simply a *res inter alios acta*.⁵³⁷ In any event, the Commission considered that there was no need to provide for this in the article it intended to formulate.

(31) Having completed its consideration of cases in which, in its opinion, the existence of the international responsibility of one State for an internationally wrongful act committed by another State must be recognized, the

⁵³⁴ For the text of the Convention (hereinafter referred to as the "1969 Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

⁵³⁵ Some writers have referred to this possibility and have treated it as a case in which responsibility for the act of another would not be open to doubt. See, for example, Dahm, *op. cit.*, p. 204; L. Cavaré, *Le droit international public positif*, 3rd ed., rev. by J.-P. Quéneudec (Paris, Pedone, 1970), vol. II, p. 507; I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 442.

⁵³⁶ A more doubtful point is whether State B could evade the obligation under general international law to make reparation for the consequences of an internationally wrongful act committed against State C if the latter addressed itself to it for that purpose, in breach of its agreement with State A but without breaching any undertaking towards B.

⁵³⁷ If State C, having suffered from an internationally wrongful act committed by State B, refused to accept the agreement concluded by B with A and to seek reparation from a State other than B itself, the latter would of course be obliged, in accordance with general international law, to answer for the act committed. It would then have no alternative but to make its own approach to State A in order to obtain reimbursement of the amount of compensation paid to State C. The true nature of the agreement between A and B as a 'guarantee' agreement would then become apparent.

Commission had to consider a question that follows automatically from such recognition. It had to consider whether the *responsibility thus devolving upon another State precludes that of the State which committed the internationally wrongful act or whether it is incurred in parallel with the latter's responsibility*. The Commission noted that State practice is not really clear in this respect⁵³⁸ and that doctrine is divided on the point.⁵³⁹ The Commission therefore discussed the question at length, examining the arguments for and against the two possible hypotheses. In support of the view that the responsibility of the State which has the power of direction or control over another State or which has exercised coercion against it should be exclusive, it was pointed out that the State subject to direction, control or coercion is, in the circumstances, deprived of the power to determine its conduct freely, and it would therefore be unjust to hold it responsible for an act committed by it under such conditions. In the view of the proponents of this argument, the criteria for admitting cases of responsibility for the act of another obviously had to be very restrictive (in particular, the coercion must have been "irresistible"), but when the strict conditions governing its existence were fulfilled, that responsibility should be regarded as excluding all responsibility on the part of the State that committed the internationally wrongful act. In opposition to this view, it was pointed out that there had nevertheless been cases in which the State which had committed the internationally wrongful act could have resisted the instructions from the State having the power to give it those instructions, or the coercion exercised by another State, and that the adoption of a principle which in any case precludes responsibility on its part would not encourage it to resist pressure. Moreover, the State instructed or coerced sometimes went even beyond what had been asked of it by the instructing or coercing State—not to mention the fact that, in the case where a State had only power of control over the activities of another State, that other State might commit a wrongful act without the State which controlled it having asked it to do so. In the end, the Commission was convinced by the force of these

⁵³⁸ Practice provides a number of indications that would tend to provide support for the idea of the exclusive nature of the responsibility of the State answering for the act of another. When States have been approached with demands for reparation in respect of an internationally wrongful act committed by another State, no mention has ever been made of the existence of any responsibility that might remain with the latter, nor have there been any cases in which both States have been approached at the same time. For its part, the State to which the demand for reparation has been addressed has either denied or admitted its responsibility, without mentioning any division of responsibility with the State which committed the internationally wrongful act. In addition, the possibility of dual responsibility was not envisaged in the replies to point X of the request for information submitted to States by the Preparatory Committee of the 1930 Codification Conference (League of Nations, *Bases of Discussion . . . (op. cit.)*, pp. 121 *et seq.*). It will be noted that in the Fink case (referred to above in paragraph (20) of this commentary), in which the claimant State approached the occupied State to obtain reparation for damage caused by acts committed by its organs at the request of the occupying State, the Court of Appeal of Alexandria denied the existence of any responsibility on the part of the occupied State. Nevertheless, except in this particular case, the responsibility of the State to which the internationally wrongful act was attributable has never been expressly precluded.

⁵³⁹ Eagleton (*op. cit.*, pp. 26 *et seq.*) and Ross (*op. cit.*, p. 261) hold that the responsibility which in certain cases devolves upon a State other than the State which actually committed the wrongful act is exclusive. Ago (*La responsabilità indiretta . . . (op. cit.)*, p. 54), Barile (*loc. cit.*, p. 447), Morelli (*op. cit.*, p. 364) and Verzijl (*op. cit.*, p. 705) lean towards the opposite view.

arguments. It therefore decided that the attribution of international responsibility to a State which has the power of direction or control over a certain area of the activities of another State or which has coerced another State into committing a wrongful act should not automatically preclude the responsibility of the State subject to that power or coercion. The latter's responsibility could be wholly precluded only if, in committing the internationally wrongful act, it had done no more than the other State had asked it to do and if resistance to the request had been extremely difficult. In other cases, that responsibility should subsist, although to a lesser degree, alongside that of the State which has the power of direction or control or which has exercised the coercion.⁵⁴⁰ In part 2 of the draft, the Commission will determine how responsibility for one and the same act should be divided between the two States and what form each share of the responsibility should take. This solution seemed to have the advantage of allowing the Commission not to confine itself to considering, as a cause of responsibility for the act of another, such a harsh form of coercion as that involving the threat or use of armed force. It also seemed to the Commission that this solution was the one which best looked after the interests of the injured third State, which, in particularly delicate cases, would not find itself debarred from bringing its claim against the State which had committed the wrongful act.

(32) In conclusion, it should be added that, after some thought, the Commission decided not to deal with the question of the possible existence of cases of responsibility of a State for an internationally wrongful act by a subject of international law other than a State, and in particular by an international organization. Although theoretically possible, such a case seemed to be of no practical interest.

(33) On the basis of the conclusions reached at the end of this lengthy analysis of all aspects of one of the most difficult questions which it has had to face in connexion with the present draft, the Commission proceeded to formulate article 28. It will readily be seen that the first case for which this article establishes application of the exceptional principle of attribution of responsibility for an internationally wrongful act to a State other than the State which has committed the act is that defined in *paragraph 1* of the article, namely, the case in which the first State has, *de jure* or *de facto*, the power of direction or control over the second State in the field of activity in which the internationally wrongful act has been committed. This situation has been so amply illustrated by various examples in the preceding paragraphs of this commentary that there is no need to dwell at this stage on why the Commission regarded it as the main instance of responsibility for the act of another in international law. As a result, therefore, of the first clause of article 28, if, regardless of the type of relations existing between two States, an internationally wrongful act occurs in a field of activity of a State which is subject to the direction or control of another State, that other State will incur

international responsibility;⁵⁴¹ it is not necessary for the latter State actually to have used its power in the specific case in question, in other words, for it actually to have given the instructions to commit the offence, or, in exercising its power of control, for it to have "permitted" the offence which the "controlled" State was going to commit. For article 28, paragraph 1, to apply, it is likewise of no importance whether the relationship between the two States which lies at the basis of the power of direction or control exercised by one over the other is a relationship established in law or purely a matter of fact, or whether it is lawful or unlawful. As has been seen, historical cases of relations between two States in which one of them had a power of direction or control in a field of activity belonging to the other have included international relationships of dependence: for instance, in the past, "vassalage" or the "international" protectorate, in the proper sense of the term; or, right up to the present, relations between federal States and member States of the federation, where the member State has retained an international capacity of its own, however limited; and above all, relations between occupying State and occupied State in cases of territorial occupation. It is hardly necessary to reiterate that in the majority, although not unanimous, view of the Commission, this last-mentioned form of relationship, characterized in most cases by the fact that the occupied State retains its sovereignty and its own international personality while the occupying State exercises functions of direction and control over the occupied State's activities in a wide variety of fields, is the one likely today to provide the most frequent and most topical examples of the phenomenon of the attribution to a State of international responsibility for an act committed by another State.

(34) The second case in respect of which article 28 provides separately, in *paragraph 2*, for the international responsibility of a State for an internationally wrongful act committed by another State is that in which the first State has resorted to coercion to induce the second State to commit the internationally wrongful act. For this case to arise, it is clearly not enough for coercion to have been exercised by one State against another and for the latter to have committed an internationally wrongful act. There must also be a specific link between the two: the first State must have required the second State to commit the wrongful act and must have resorted to coercion to back up its demand. On the other hand, it is irrelevant whether the use of coercion was in itself unlawful or not. As to the form which this coercion must take in order to place responsibility on the coercing State for the wrongful act committed by the State coerced, the Commission did not see any point in providing an exact definition. The word "coercion" is in itself precise enough to designate an action which is directed against another State and which seriously curbs that State's freedom to adopt conduct other than that required by the State taking the action. The clearest and most straightforward case is, of course, that involving the use or threat of armed force; in the Commission's view, however, there is no reason why coercion should not take other forms, and in particular that of serious economic pressure, provided always that it

⁵⁴⁰ In accepting this argument, the Commission is departing slightly from the view it expressed in paragraph (11) of the commentary to article 1 (see foot-note 487 above) and in paragraph (3) of the introductory commentary to chapter IV of the draft (*Yearbook* . . . 1978, vol. II (Part Two), p. 99, document A/33/10, chap. III, sect. B. 2).

⁵⁴¹ If, on the other hand, the act in question occurs in a sector of activity in which the State committing the act enjoys complete freedom of decision and action, the responsibility will logically lie with that State alone.

is such as to deprive the State suffering it of any possibility of deciding freely on the conduct to be adopted.

(35) *Paragraph 3* of article 28 then draws attention to the fact that, in the cases referred to in paragraphs 1 and 2, in addition to the responsibility for the act of another of the State which has the power of direction or control or which has exercised the coercion—that is, the principal and inescapable responsibility—the otherwise normal responsibility of the State to which the internationally wrongful act is attributable may also continue to exist. As the Commission has just mentioned, this second responsibility will doubtless arise in cases where the State to which the internationally wrongful act is attributable has done more than was demanded of it by the State which has the power of direction or which has exercised the coercion, or in cases where it would not have been too onerous for it to have resisted the instructions or the coercion; or where the State in fact acted of its own volition, though in a field of activity subject to the control of another State. In any event, the task of determining the possible division of responsibility between the two States, should it be recognized that there is also responsibility on the part of the State which committed the internationally wrongful act, will be undertaken in part 2 of the draft, which will deal with the content, forms and degrees of international responsibility. The problem of direct concern in this article is solely that of determining those cases in which responsibility for the act of another, whether on its own or along with that of the State which has committed the offence, arises for the other State involved in such cases.

(36) Accordingly, article 28, like article 27 which precedes it in the same chapter, is concerned with a situation in which one State is involved in the internationally wrongful act of another State. In the case of article 27, this involvement lies in aid or assistance for the commission of the internationally wrongful act by the other State. In the case of article 28, it lies in the power of direction or control enjoyed by one State in the field of activity in which the wrongful act has been committed by the other State, or in coercion by the first State to induce the second State to commit the act in question. In both cases, the existence of an international offence committed by a given State gives rise to international responsibility on the part of another State. However, the basis and the *ratio* for this responsibility are different. Article 27 in fact covers two separate internationally wrongful acts, even though the existence of the offence of the State which renders aid or assistance for the commission of the offence by the State receiving that aid or assistance is manifestly linked with the commission of that second offence. The present article, on the other hand, relates to a single internationally wrongful act, attributable as such to a single State. In this case, however, the involvement of another State in one of the ways described above means that that other State finds itself attributed international responsibility for the act of another, even if this responsibility does not necessarily absorb that which, under the general rule, is always attributable to the State which has committed the act in question.

(37) With regard to the *terminology* used, the Commission, in order to avoid any ambiguity, preferred to avoid the expression “indirect” or “vicarious responsibility” (*responsabilité indirecte* in French, *mittelbare Haftung* in German) to designate the situation envisaged in article 28. Although used regularly by most writers to cover all cases in which a State is called upon to

answer for an internationally wrongful act committed by another State or another subject of international law, the expressions in question have sometimes been employed, especially in the past, to designate widely differing situations.⁵⁴² The Commission has therefore spoken solely of the international responsibility of a State for the wrongful act of another State.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) The subject of part 1 of the draft is the “internationally wrongful act”; in other words, part 1 is concerned with defining the rules for establishing, under international law, the existence of an act which is to be characterized as wrongful and which, as such, constitutes the source of a State’s international responsibility. Article 1 enunciates the basic principle attaching international responsibility to every internationally wrongful act of a State. Following on the enunciation of that principle, article 3 indicates in general terms the conditions which must be fulfilled for there to be an internationally wrongful act of a State, i.e., it establishes the constituent elements of an act that warrant its being so characterized. The article says that there is an internationally wrongful act of a State when conduct is attributable to the State under international law (the subjective element) and that conduct constitutes a breach of an international obligation of the State (the objective element). Next, the draft articles formulated in chapters II and III respectively analyse and expand on each of those two elements, while chapter IV deals with certain special situations in which, in one way or another, a State is implicated in an internationally wrongful act committed by another State. Chapter V, which completes and rounds off part 1 of the draft, is intended to define those cases in which, despite the apparent fulfilment of the two conditions for the existence of an internationally wrongful act, its existence cannot be inferred owing to the presence of a circumstance which stands in the way of such an inference. The circumstances usually considered to have this effect are consent, countermeasures in respect of an internationally wrongful act, *force majeure* and fortuitous event, distress, state of emergency and self-defence. It is with each of these separate circumstances precluding wrongfulness that chapter V is concerned.

(2) The Commission has already had occasion to state its view that the true effect of the presence of such circumstances is not, at least in the normal case, to preclude responsibility that would otherwise result from an act wrongful in itself, but rather to preclude the characterization of the conduct of the State in one of those circumstances as wrongful. In the commentary to draft article 2, for example, it is stated that:

The Commission also recognized that the existence of circumstances which might exclude wrongfulness, already mentioned in the commentary to article 1, did not affect the principle stated in article 2 and

⁵⁴² For the various meanings in which the expression “indirect” or “vicarious” responsibility has been used, see, *inter alia*, Klein, *op. cit.*, pp. 41 *et seq.*

could not be deemed to constitute an exception to that principle. When a State engages in certain conduct in circumstances such as self-defence, *force majeure*, or the legitimate application of a sanction, its conduct does not constitute an internationally wrongful act because, in those circumstances, the State is not required to comply with the international obligation which it would normally have to respect, so that there cannot be a breach of that obligation. Consequently, one of the essential conditions for the existence of an internationally wrongful act is absent. This case certainly cannot be claimed as an exception to the rule that no State can escape the possibility of having its conduct characterized as internationally wrongful if—and this is the point—its conduct meets all the conditions.⁵⁴³

(3) It would be incorrect to regard the expressions “circumstances precluding responsibility” and “circumstances precluding wrongfulness” as mere synonyms. Such an idea could be considered valid only by those who define a wrongful act in terms of the responsibility resulting from that act or—to put it more plainly—who characterize an act as wrongful only because the law attaches responsibility to the act in question. According to the proponents of this argument, if no responsibility attaches to the commission of a given act the act cannot logically be characterized as wrongful; thus, in speaking of circumstances precluding responsibility, one would be referring to the same notion as if one spoke of circumstances precluding wrongfulness.⁵⁴⁴ But matters seem different to those who regard the notion of the “wrongful act” as one which, although linked to that of “responsibility”, nevertheless remains distinct from it. Throughout the drafting of the articles, the Commission has made clear its conviction that a distinction must be drawn between the idea of “wrongfulness”, indicating the fact that certain conduct by a State conflicts with an obligation imposed on that State by a “primary” rule of international law, and the idea of “responsibility”, indicating the legal consequences which another (“secondary”) rule of international law attaches to the act of the State constituted by such conduct.

(4) Moreover, it must be borne in mind that the basic principle of the draft is, as already mentioned above, the principle enunciated in article I, which affirms that every internationally wrongful act of a State entails the international responsibility of that State. If, therefore, in a given case, the presence of a particular circumstance were to have the consequence that an act of a State could not be characterized as internationally wrongful, that same presence would automatically have the consequence that no form of international responsibility linked to a wrongful act could result from it. In other words, for the purposes of the draft, any circumstance precluding the wrongfulness of an act necessarily has the effect of precluding responsibility as well.⁵⁴⁵ However, the converse does not apply with the same ineluctable logic. There is no reason why, from a purely theoretical

⁵⁴³ *Yearbook . . . 1973*, vol. II, p. 178, document A/9010/Rev.1, chap. II, sect. B. 2, para. (7) of the commentary to article 2.

⁵⁴⁴ For example, H. Kelsen, “Unrecht und Unrechtsfolge im Völkerrecht”, *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 481 *et seq.* Since Kelsen does not accept the distinction between “primary” rules and “secondary” rules, it is logical for him to regard the concept of the obligation itself as simply a derivative of the concept of responsibility.

⁵⁴⁵ It is necessary to distinguish clearly between the circumstances discussed in chapter V and those covered by article 28 of the draft. In the case of the latter, the responsibility deriving from the wrongful act is in no way precluded: it is simply placed on a different subject, without prejudice to the international responsibility, under other articles of the draft, of the State which has committed the internationally wrongful act.

standpoint, there should not be some circumstances that, while precluding responsibility, would not at the same time preclude the wrongfulness of an act which, by way of exception, would not give rise to responsibility.⁵⁴⁶

(5) The prior question posed in chapter V is therefore the following: when an act of a State is not in conformity with the requirements of an international obligation incumbent on that State, but is committed, for example, with the consent of the State having the subjective right that would otherwise have been injured, or in application of a legitimate countermeasure in respect of another State’s internationally wrongful act, in circumstances of *force majeure* or fortuitous event, or in self-defence, etc., is it an act which, by reason of one of these circumstances, ceases to be an internationally wrongful act and as a consequence—but only as a consequence—does not entail the international responsibility of its author, or is it an act which remains wrongful in itself, but no longer engages the responsibility of the State that committed it? For the Commission, it is difficult to conceive that international law could characterize an act as internationally wrongful without attaching to it disadvantageous consequences for its author. It is difficult to see what would be the point of making such a characterization. Imposing an obligation while at the same time attaching no legal consequences to breaches of it would in fact amount to not imposing the obligation at all. Such a situation would, moreover, be in flagrant contradiction with one of the dominant characteristics of a system of law so imbued with effectiveness as the international legal order.

(6) Replies to point XI of the request for information submitted to State by the Preparatory Committee for the 1930 Codification Conference, concerning “circumstances in which a State is entitled to disclaim responsibility”, show clearly that, in the opinion of States, the circumstances dealt with in chapter V of the draft preclude wrongfulness and only indirectly do they preclude responsibility. For example, the Austrian Government said in its reply:

If the damage caused is not contrary to international law, there can be no ground for international responsibility.⁵⁴⁷

The reply from the United Kingdom Government stated that:

⁵⁴⁶ The *abstract* possibility that there are circumstances which would preclude responsibility, but would in no way affect wrongfulness has been maintained by a number of writers. See, in particular, G. Sperduti, “Introduzione allo studio delle funzioni della necessità nel diritto internazionale”, *Rivista di diritto internazionale* (Padua), XXXV year, 4th series, vol. XXII, Nos. 1–2 (1943), pp. 19 *et seq.*; G. Morelli, *Nozioni di diritto internazionale*, 6th ed. (Padua, CEDAM, 1963), p. 351; G. Gaja, *L'esaurimento dei ricorsi interni nel diritto internazionale* (Milan, Giuffrè, 1967), pp. 29 *et seq.* In advancing this hypothesis, these writers on international law are, of course, referring only to cases of responsibility for “wrongful” acts, since the issue would be distorted if the argument were extended to cover cases where “international responsibility” (actually nothing more than an obligation to make reparation for any injury sustained) is attached to activities which are considered “lawful” under international law. In such cases, the existence of circumstances precluding that particular form of responsibility is of course conceivable, whereas there can be no suggestion whatsoever of circumstances precluding a “wrongfulness” which, by definition, is precluded from the outset. See in this connexion Gaja, *op. cit.*, pp. 33 *et seq.*

⁵⁴⁷ League of Nations, *Bases of discussion . . . (op. cit.)*, p. 125. It is clear that the reason the Austrian Government considered that there was no ground for responsibility in the cases referred to was that the international wrongfulness of the act of the State ceased to exist.

... self-defence may justify action on the part of a State which would otherwise have been *improper*.⁵⁴⁸

Even more clearly, the Norwegian Government stated, in connexion with self-defence, that . . .

... only an act performed in the defence of the rights of a State which is authorized by international law should involve exemption from responsibility; but then the act would not be an "*act contrary to international law*".⁵⁴⁹

(7) It is true that not only in other replies to point XI of the "request for information" but also in statements of position on actual disputes, some Governments speak at times of circumstances "precluding responsibility". However, the use of such terminology is no proof of any intention on the part of these Governments to argue that the circumstance to which they refer precludes responsibility but does not affect the wrongfulness of the act of the State. Normally, the issue in dispute is whether or not international responsibility of the State exists in a specific case, and thus the ultimate concern of the parties is to determine whether or not responsibility was incurred; it makes no difference, for that purpose, whether the circumstance invoked in its defence by the author of the act alleged to have given rise to responsibility bears directly on the existence of responsibility or whether it bears on the existence of the wrongful act, and, only as a consequence on the existence of responsibility. Accordingly, in stating the ultimate consequence, Governments sometimes assert that there is no State responsibility in a given case because the organ which adopted certain conduct acted in a private capacity, or because the person who committed the act was a private individual, and so on, instead of saying, as would be more correct, that in such cases there is no internationally wrongful act and therefore no responsibility. It is obviously not the intention of these Governments to say that the conduct of their organs does constitute a wrongful act of the State but does not entail its responsibility; in denying the consequence, they also deny the premise. It may therefore be concluded that State practice⁵⁵⁰ confirms the validity of the assertion that the circumstances to which this chapter refers preclude the wrongfulness of the conduct of the State, and only indirectly do they preclude the international responsibility that would otherwise result from the conduct. The attitude of international judges and arbitrators, although they may not have expressly considered the question, shows clearly that they have in no sense regarded these circumstances as producing the effect of precluding responsibility for acts which in themselves remain wrongful.

(8) As far as the literature is concerned, most writers who deal with the question use expressions implying that wrongfulness is precluded: "circumstances which exclude the normal illegitimacy of an act", "*circonstances excluant l'illicéité*", "*motifs d'exclusion de l'illicéité*", "*Ausschluss der Rechtswidrigkeit*", "*Gründe die Rechtswidrigkeit ausschliessen*", "*Unrechtausschliessungsgründe*", "*circostanze escludenti la illicéità*," and so on. Again, it can also be said that, with few exceptions, writers who use the expression "circumstances precluding responsibility" never do so with

the intention of maintaining that those circumstances preclude responsibility but not the wrongfulness of an act which, by way of exception, does not give rise to responsibility. Those who use this terminology are, in fact, more often than not, writers who think in terms of responsibility (responsibility for acts of organs lacking competence, of private individuals, etc.), without considering the question of the relationship between the notion of wrongfulness and the notion of responsibility. There are also writers who entitle the chapter or paragraph dealing with this question "circumstances precluding responsibility" but, in the body of their text, speak of "circumstances nullifying the illegality of the act" ("*circonstances annihilant l'illicéité de l'acte*")⁵⁵¹ or of "grounds precluding wrongfulness" ("*motifs d'exclusion de l'illicéité*").⁵⁵² As to the substance of the problem, it is a fact that a very great majority of internationalists start from the premise that each of the circumstances here envisaged precludes, by its presence, the international wrongfulness of an act of the State that otherwise would constitute a breach of an international obligation towards another State.⁵⁵³

(9) The "circumstances" considered in this chapter of the draft have one essential feature in common: that of rendering definitively or temporarily inoperative the international obligation in respect of which a breach is alleged, in cases in which one of these circumstances is present.⁵⁵⁴ The act of the State in question cannot be characterized as wrongful for the good reason that, because of the presence of a certain circumstance, the State committing the act was not under an international obligation *in that case* to act otherwise. In other words, there is no wrongfulness when one of the circumstances referred to is present, because by reason of its presence the objective element of the internationally wrongful act, namely, the breach of an international obligation, is lacking. For instance, in the case of the circumstance known as "consent", the reason why the State incurs no responsibility even though it has engaged in conduct not in conformity with what is normally required by an international obligation binding it to another State is that, in that particular instance, the obligation in question is rendered inoperative by mutual consent. There can have been no breach of that obligation, no wrongful act can have occurred, and hence there can be no question of

⁵⁵¹ Spiropoulos, *op. cit.*, p. 286.

⁵⁵² L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), p. 368.

⁵⁵³ See, in addition to the writers mentioned in the following footnote, R. Ago, "Le délit international", *Recueil des cours* . . ., 1939-II (Paris, Sirey, 1947), vol. 68, pp. 532-533; Morelli, *op. cit.*, p. 351; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III, p. 1523; E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, ed. M. Sorensen (London, Macmillan, 1968), p. 541; G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 784; M. Giuliano, *Diritto internazionale* (Milan, Giuffrè, 1974), vol. I, p. 599; A. Favre, *Principes du droit des gens* (Paris, Librairie de droit et de jurisprudence, 1974), p. 643; H. J. Schlochauer, "Die Entwicklung des völkerrechtlichen Deliktsrechts", *Archiv des Völkerrecht* (Tübingen), vol. 16, No. 3 (1975), pp. 268-269.

⁵⁵⁴ A number of writers have observed that "circumstances precluding wrongfulness" have this effect because, where they are present, they preclude the existence of the international obligation. See in particular Strupp, *loc. cit.*, p. 121; Scerni, *loc. cit.*, p. 476; Ross, *op. cit.*, p. 243; Guggenheim, *op. cit.*, p. 57; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957) vol. I, pp. 572-573; Gaja, *op. cit.*, pp. 32-33; B. Graefrath, E. Oeser and P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), p. 73.

⁵⁴⁸ *Ibid.*, p. 126.

⁵⁴⁹ *Ibid.*, p. 127.

⁵⁵⁰ For an analysis of State practice in the matter, see Gaja, *op. cit.*, pp. 31-32.

international responsibility. The same applies to "countermeasures in respect of an internationally wrongful act"; the reason why there is no responsibility is that the international obligation to refrain from certain conduct towards another State does not apply when that conduct is a legitimate reaction to an internationally wrongful act committed by the State against which the conduct is adopted. Here again, the conduct does not violate any international obligation incumbent on the State in that case and hence does not constitute, from the objective standpoint, an internationally wrongful act. Similar arguments apply to the other circumstances discussed in this chapter.

(10) When any one of these circumstances is present in a particular case, the wrongfulness of the act of the State is exceptionally precluded because in that instance, by reason of the special circumstances involved, the State taking the action is no longer obliged to act otherwise. From this point of view, there are no differences between any of the circumstances dealt with in the present chapter.⁵⁵⁵ The *exceptional* character lies precisely in the fact that the circumstance found to be present in the specific case in question renders ineffective an international obligation which, in the absence of that circumstance, would be incumbent on the State and would make any conduct that was not in conformity with the requirements of the obligation wrongful. There is an obvious difference between conduct that is generally lawful and conduct that is generally wrongful and will remain so unless there is a special circumstance which, in a specific case, removes its wrongfulness.

(11) Finally, it follows from these considerations that the "circumstances precluding wrongfulness" examined in chapter V of part I of the draft (The origin of international responsibility) must not be confused with other circumstances which might have the effect not of precluding the wrongfulness of the act of the State but of attenuating or aggravating the responsibility entailed by that act. When, in a specific case, circumstances of this type are involved, the existence of the wrongfulness of the act of the State is in no way called into question. It is on the consequences attaching to the act that the attenuating or aggravating circumstances may possibly have an effect. The Commission therefore intends to take up the questions raised by attenuating or aggravating circumstances when it comes to study the extent of responsibility, i.e. in the context of part 2 of the draft articles, dealing with the content, forms and degrees of international responsibility.

Article 29. Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to

⁵⁵⁵ Some writers, such as Strupp, Guggenheim, Steiniger and Graefrath, maintain that, in the case of all or some of these circumstances, the wrongfulness of the conduct adopted by the State would already be precluded under the "primary" rule providing for the obligation in question. In their view, the presence in this particular case of one of these circumstances as a circumstance *exceptionally* precluding wrongfulness would not therefore be necessary in order to conclude, in such cases, that the said conduct does not breach any obligation and hence cannot constitute an internationally wrongful act.

that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

(1) In examining successively the various causes which may preclude the wrongfulness of an act of the State under international law, the first question that arises is whether the wrongfulness of conduct of a State not in conformity with that required of it under an international obligation is precluded if such conduct is consented to by the State having the right corresponding to the obligation in question. In other words, does the principle *volenti non fit injuria* apply in international law? The rule stated in article 29 gives an affirmative answer to this question.

(2) If a State (or any other subject of international law) consents to another State's committing an act that, without such consent, would constitute a breach of an international obligation towards the first State, that consent really amounts to an agreement between the two subjects, an agreement which has the effect of rendering the obligation inoperative in that particular case. Thus, since the obligation is no longer incumbent on the State in the situation in question, the act of that State is no longer contrary to any international obligation and its wrongfulness is precluded because the objective element of the internationally wrongful act is lacking. Nevertheless, it should be explained that there is, of course, no question here of a treaty or agreement intended to suspend in general the rule establishing the obligation, and still less of a treaty or agreement intended to modify or abrogate the rule in question. The rule from which the obligation derives still exists. It must be reiterated that the State benefiting from the obligation consents not to general suspension of the rule or modification or abrogation thereof, but to non-application of the obligation provided for by the rule in a specific instance. Of course, the relevant rules and obligations may exceptionally be such that they automatically cease to exist once it has been decided not to apply them in a given case. However, normally a State which requests permission to act in certain circumstances in a manner not in conformity with the obligation does not intend either to modify or abrogate the rule from which the obligation derives or to suspend its general application. The rule is maintained, and consent will have to be obtained whenever the State on which the obligation is incumbent wishes to act in a manner not in conformity with what the obligation requires of it.⁵⁵⁶

(3) The case covered by the article therefore comprises, first, the request of a State to be permitted to act in a

⁵⁵⁶ When a State approaches another State with a view to generally suspending, modifying or terminating the application of a rule in force between them, it is not a question of precluding wrongfulness but a question which falls under the law of treaties and, more particularly, under certain rules codified in part V of the 1969 Vienna Convention (for reference, see foot-note 534 above).

specific case in a manner not in conformity with the obligation and, secondly, the expression of consent, by the State benefiting from the obligation, to such conduct by the first State. It is the combined effect of these two elements which results in an agreement that, in the case in point, precludes the wrongfulness of the act. That explains why only consent given by a State, or possibly by another subject of international law, can have the effect of precluding the international wrongfulness of the act in that case. A rule of international law and the obligations resulting therefrom can be rendered inoperative, and only for one particular act, solely by means of consent expressed at the international level. This also indicates the possible exception to the general principle enunciated in the article: in the case of peremptory rules of international law which, as such, permit of no derogation by agreement of the parties, the consent of the State whose subjective right has been infringed cannot remove, even in a single instance, an obligation created by those rules and thus preclude the wrongfulness of an act not in conformity with that obligation.

(4) There are many cases in international practice and judicial decisions where the consent given by a State for which a given obligation is in force has been invoked as precluding the existence of a breach of that obligation. Admittedly, a careful analysis of these cases reveals disagreements about whether consent had really been given or, which comes to the same thing, whether it had been validly given. But it also reveals—and this is the point to be noted here—that the parties to the dispute, and any judges or arbitrators to whom it may have been submitted, all recognized that the consent in question, if it was established, precluded the possibility of characterizing the conduct to which the consent had been given as an internationally wrongful act.

(5) The entry of foreign troops into the territory of a State, for example, is normally considered a serious violation of State sovereignty and often, indeed, an act of aggression. But it is clear that such action ceases to be so characterized and becomes perfectly lawful if it occurred at the request or with the agreement of the State. The occupation of Austria by German troops in March 1938 is a typical example of occupation by troops of one State of the territory of another State. In order to answer the question whether that occupation was internationally lawful or wrongful, the International Military Tribunal at Nuremberg found it necessary first of all to establish whether or not Austria had given its consent to the entry of German troops, and it reached the conclusion that despite the strong pressure exerted on Austria, consent had not been given. An interesting point to note, moreover, is that the Third Reich itself considered that it needed Austria's consent to preclude the otherwise flagrant wrongfulness of its act. A further point is that the Nuremberg Tribunal raised the question whether or not there had been consent by the other States parties to the Treaties of Versailles and Saint-Germain-en-Laye, pointing out that consideration of that additional question was warranted because the defence claimed that the acquiescence of those Powers precluded the possibility of a breach of the international obligations imposed on Germany and Austria by those treaties.⁵⁵⁷

(6) The consent or the request of the Government of a

State whose sovereignty would have been violated in the absence of such consent or request has also been cited as justification for sending troops into the territory of another State in order to help it suppress internal disturbances, a revolt or an insurrection. Such justification has been advanced in many recent cases, including several brought to the attention of the Security Council and the General Assembly of the United Nations.⁵⁵⁸ During the relevant debates in the Security Council and the General Assembly, no State contested the validity of the actual principle that, as a general rule, the consent given by the territorial State precluded the wrongfulness of sending foreign troops into its territory.⁵⁵⁹ The points on which there were differences of opinion were, rather, whether or not there had been consent by the State, whether or not that consent had been validly expressed, and whether or not the rights of other States had been infringed.

(7) Similar considerations are seen in the positions taken by States during debates on the continued stationing of troops of a State in foreign territory, where the initial lawfulness of such stationing was not contested.⁵⁶⁰ The consent of the State whose sovereignty was involved has also been advanced as justification for sending troops into foreign territory in order to free hostages. Various arguments have been advanced for and against the lawfulness of these raids, but what is important to emphasize in this context is the fact that even States which

⁵⁵⁸ For example, by the United Kingdom in connexion with the dispatch of British troops to Muscat and Oman in 1957 (United Kingdom, *Parliamentary Debates* (Hansard), *House of Commons, Official Report* (London, H.M. Stationery Office), 5th series, vol. 574 (29 July 1957), col. 872) and to Jordan in 1958 (*ibid.*, vol. 591 (17 July 1958), cols. 1437–1439 and 1507; *Official Records of the Security Council, Thirteenth Year*, 831st meeting, para. 28); by the United States of America in connexion with the dispatch of United States troops to Lebanon in 1958 (*ibid.*, 827th meeting, para. 34; *Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 733rd meeting, para. 7); by Belgium in connexion with the dispatch of Belgian troops to the Republic of the Congo in 1960 and in 1964 (*Official Records of the Security Council, Fifteenth Year*, 873rd meeting, para. 186, and *ibid.*, *Nineteenth Year*, 1173rd meeting, para. 73); by the USSR in connexion with the dispatch of Soviet troops to Hungary in 1956 and to Czechoslovakia in 1968 (*ibid.*, *Eleventh Year*, 752nd meeting, para. 136, and *ibid.*, *Twenty-third Year, Supplement for July, August and September 1968*, document S/8759).

⁵⁵⁹ The validity of this principle was reaffirmed, implicitly or explicitly, by several of the States which spoke in the debates. See, for example, with respect to the United States intervention in Lebanon and the British intervention in Jordan, the statements made in the General Assembly by the USSR (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 734th meeting, para. 72), Australia (*ibid.*, 735th meeting, paras. 60–61), Greece (*ibid.*, 738th meeting, paras. 95–96), Pakistan (*ibid.*, 740th meeting, paras. 53–54), Canada (*ibid.*, 741st meeting, para. 42), Ethiopia (*ibid.*, 742nd meeting, paras. 73–76), Cuba (*ibid.*, 744th meeting, paras. 40 *et seq.*), Portugal (*ibid.*, 744th meeting, para. 109), Bulgaria (*ibid.*, 737th meeting, paras. 31–34), Albania (*ibid.*, 739th meeting, para. 75), Poland (*ibid.*, 740th meeting, para. 82), Ghana (*ibid.*, 744th meeting, para. 94) and Nepal (*ibid.*, 745th meeting, para. 71). With respect to Belgium's intervention in the Congo in 1964, see the statements of Bolivia (*Official Records of the Security Council, Nineteenth Year*, 1183rd meeting, para. 69), Nigeria (*ibid.*, 1176th meeting, para. 6) and Algeria (*ibid.*, 1172nd meeting, para. 22).

⁵⁶⁰ See, for example, the statements made in the Security Council by the representatives of the Soviet Union, the United Kingdom and Greece, concerning the stationing of British troops in Greece in 1946 (*Official Records of the Security Council, First Year: First Series, No. 1*, 6th meeting); of the representatives of Lebanon and Syria (and of Australia and Mexico) during the debate in the Security Council on the presence of French and British troops in Lebanon and Syria (*ibid.*, 20th, 21st and 22nd meetings); and of the representative of Egypt during the debate in the Security Council concerning the stationing of British troops in Egypt (*ibid.*, *Second Year*, 175th meeting).

⁵⁵⁷ See United Kingdom, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964, (London, H.M. Stationery Office, 1946), pp. 17 *et seq.*

in principle consider such raids to be wrongful concede their lawfulness if they were consented to by the State having sovereignty over the places where they were carried out.⁵⁶¹ Mention should also be made, again in the context of action taken by organs of a State in the territory of another State, of cases of arrests made by the police of a State on foreign soil. There is no doubt that such arrests or abductions normally constitute a breach of an international obligation towards the territorial State. But it is clear from international practice and judicial decisions that these same actions cease to be wrongful if the territorial State consents to them.

(8) Attention may be drawn, in connexion with the latter type of case, to the decision of the Permanent Court of Arbitration of 24 February 1924 in the *Savarkar* case, between France and Great Britain. Savarkar, an Indian revolutionary, was being sent to India on board the British vessel *Morea* to stand trial. When the *Morea* put in at Marseilles, Savarkar managed to escape ashore, but was immediately arrested by a French gendarme, who then helped members of the British police to take the prisoner back to the ship. The following day, after the *Morea* had sailed from Marseilles, the French Government disavowed the conduct of the French gendarme and demanded the return of Savarkar. The Arbitral Tribunal, composed of five members of the Permanent Court of Arbitration, ruled that the British authorities were under no obligation to return him, and expressed the opinion that the action of the British police had not constituted "a violation of French sovereignty" because France, through the conduct of its gendarme, had consented to that conduct, or at least had allowed the British police to believe that it had so consented.⁵⁶² A case similar to but, as it were, the reverse of the one referred to above occurs when persons on board a foreign ship lying in harbour in a State are arrested. Here again, the question of the effect of the consent of the injured subject arises. One example was the "*Aunis*" case. The Prefect of Genoa, having learned that five persons wanted by the Italian police were on board the French vessel *Aunis*, which was lying in the harbour of Genoa, asked the French Consul in Genoa for permission to arrest them. The consul gave permission, whereupon the arrest was made, but on the following day the Consul reversed himself and requested the return of the arrested persons. The Italian Government refused to return them, on the ground that the arrest had taken place with the consent of the French Consul and therefore in conditions which rendered that act completely lawful.⁵⁶³

⁵⁶¹ It is significant in this connexion that, at the time of the Larnaca raid, the Government of Egypt sought to justify the operation on the ground that it had requested and obtained the prior consent of the Government of Cyprus and that the latter, in order to deny the lawfulness of the operation, denied having given such consent (see *The New York Times* of 20, 21, 22 and 23 February 1978).

⁵⁶² "... the British police might naturally have believed that the brigadier had acted in accordance with his instructions,* or that his conduct had been approved*" (*The Hague Court Reports*, J. B. Scott, ed. (New York, Oxford University Press, 1916), pp. 276 *et seq.*). More recently, the District Court in New York was guided by the same principle in the case of the United States of America v. Morton Sobell. In its decision of 20 June 1956, the Court ruled that a person arrested in Mexican territory by United States law enforcement agents need not be returned to Mexico, because the arrest had been made with the consent of the Mexican State (United States of America, *Federal Supplement* (Saint Paul, Minn., West Publishing, 1956), vol. 142, pp. 515 *et seq.*).

⁵⁶³ See telegram of 11 July 1863 and Note dated 19 July 1863 of the Italian Minister for Foreign Affairs, Visconti Venosta, to the Italian Minister in Paris (S.I.O.I.-C.N.R. (*op. cit.*), pp. 870-871).

(9) Again, in cases relating to the payment of moratory interest on a debt imposed by an international instrument, it has been found that wrongfulness of the conduct adopted by a State is precluded where the State towards which it had an obligation explicitly or implicitly gave its consent to non-fulfilment of the obligation. An interesting example is the decision of the permanent Court of Arbitration of 11 November 1912 in the *Russian Indemnity* case between Russia and Turkey. Under the Treaty of 27 January (8 February) 1879, Turkey was required to pay an indemnity to Russia in reparation for damage suffered by the latter during the Russo-Turkish war. Since Turkey was not in a position to make immediate payment of the entire amount, it spread the payment over a period of more than 20 years, with the result that it did not complete the payments until 1902. In 1891, the Russian Government made a formal demand to the Ottoman Government for payment of the principal plus interest, but when the subsequent instalments were paid, the creditor Government made no reservation as to interest and did not apply any part of the amounts received to interest. It was only in 1902, upon completion of the payments, that Russia demanded the payment of moratory interest, which the Ottoman Government refused to make. The Permanent Court of Arbitration, to which the dispute was submitted, took the view that:

In principle, the Imperial Ottoman Government was under an obligation to the Imperial Russian Government for the payment of moratory compensation as from 31 December 1890/12 January 1891, the date of receipt of a demand for payment that was explicit and in due form.

However, inasmuch as the rights of the Imperial Russian Government under that demand for payment had in fact been extinguished as a result of the subsequent waiver by its Ambassador in Constantinople, the Imperial Ottoman Government is now under no obligation to pay interest to it according to the dates on which payment of the indemnity was effected...⁵⁶⁴

Thus, the Court found that Russia's consent had rendered the conduct of Turkey lawful, although it would otherwise have constituted a breach of an international obligation incumbent on Turkey.

(10) It may therefore be concluded from the analysis of pertinent cases that international practice and jurisprudence are consistent in recognizing that consent given by the subject entitled to observance of a specific obligation precludes the wrongfulness of an act of a State which, in the absence of such consent, would constitute a breach of that obligation. A similar uniformity of views is to be found in the literature. All writers who have dealt with the question agree that, where there is consent that the subject committing the act should adopt conduct not in conformity with what would normally be required of it under an international obligation, that conduct cannot be characterized as internationally wrongful.⁵⁶⁵ The conclusions reached through a study of learned works are

⁵⁶⁴ United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 446. [Translation by the Secretariat.]

⁵⁶⁵ This is true in particular of those writers who have dealt with the question of internationally wrongful acts in general. Mention should be made in particular of the following: F. von Liszt, *Le droit international*, trans. G. Gidel of 9th edition (1913) (Paris, Pedone, 1927), p. 201; Strupp, *loc. cit.*, p. 121; Ago, "Le délit international" (*loc. cit.*), p. 533 *et seq.*; Ross, *op. cit.*, pp. 243-244; Guggenheim, *op. cit.*, p. 57; G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed., rev. (Milan, Giuffrè, 1962), p. 246; Morelli, *op. cit.*, p. 351; A. Schüle, "Ausschluss der Rechtswidrigkeit", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1962), vol. III, p. 85; Dahm, *op. cit.*, p. 215; Sereni, *Diritto*

(Continued on following page.)

thus identical with those that follow from our analysis of international practice and judicial decisions.

(11) In the light of State practice, international judicial decisions and doctrine, it may therefore be affirmed that there exists in international law a firmly established principle whereby consent of the State having the subjective right which, in the absence of such consent, would be infringed by the wrongful act of another State, is a circumstance which precludes the wrongfulness of that act. However, in order to produce such an effect, the consent of the State must be *valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers*. Moreover, consent can be invoked as precluding the wrongfulness of an act by another State only *within the limits which the State expressing the consent intends with respect to its scope and duration*.

(12) Thus, in order to be considered as a circumstance precluding wrongfulness, the consent must, first of all, be consent which is *valid under the rules of international law* that lay down the basic conditions to be fulfilled if an expression of the will of a State is to be considered as such. Hence the consent must not be vitiated by "defects" such as error, fraud, corruption or coercion. The principles which apply to the determination of the validity of treaties also apply, as a general rule, to the validity of the consent of a State to an action which would, in the absence of such consent, be internationally wrongful.⁵⁶⁶ If, for example,

(Foot-note 565 continued.)

internazionale (op. cit.), pp. 1523-1524; Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 785; P. A. Steiniger, "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin* (Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe), vol. XXII, No. 6 (1973), p. 444; Favre, *op. cit.*, p. 643; Giuliano, *op. cit.*, p. 599.

However, it is also true of writers who have made specific studies of some of the cases referred to above, such as intervention in the internal affairs of another State, abductions within the territory of another State, or non-payment of a debt. For the first of those cases, see, for example, A. Van Wynen Thomas and A. J. Thomas, Jr., *Non-Intervention: The Law and its Import in the Americas* (Dallas, Texas, Southern Methodist University Press, 1956), pp. 91 *et seq.*; E. Lauterpacht, "The contemporary practice of the United Kingdom in the field of international law—Survey and comment, V", *International and Comparative Law Quarterly* (London), vol. 7 (January 1958), part I, p. 108; Q. Wright, "Subversive intervention", *American Journal of International Law* (Washington, D.C.), vol. 54, No. 3 (July 1960), p. 529; J. E. S. Fawcett, "Intervention in international law: A study of some recent cases", *Recueil des cours . . . 1961-11* (Leyden, Sijthoff, 1962), vol. 103, pp. 366 *et seq.* With regard to the second case, see for example, M. H. Cardozo, "When extradition fails, is abduction the solution?", *American Journal of International Law* (Washington, D.C.) vol. 55, No. 1 (January 1961), p. 132; see also V. Coussirat-Coustère and P. M. Eisemann, "L'enlèvement de personnes privées et le droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XL, No. 2 (April-June 1972), pp. 361 *et seq.*; M. C. Bassiouni, *International Extradition and World Public Order* (Leyden, Sijthoff, 1974), pp. 127 *et seq.* With regard to non-payment of a debt, see P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau, 1922), vol. I, part I, p. 532.

This conclusion is by no means weakened by the fact that certain writers, such as, for example, Strupp, Guggenheim and Steiniger, take the view that "consent" of the injured State should not be presented as a "circumstance precluding wrongfulness", because that would presuppose the existence of a wrongful act which, exceptionally, becomes lawful. In the opinion of these writers—to which that of one member of the Commission is similar—if there is consent by the State towards which certain conduct is adopted, then there is no obligation to act otherwise and it follows as a matter of course that there is no breach whatever of any such obligation (see above, introductory commentary to chapter V).

⁵⁶⁶ See Ago, "Le délit international" (*loc. cit.*), p. 534; Ross, *op. cit.*,

consent to the otherwise wrongful action to which the State is required to agree has been obtained by armed coercion, that is, by acts involving recourse to force, it cannot be considered as consent, so the action in question will constitute an internationally wrongful act, even if from a formal point of view the existence of an alleged expression of agreement could be invoked. As the Nuremberg Tribunal had occasion to point out, consent given under the threat of invasion can only be totally without effect.⁵⁶⁷ A similar conclusion must be reached in all cases in which the consent is vitiated by any "defect" recognized by international law. The Commission lays particular stress on the requirement that consent to the commission of an act not in conformity with an international obligation must be validly expressed if it is to have the effect of precluding the international wrongfulness of that act. This meets not only the general need for equity, but also, and more especially, the need to protect weaker States against possible abuses by more powerful States.

(13) The consent must therefore be consent which is freely given. As in the case of other expressions of the will of the State, it may be tacit or implicit, provided, however, that it is always *clearly established*.⁵⁶⁸ In the *Russian Indemnity* case, for example, the Permanent Court of Arbitration, as we have seen, held that there had been consent on the part of Russia to the non-payment of the moratory interest due from Turkey and that the latter was therefore under no obligation to pay it.⁵⁶⁹ Now the consent by Russia to conduct by Turkey which would otherwise have been wrongful had not, in that case, been given expressly. According to the Court, it was implicit in the conduct previously adopted by the Russian Embassy in Constantinople.⁵⁷⁰ Similarly, in cases involving arrests by organs of one State of persons who were in the territory of another State, it has sometimes been held that the action of the local police in co-operating in the arrest constituted, in those cases, a form of consent—tacit, but incontestable—by the territorial State and that, consequently, there had been no violation of the territorial sovereignty of that State.⁵⁷¹

(14) Moreover, the consent must always be *really expressed*. It can in no way be "presumed". "Presumed" consent and "tacit" or "implied" consent should not be confused. In the case of "presumed consent", there is really no consent by the State. It is merely presumed that the State would have consented to the act in question if it

pp. 243-244; Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 758; Giuliano, *op. cit.*, p. 599.

⁵⁶⁷ *Judgment of the International Military Tribunal . . .*, *op. cit.*, pp. 18-19.

⁵⁶⁸ See in this connexion Ago, "Le délit international" (*loc. cit.*), p. 534; Schüle, *loc. cit.*, p. 85; Dahm, *op. cit.*, vol. III, p. 15.

⁵⁶⁹ See above, paragraph (9) of this commentary.

⁵⁷⁰ In this connexion, the decision of the Permanent Court of Arbitration pointed out that the Russian Embassy in Constantinople had:

"repeatedly accepted without discussion or reservation and mentioned again and again in its own diplomatic correspondence the amount of the balance of the indemnity as identical with the amount of the balance of the principal. In other words, the correspondence of the last few years proves that the two parties interpreted, in fact, the acts of 1879 as implying that the payment of the balance of the principal and the payment of the balance to which the claimants had a right were identical, and this implied the relinquishment of the right to interest or moratory interest-damages." (*The Hague Court Reports*, ed. Scott (*op. cit.*), pp. 322-323.)

⁵⁷¹ See the decision of the Permanent Court of Arbitration in the Savarkar case referred to above, in para. (8) of this commentary.

had been possible to request consent. The justification usually advanced for this presumption is that the conduct in question was adopted in the sole and urgent interest of the State whose right was formally infringed; that State, it is said, would certainly have consented if circumstances had not made it impossible to wait for the expression of its consent.⁵⁷² However, the Commission finds it difficult to accept, even *de lege ferenda*, that such a circumstance could be regarded under international law as precluding the wrongfulness of the conduct. Cases of abuse would be too common. Moreover, this conclusion is generally confirmed by the positions taken by writers who have dealt with the question.⁵⁷³

(15) Again, the "consent" must be *internationally attributable to the State*. In other words, it must emanate from an organ whose will is deemed, at the international level, to be the will of the State, and the organ in question must also be competent to express that will in the case in point.⁵⁷⁴ In the practice of States, the validity of consent has frequently been questioned from this standpoint, as it has in debates which have taken place in the United Nations General Assembly and Security Council. For example, the question has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could be given only by the central Government.⁵⁷⁵ In other cases, the question has been raised of the "legitimacy" of the Government which had given the consent—sometimes in the light of the constitutional rules in force in the State, and sometimes on the grounds that the Government in question did not have the support of the people, or that it was a "puppet" Government backed by the State to which the consent had been given.⁵⁷⁶ The validity of consent has sometimes been questioned because the consent was expressed in

violation of the relevant provisions of internal law.⁵⁷⁷ It goes without saying that the answer to the question whether the consent expressed by a given organ should or should not be regarded as the true consent of the State must be found in the rules of international law relating to the expression of the will of the State, not to mention the constitutional rules to which, in certain cases, international law may refer.

(16) In order for it to constitute a circumstance precluding the wrongfulness of an act committed by a State in a particular instance, the consent of the State having the subjective right which would otherwise have been infringed must also have been given prior to the commission of the act. Only in that case is there no wrongfulness, since only then can it be affirmed that there was no breach of the obligation at the time when the act was committed. In practice, cases are sometimes found in which consent seems to have been given at the time when the act was committed, even if in reality it was given immediately before the commission of the act. In any event, there is no doubt that if the consent is given only after the commission of the act (*ex post facto*), it will simply be a waiver of the right to assert responsibility and the claims arising therefrom. But, with such a waiver, the wrongfulness of the prior act still remains. Furthermore, consent given for the commission of a continuing act after the commencement of that act removes the wrongfulness only from the time when the consent is given.⁵⁷⁸ In some cases in which foreign troops have been sent into the territory of a State, for example, the consent of the territorial State to such action has been given after the troops were dispatched. Now, assuming that the dispatch of the troops is not in itself an internationally lawful act, the consent given by the State to their presence in its territory can have the effect of making their presence lawful only from the moment when the consent is given. Between the date on which the troops are sent in and the date on which consent is expressed, the wrongful act subsists, even if the territorial State waives the right to assert the responsibility of the State which has sent the troops.

(17) Finally, as already pointed out, consent precludes the wrongfulness of a particular act only within the limits which the State expressing the consent intends with respect to its scope and duration. For example, if a State consents to overflight of its territory by commercial aircraft of another State, that consent cannot preclude the wrongfulness of overflight of its territory by aircraft transporting troops and military equipment. Likewise, if a State gives its consent to the stationing of foreign troops in its territory for a specific period, that consent would obviously not preclude the wrongfulness of the stationing of such troops beyond the period fixed.

(18) Two final clarifications are necessary. First, it must be pointed out that the consent which takes away the wrongfulness of the conduct of a State may in itself

⁵⁷² In this case, the circumstance which might preclude wrongfulness would be the fact that the conduct was adopted in the sole and urgent interest of the injured State, rather than the "consent" of that State.

⁵⁷³ See in this connexion Ago, "Le délit international" (*loc. cit.*), pp. 535–536; and Schüle, *loc. cit.*, p. 85. For a contrary view, although in exceptional cases, see Dahm, *op. cit.*, p. 215. On the subject of acquiescence in international law, see I. C. MacGibbon, "The scope of acquiescence in international law", *The British Yearbook of International Law*, 1954 (London), vol. 31 (1956), pp. 143 *et seq.*; A.-C. Kiss, "Les actes unilatéraux dans la pratique française du droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 2 (April–June 1961), pp. 325 *et seq.*; J. Bentz, "Le silence comme manifestation de volonté en droit international public", *ibid.*, vol. XXXIV, No. 1 (January–March 1963), pp. 86 *et seq.*

⁵⁷⁴ For example, consent given by a prominent foreign private person certainly cannot, as such, be taken as the consent of the State of which the foreigner is a national.

⁵⁷⁵ For example, in connexion with the dispatch of Belgian troops to the Republic of the Congo in 1960 (see *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, particularly the statement of the representative of Belgium, paras. 186–188 and 209).

⁵⁷⁶ See, for example, the debates which took place in 1958 at the Third Emergency Special Session of the General Assembly and in the Security Council concerning the dispatch of United States troops to Lebanon and of United Kingdom troops to Jordan (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 733rd meeting, para. 7, 735th meeting, para. 32, 739th meeting, para. 77, 740th meeting, para. 83, 741st meeting, para. 42, 742nd meeting, paras. 40 and 44, 744th meeting, paras. 44 and 109, 745th meeting, para. 71; and *Official Records of the Security Council, Thirteenth Year*, 827th meeting, para. 114), and in 1964 in the Security Council with regard to the dispatch of foreign troops to Stanleyville (*ibid.*, *Nineteenth Year*, 1170th meeting, para. 118, 1173rd meeting, para. 73, 1175th meeting, para. 66, and 1183rd meeting, paras. 16, 17 and 69).

⁵⁷⁷ For example, in the debates which took place in 1958 at the Third Emergency Special Session of the General Assembly on the dispatch of United States troops to Lebanon (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 733rd meeting, para. 72, 735th meeting, paras. 45 and 112, 737th meeting, para. 32, 739th meeting, para. 75, and 740th meeting, para. 58).

⁵⁷⁸ See, in this connexion, Ago, "Le délit international" (*loc. cit.*), p. 534; Ross, *op. cit.*, p. 243; Morelli, *op. cit.*, p. 351; Schüle, *loc. cit.*, p. 85; Sereni, *Diritto internazionale* (*op. cit.*), p. 1524; Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 758; Giuliano, *op. cit.*, p. 598. For a contrary view, see Dahm, *op. cit.*, p. 215.

sometimes constitute a separate wrongful act. This is so, for example, where State A consents to the entry into its territory of troops of State B even though it has a commitment to State C not to allow such entry. The conduct of State B becomes lawful as a result of the consent given by State A, but the conduct of State A constitutes a wrongful act towards State C. The consent given by State A may therefore constitute an internationally wrongful act towards a third State if it involves the breach of an obligation assumed by State A towards that third State. Similarly, in the case of a non-separable treaty, such as a treaty of neutralization, the "neutralized" State cannot consent to contravention of the provisions of the treaty by one of the States parties without a wrongful act being committed vis-à-vis the other States parties.

(19) Secondly, it must be asked whether *all* international responsibility is to be precluded when a State consents to the commission of a specific act which, without its consent, would be wrongful. In this connexion, it must be remembered that consent can be given in very different circumstances. A State may consent to another State committing a certain act, but on condition that it agrees to indemnify persons who may suffer damage as a result. In that case, of course, the indemnity is not a form of liability for an internationally wrongful act: the obligation to indemnify is based not on an act of that kind, but on the agreement concluded between the two States. A State may also consent to an action provided that the action includes the assumption of risks engaging responsibility for harmful consequences arising out of activities which are not prohibited by international law.

(20) Are there any exceptions to the principle that consent given by a State which would otherwise be entitled to require compliance with a specific international obligation precludes the wrongfulness of conduct not in conformity with that obligation? It should first be observed that if, in a given situation, there are a number of States in regard to which the State committing the act was under an obligation to adopt different conduct, the consent of only one of these subjects—even if it is the one most directly concerned—cannot preclude the wrongfulness of the conduct in relation to the others. In other words, consent so given precludes the existence of an internationally wrongful act only in relation to the subject which gave such consent. Thus, as already pointed out, if State A has an obligation to States B, C and D to respect the neutrality of State B and State B subsequently gives its consent to the entry of troops of State A into its territory, States A and B will certainly have committed an internationally wrongful act in regard to States C and D. Similarly, if a State party to an international labour convention (concerning, for example, the weekly rest period) subjects a national of another State party—with the agreement of that State—to treatment not in conformity with its obligations under the convention, the act may not be internationally wrongful with respect to the State which gave its consent, but it will remain internationally wrongful vis-à-vis the other States parties to the convention.⁵⁷⁹ This does not, however, involve any

⁵⁷⁹ The question is of undoubted practical importance. When disputes concerning the maintenance in or dispatch of foreign troops to the territory of a State have been brought to the attention of competent organs of the United Nations, the question has arisen whether any breach of obligations under the Charter regarding the maintenance of international peace and security related solely to the State in whose

exception to the principle stated in article 29. As pointed out in paragraphs (2) and (3) of this commentary, the consent given by the subject whose right would otherwise be injured is, in fact, only one element of an agreement made between the subject having the obligation and the subject having the corresponding subjective right—an agreement by virtue of which the obligation, in that instance, ceases to be operative in respect of a given act. But it is obvious that such an agreement—like any other agreement—produces effects only as between the parties. Consequently, if the obligation has subsisted toward other subjects, it will, as a result of the agreement between two States alone, have ceased to be operative only between those States. In relation to the other subjects it continues to exist, and, with respect to them, conduct not in conformity with the obligation must be characterized as an internationally wrongful act. This is a conclusion which follows from the fundamental principle of the sovereign equality of States. It is, of course, simply a straightforward case of application of the principle stated in the article, and not some sort of exception to that principle.

(21) The only case still to be considered is that in which a State gives its consent to conduct by another State that is contrary to an obligation imposed by a rule of *jus cogens*. This is the only real exception to the general principle of consent as a circumstance precluding wrongfulness. There is no doubt that the existence of rules of *jus cogens* has an effect on the principle under consideration. If one accepts the existence in international law of rules of *jus cogens*—in other words, of peremptory norms from which no derogation is permitted—one must also accept the fact that conduct of a State which is not in conformity with an obligation imposed by one of these rules must remain an internationally wrongful act even if the injured State has given its consent to the conduct in question. The rules of *jus cogens* are rules whose applicability to some States cannot be avoided by means of special agreements. In other words, by their very nature they defeat any attempt by two States to replace them in their relations by other rules having a different content. Hence they cannot be affected by this special type of agreement concluded between a State which adopts conduct not in conformity with an obligation created by a peremptory norm and a State which consents to that conduct. Notwithstanding such an agreement, the obligation remains incumbent on the parties, and conduct not in conformity with what is required under the obligation therefore represents a breach of the obligation and constitutes an internationally wrongful act, the wrongfulness of which subsists, even with respect to the State which has given its consent.

(22) These considerations led the Commission to admit one exception to the basic principle developed in this commentary, even though the widespread recognition of the existence in international law of rules of *jus cogens* is too recent for State practice or international judicial decisions yet to reveal any support, in terms of specific situations, for the conclusion indicated by logical principles. Moreover, certain statements already show signs of a conviction which has not yet had occasion to be

territory the foreign troops were located, or whether there was also a breach of obligations towards other States Members of the United Nations. If so, the consent of the State in whose territory the troops were located—if it existed and was valid—could not preclude the wrongfulness of such conduct vis-à-vis the other States Members of the United Nations.

openly expressed. For instance, some Governments have at times expressed doubts as to the exculpatory effect of consent given by a Government to action by a foreign Government that would constitute "interference with the fundamental right of every people to choose the kind of Government under which it wants to live" or to intervention "to support and maintain [unpopular Governments] in power against the wish of a majority of their people and thus deny to the people the elementary right . . . of self-determination".⁵⁸⁰ Would it, for example, be an acceptable proposition today that the consent of the Government of a sovereign State to the establishment *ex novo* of a protectorate over that State, or of some other system making it dependent on another State, could have the effect of precluding the wrongfulness of the act of establishing such a system? The generally recognized peremptory nature of the prohibition of encroachment on the independence of other States and on the right of self-determination of peoples would clearly rule out any such acceptance. In any case, the logic of the conclusions to be drawn from the existence in international law of rules of *jus cogens* is so incontestable that it compels acceptance, in relation to these rules and the obligations arising out of them, of an exception to the general principle that consent given by a State to the adoption of conduct not in conformity with what would be required by an international obligation incumbent upon it precludes the wrongfulness of such conduct.

(23) In the light of the foregoing considerations, the Commission drafted article 29 in two paragraphs. *Paragraph 1* formulates the general principle of the consent of the injured State as a circumstance precluding wrongfulness, and *paragraph 2* sets out the only exception allowed to that principle. The general principle is defined in *paragraph 1*, as follows:

The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

This formula clearly shows the mechanism of this ground for precluding wrongfulness. The consent of the injured State in no way abrogates the international obligation as such, but merely sets aside its application in respect of, as the text states, the "specified act" to which the consent relates. The obligation therefore subsists, but is not breached in that particular case precisely because of the consent given by the State having the subjective right corresponding to the obligation.

(24) The wording adopted formulates the principle strictly, in order to avoid providing a basis for improper justifications based on non-existent consent. In the first place, wrongfulness is precluded, as has been stated, only in regard to the "specified act" to which the consent given refers and only, as indicated by the phrase at the end of the paragraph, "to the extent" that the "specified act" not in conformity with the obligation "remains within the limits" of such consent. Secondly, as the article expressly states, the consent of the State whose subjective right is affected must be consent "validly given". This requirement eliminates all cases in which the consent invoked would not be valid under the relevant rules of in-

ternational law, including, of course, consent which is in fact simply the result of error, fraud, corruption or coercion. Moreover, the valid consent must in actual fact have been "given", which definitely excludes the possibility of attributing any effect to purely "presumed" consent. Thirdly, the phrase "to the commission by another State of a specified act not in conformity with an obligation" makes it clear that the consent must be expressed "before" commission of the act, even though in some cases it may be consent given "immediately before". The main point, for the purposes of the Commission, is to preclude the validity of consent given after commission of the act in question. Finally, the inclusion after the words "precludes the wrongfulness of the act" of the words "in relation to that State" emphasizes that the principle enunciated in the article in no way precludes the possibility that the act in question may be a wrongful act in relation to a third State.

(25) *Paragraph 2* provides that *paragraph 1* does not apply if the obligation arises out of a peremptory norm of general international law (*jus cogens*). This, in the opinion of the Commission, is the sole exception to the general principle. By virtue of such an exception, the consent given by the State having the subjective right corresponding to an obligation imposed on another State by a peremptory norm of general international law (*jus cogens*) does not produce the effect of rendering lawful a specified act not in conformity with that obligation committed by that other State, or of relieving the latter of the resultant responsibility. The second sentence of the paragraph reproduces the definition of a peremptory norm of general international law (*jus cogens*) given in article 53 of the 1969 Vienna Convention, and explains that the definition is inserted "for the purposes of the present draft articles", since the notion in question already appears in draft article 18, *paragraph 2*.

Article 30. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

Commentary

(1) Article 30 defines the second circumstance to be considered among the grounds for precluding the wrongfulness of an act of the State, namely the application of a legitimate countermeasure against a State which has committed an internationally wrongful act. In other words, an act of the State, although not in conformity with what would be required of it by a binding international obligation towards another State, is not internationally wrongful if it constitutes the application with respect to that other State of a measure permissible in international law as a reaction to an international offence which the latter State has committed previously.

(2) The circumstance precluding wrongfulness with which this article is concerned is thus one of those "countermeasures" which international law regards as legitimate following an internationally wrongful act committed previously. It is only, and this should be

⁵⁸⁰ *Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 745th meeting, para. 72, and 742nd meeting, para. 6.

emphasized, when the countermeasure in question can be described as “legitimate”—permissible under international law and taken in accordance with the conditions laid down in international law—that it can be valid as a circumstance precluding the wrongfulness of conduct of the State not in conformity with what, under other conditions, would be required of it by an international obligation. The lawfulness of the conduct of the State, although that conduct is not in conformity with the requirements of an international obligation, lies, as in the case of “consent”, in the fact that the circumstance exhibited by the situation in question exceptionally renders the obligation inoperative. Once again, there is no wrongfulness because, in the case in point, application of the obligation is set aside, and hence the obligation is not breached. Also, as in the case of consent, the circumstance precluding wrongfulness is constituted by the prior conduct of the subject for which the obligation is in force.

(3) The countermeasures with which this article is concerned are measures the object of which is, by definition, to inflict punishment or to secure performance—measures which, under different conditions, would infringe a valid and subjective right of the subject against which the measures are applied. This general feature serves to distinguish the application of these countermeasures, sometimes referred to as “sanctions” from the mere exercise of the right to obtain reparation for damage. The resulting distinction between two different categories of possible legal consequences of an internationally wrongful act is clear. Moreover, the countermeasures to which the article refers are on no account to be understood as measures which must necessarily involve the use of armed force. They can definitely consist of actions not involving armed force. A measure such as the application of economic reprisals, for example, involves no use of armed force, but its object is none the less to punish the perpetrator of an internationally wrongful act, and it therefore falls within the general notion of “countermeasures” dealt with in this article. Furthermore, the “measures” considered here always involve action which under different conditions, as just indicated, would represent a breach of an international obligation and the infringement of another’s subjective right.⁵⁸¹ Only where conduct of this nature is a reaction to an international offence by another party can it have the effect of nullifying its otherwise undeniably wrongful character.

(4) As pointed out in paragraph (2) of this commentary, the countermeasure adopted must be a measure which is “legitimate” under international law. The wrongfulness of action which a State may take on the pretext that it represents a countermeasure vis-à-vis a State accused of breaching a international obligation cannot be precluded in cases where, although the breach has occurred, it is not a breach against which international law permits reaction by means of the countermeasure in question. There are different kinds of offences, and what is more, different kinds of situations. Only in specific cases does international law grant to a State injured by an internationally wrongful act committed to its detriment—and sometimes to the detriment of other subjects of

international law as well—the possibility of adopting against the State guilty of that act a measure which, as has been stated, infringes an international subjective right of that State. If, according to international law, the only consequence of an offence is that it gives rise to the right on the part of the injured State to demand reparation, any act consisting of a reaction to that offence in a manner not in conformity with what is required by an international obligation is clearly an internationally wrongful act—an act not justified by the situation existing in the particular case. The same holds true, of course, in cases where international law, while not in principle ruling out the possibility of applying a sanction against a State which has committed a breach of a particular international obligation, requires the State that is the victim of that breach not to resort to such action until it has first sought adequate reparation. In other words, the fact that it has suffered a breach of an international obligation committed by another State does not, *in all cases*, purely and simply authorize the injured State in its turn to breach an international obligation towards the State which has committed the initial breach. What is legitimate in some cases does not become legitimate in others.

(5) What is more, we know that modern international law does not normally place any obstacles of principle in the way of the application of certain forms of reaction to an internationally wrongful act (economic reprisals, for example). However, other forms of reaction which were permissible under “classical” international law, such as armed reprisals, are no longer tolerated in peace-time. In general, as regards forms of reaction involving the use of armed force, the tendency is decidedly to restrict their application to the most serious cases and, in any event, to leave the decision about their use to subjects other than the injured State. In many cases, therefore, the use of force by a State injured by an internationally wrongful act of another State would still be wrongful, for it could not be viewed as the application of a “legitimate” countermeasure. Moreover, even where the internationally wrongful act in question would justify a reaction involving the use of force, whatever the subject responsible for applying it, action taken in this guise certainly cannot include, for instance, a breach of obligations of international humanitarian law. Such a step could never be “legitimate” and such conduct would remain wrongful. Lastly, even steps—reprisals or other measures—which in certain circumstances would be a permissible reaction to an international offence committed by another party would cease to be a legitimate form of countermeasure if they were no longer commensurate with the injury suffered as a result of the offence in question. Here too the justification pleaded by the State that it was applying a sanction would cease to be a justification. A countermeasure which in its application goes beyond the limits prescribed by international law is no longer legitimate, and in that case conduct adopted by the State that is not in conformity with an international obligation remains wrongful.

(6) In international practice and judicial decisions, it is unusual to find pronouncements or conclusions which explicitly and specifically affirm the principle that an act by a State towards another State that is not in conformity with an international obligation ceases to be internationally wrongful if the State taking the action because its rights have been infringed is simply reacting to the offence by applying a legitimate countermeasure against the perpetrator of the offence. This is not the principle

⁵⁸¹ This distinguishes the measures referred to here from those which, although harmful to the State against which they are directed, do not involve any action that, in other circumstances, would not be in conformity with an international obligation—for example, retaliatory measures.

which divides parties to inter-State disputes. Generally, the issues that are the subject of discussion or of rulings are of another kind: for example, whether or not in particular cases recourse to certain measures—notably, reprisals—was permissible as a reaction to an infringement of rights having a specific content; whether or not the adoption of such measures should in any case have been contingent on failure of a prior attempt to secure reparation; whether or not, in taking reprisals—even legitimately—it was permissible to disregard obligations relating to a particular field of activity; whether or not proportionality should be or had in fact been maintained between the injury suffered and the particular reaction; etc. But that does not conceal, behind the positions adopted on these different issues, the implicit belief of diplomats and arbitrators that in principle wrongfulness is precluded when an act, although not in conformity with the requirements of an international obligation, constitutes a “legitimate countermeasure” to an offence committed by another.

(7) So far as international judicial decisions are concerned, reference may be made to two awards by the Portugal/Germany Arbitration Tribunal set up by virtue of paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles.⁵⁸² In the first award, relating to *Responsibility of Germany for damage caused in the Portuguese colonies in the South of Africa (Naulilaa incident)*, handed down on 31 July 1928, the Tribunal, before deciding *in concreto* on the international lawfulness of certain acts by the German authorities—acts justified by the latter as reprisals for internationally wrongful conduct adopted earlier by the Portuguese authorities in Angola—deems it necessary to establish as a general principle when and in what circumstances reprisals are to be deemed legitimate measures. The award contains the following passage, which is particularly interesting in that it specifically ascribes to the temporary suspension of the application of a rule of law as between the parties the reason why an action which is not in conformity with the rule and which is a reaction against another’s wrongful act is not itself wrongful:

The latest doctrine, and more particularly German doctrine, defines reprisals in these terms:

Reprisals are an act of taking the law into its own hands (*Selbsthilfehandlung*) by the injured State, an act carried out—*after an unfulfilled demand*—in response to an act contrary to the law of nations by the offending State. *Their effect is to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations.** They are limited by the experiences of mankind and the rules of good faith, applicable in relations between States. *They would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive.*⁵⁸³

The award goes on to indicate that the opinions of learned writers are divided as to whether or not the reprisals must be proportionate to the wrong. The Tribunal then proceeds to deal with the case itself and concludes:

The first requirement—the *sine qua non*—of the right to take reprisals is a *motive* furnished by an earlier act contrary to the law of nations. This requirement—which the German side concedes must be satisfied—is missing, and that fact would be sufficient grounds for dismissing the claim of the German Government.⁵⁸⁴

Yet the Tribunal deems it necessary to add that, even if it were admitted that the conduct of the Portuguese authorities had been internationally wrongful, the German reprisals would still have been wrongful, for they had not been preceded by an unfulfilled demand and, moreover, they were disproportionate to the alleged wrong. At the same time, however, it is clear from the Tribunal’s statements that, if the twofold requirement of a prior demand and proportionality between the offence and the countermeasure had been satisfied, it would have regarded the German action against Portugal’s possible international offence as not being wrongful.

(8) In the second award, handed down on 30 June 1930 and relating to the *Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war (“Cysne” case)*, the Tribunal states the following:

With regard to the theory of reprisals, the arbitrators refer to the award of 31 July 1928, in which the matter is discussed in detail. As the respondent maintains, *an act contrary to international law may be justified, by way of reprisals, if motivated by a like act.** The German Government was able, therefore, without breaching the rules of the law of nations, to respond to the Allied additions which were contrary to article 28 D.L. [article 28 of the London Declaration (see paragraph 19 below)] by an addition contrary to article 23.⁵⁸⁵

The Tribunal thus clearly demonstrates its opinion that an act performed by a Government as a countermeasure to an international offence against it is on that account to be considered lawful, even though intrinsically “contrary to the law of nations”.

(9) So far as State practice is concerned, the positions adopted by official organs reveal, explicitly or implicitly, a belief in the international lawfulness of a course of conduct which is not in conformity with the requirements of an international obligation and has been adopted in certain circumstances by a State towards another State which has previously breached an international obligation towards it. Particularly revealing in this connexion are the replies of States to point XI (Circumstances in which a State is entitled to disclaim responsibility) of the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference, which, *inter alia*, mentioned the following case:

What are the conditions which must be fulfilled, when the State claims to have acted in circumstances which justified a policy of reprisals?⁵⁸⁶ The very formulation of this request presupposed the existence of cases in which a “policy of reprisals” would be lawful, and none of the Governments that replied debated that point. In their replies, the Governments merely indicated in what cases and under what conditions they would regard reprisals as internationally lawful.⁵⁸⁷ In doing so, they implicitly acknowledged the principle that in a number of cases the State was free to react, in the form of legitimate countermeasures, to an internationally wrongful act committed by a State, by means of conduct which would otherwise be characterized as wrongful in its turn and would entail international responsibility. On the

⁵⁸² *British and Foreign State Papers*, 1919 (London, H.M. Stationery Office, 1922), p. 7.

⁵⁸³ United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 1025–1026. [Translation by the Secretariat.]

⁵⁸⁴ *Ibid.*, p. 1027.

⁵⁸⁵ *Ibid.*, p. 1056. [Translation by the Secretariat.]

⁵⁸⁶ League of Nations, *Bases of Discussion . . . (op. cit.)*, p. 128.

⁵⁸⁷ *Ibid.*, pp. 128 *et seq.*, and League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to Vol. III (C.75(a).M.69(a).1929.V)*, pp. 4 and 22.

basis of the replies, the Preparatory Committee drew up the following "Basis of discussion" for the Conference:

A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs. (Basis of discussion No. 25).⁵⁸⁸

(10) After the Second World War and in consequence of the definitive affirmation, as a fundamental principle of contemporary international law, of the ban on the use of force, the *opinio juris* of States on the legitimacy of reprisals marked the culmination of a process that had been increasingly discernible in the successive stages of the acceptance of that principle.⁵⁸⁹ Unquestionably, therefore, this *opinio* has become much more restrictive.⁵⁹⁰ The United Nations has frequently discussed the international legitimacy of certain actions undertaken by way of reprisals, and more specifically cases where such actions involved the use of armed force.⁵⁹¹ The progress of the legal belief of States in this respect found tangible expression in the Declaration on Principles of

⁵⁸⁸ League of Nations, *Bases of Discussion . . . (op. cit.)*, p. 130. The Conference ended before it had the opportunity to discuss a number of the bases of discussion, including Basis No. 25.

⁵⁸⁹ An early restriction on the legitimacy of resorting to armed reprisals is found in article 1 of the Hague Convention (II) of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. Subsequently, recourse to armed reprisals became implicitly conditional on the prior exhaustion of the procedures for peaceful settlement provided for in many bilateral treaties (Bryan Treaties between the United States of America and various Latin American countries, other treaties of the same kind) and multilateral treaties (Locarno Pact of 1925, etc.). The question of the legitimacy of armed reprisals was raised in connexion with the partial ban on war laid down in the Covenant of the League of Nations, more particularly on the occasion of the bombardment and occupation of Corfu by Italy in 1923 after the massacre of the Tellini mission at Jamina, but in practice the question remained open, despite certain positions taken in support of a ban on this form of reprisal. The discussion was resumed in 1928 in connexion with the Kellogg-Briand Pact and the outlawing of wars of aggression. Progress along these lines had long been advocated by some academic bodies, such as the Institute of International Law. Article 4 of the resolution concerning the "Régime of reprisals in peace-time" adopted in 1934 by the Institute of International Law specified:

"Armed reprisals are prohibited in the same way as recourse to war. (*Annuaire de l'Institut de droit international*, 1934 (Brussels), vol. 38, 2nd part, p. 709.)

⁵⁹⁰ In international jurisprudence, one of the first manifestations of this new attitude can be found in the Judgment of the International Court of Justice of 9 April 1949 in the *Corfu Channel Case (Merits)*. The Court denied the lawfulness of the minesweeping operation—called "Operation Retail"—carried out on 12–13 November 1946 by the British Navy in Albanian territorial waters. The Court considered the operation as the "manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law", even though it recognized that Albania had completely failed to carry out its duty of carrying out the minesweeping itself after the explosions on 22 October 1946 which had caused serious damage and loss of human life on two British warships (*I.C.J. Reports 1949*, p. 35).

⁵⁹¹ See, in particular, Security Council resolution 188 (1964) of 9 April 1964, in which the Council indicates, in general terms, that it:

"Condemns reprisals as incompatible with the purposes and principles of the United Nations".

The term "reprisals" refers here to armed reprisals.

For a list of relevant cases considered and decisions taken by the Security Council, see D. Bowett, "Reprisals involving recourse to armed force", *American Journal of International Law* vol. 66, No. 1 (January 1972), pp. 33 *et seq.*

The incompatibility of reprisals involving the use of armed force has been maintained by virtually all writers on this question. See I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 281, and the references he gives. Only recently has there been renewed discussion of this principle, owing to the difficulties encountered by the Security Council in performing the function assigned to it by the Charter. See in this connexion the debate which

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁵⁹² which proclaims (Principle I) that: "States have a duty to refrain from acts of reprisal involving the use of force". Thus, a State which is the victim of a breach of an international obligation towards it cannot legitimately react by armed reprisals against the State which committed the breach, since international law now forbids individual States taking reprisals which involve the use of armed force against other States.⁵⁹³

(11) On the other hand, the legitimacy of forms of reprisal other than armed reprisals as measures applicable against States which have committed international offences was in no way disputed by the representatives of the Governments which participated in the preparation of the above-mentioned Declaration. On the contrary, it was explicitly and implicitly recognized by the representatives.⁵⁹⁴ These views therefore confirm that, if the necessary conditions are fulfilled,⁵⁹⁵ there is nothing to prevent a State which has suffered an internationally wrongful act from reacting against the State which committed the act by a measure consisting of unarmed reprisals. However, even though it does not involve the use of armed force, such a measure nevertheless constitutes conduct not in conformity with what would be required under an international obligation towards the State against which it is directed.⁵⁹⁶ In such a case, therefore, the fact that the measure in question was taken as a legitimate reaction on the part of the State wronged by an international offence, against the State which had committed that offence earlier, precludes the wrongfulness that such a measure might otherwise entail.

(12) It should be noted, incidentally, that the former monopoly of the State directly injured by the internationally wrongful act of another State, as regards the possibility of taking reactive measures against that other State consisting of acts that would otherwise be unlawful, is no longer absolute in modern international law. The progressive affirmation in modern international law of

took place in 1969–1972 in the *American Journal of International Law*, and particularly the articles by R. A. Falk, "The Beirut raid and international law of retaliation" *American Journal of International Law* vol. 63, No. 3 (July 1969), pp. 415 *et seq.*; Y. Blum "The Beirut raid and the international double standard. A reply to Professor Richard A. Falk", *ibid.*, vol. 64, No. 1 (January 1970), pp. 73 *et seq.*; D. Bowett, *loc. cit.*, pp. 1 *et seq.*; R. W. Tucker, "Reprisals and self-defence: the customary law", *American Journal of International Law*, vol. 66, No. 3 (July 1972), p. 587. However, even those writers who consider the use of force justifiable in the cases in question are none the less inclined to base such justification on notions other than that of reprisals.

⁵⁹² Resolution 2625 (XXV), of the General Assembly of 24 October 1970, annex.

⁵⁹³ The fact that armed reprisals are prohibited under modern international law obviously does not prejudice the undeniable collective right of self-defence provided for in Article 51 of the Charter of the United Nations.

⁵⁹⁴ See, for example, the statement on 13 December 1968 by the representative of the Netherlands in the Sixth Committee of the General Assembly (*Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1095th meeting, para. 9).

⁵⁹⁵ Namely, that the offence to which the reprisals are intended to be a response must not be such as to entail any consequence other than to give rise to the right of the injured party to obtain reparation; that, if such is the case, the injured party must have made a prior attempt to obtain reparation; and that, in any event, the reaction must not have been disproportionate to the offence. An additional condition is that there must not be any procedures for peaceful settlement previously agreed upon by the parties.

⁵⁹⁶ If this were not so, the measure would amount to mere retortion and would not constitute reprisals in the strict sense.

the principle that some obligations—termed obligations *erga omnes*—are of such broad sweep that a breach of any one of them is to be deemed an offence against all the members of the international community and not simply against the State or States directly affected by the breach, has led the international community to turn towards a system which vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented.

(13) Under the Charter of the United Nations, these responsibilities are vested in the competent organs of the Organization. These organs are empowered in certain circumstances not simply to authorize, but even to direct a Member State other than the one directly injured by a particular international offence, or a group of Member States,⁵⁹⁷ or at times all Member States, to apply certain sanctions, including measures involving the use of armed force, against a State which has committed an offence of a specified content and gravity. One must not of course be misled by the terminology. In the language of the United Nations, as previously in that of the League of Nations, the use of the word “sanctions” does not mean exclusively actions which infringe what in other circumstances would constitute a genuine right, and therefore a right which must be respected, of the State suffering the sanctions in question. These sanctions—as, for example, some of those enumerated in Article 41 of the Charter of the United Nations and some of those provided for earlier in Article 16, paragraph 1, of the Covenant of the League of Nations—may doubtless constitute measures harmful to the interests of the State against which they are directed, but they do not necessarily and in all cases involve failure to conform with the requirements of international obligations towards that State, even though that may often be the case.

(14) For example, the severance by a State of economic relations with another State to which the first State is bound by an economic or trade co-operation treaty, in response to a decision of an international body such as the United Nations, is an act which in other circumstances would probably be regarded as internationally wrongful. The same would be true of the interruption of rail, sea or air communications governed by one of the many agreements on co-operation in those fields, or of such measures as an embargo on the supply of arms or other material provided for by a treaty, etc.⁵⁹⁸ In these and other conceivable cases, sanctions applied in conformity with the provisions of the Charter would certainly not be wrongful in the legal system of the United Nations, even though they might conflict with other treaty obligations incumbent upon the State applying them.⁵⁹⁹ Indeed, this

view has never been contested. It is fully justified because, under the rules laid down in the Charter, such measures are the “legitimate” application of sanctions against a State which is found guilty within that system of certain specific wrongful acts.⁶⁰⁰ This view would, moreover, seem to be valid not only in cases where the duly adopted decision of the Organization authorizing the application of a sanction is mandatory for the Member States but also where the taking of such measures is merely recommended.

(15) Learned writers are practically unanimous in maintaining that the conduct of a State should not be considered as wrongful if adopted in the legitimate exercise of a measure of reaction against another State as a result of an internationally wrongful act committed by the latter, even though the same conduct, seen outside the special situation leading to its adoption, would be considered as not in conformity with the requirements of an international obligation in effect between the States, and hence as wrongful. A number of writers on international law, in considering circumstances excluding wrongfulness, refer to the application of a sanction,⁶⁰¹ others to sanction or reaction to a prior internationally wrongful act,⁶⁰² and others—who are more numerous—to legitimate reprisals⁶⁰³ or, more generally, to measures

however, it seems indisputable that under Article 103 of the Charter the Member State called upon to apply the sanctions could not claim to be debarred from doing so by a treaty binding it to the non-member State which was the subject of the sanctions.

⁶⁰⁰ It is by no means impossible, however, that the Organization itself, as such, might in applying a sanction directly against a State find itself in the position of acting in a manner not in conformity with the requirements of an obligation binding it to that State. Without necessarily going so far as to visualize the somewhat extreme case of an act committed in the application of sanctions involving—in this case legitimately—the use of armed contingents under the direct authority of the United Nations, the Organization—or the International Labour Organisation or some other organization—might deny to a State which has seriously and persistently breached an obligation towards the Organization itself the financial or technical assistance which the latter has pledged to provide under the terms of an agreement. In such a situation, it is surely beyond doubt that such measures would not be wrongful. However, such a question is beyond the scope of the present draft articles, which are concerned exclusively with internationally wrongful acts committed by States and with the responsibility which flows from such acts.

⁶⁰¹ See, for example, H. Kelsen, *loc. cit.*, p. 561, and *Principles of International Law* (New York, Rinehart, 1952), p. 23; Ago, “Le délit international” (*loc. cit.*), pp. 536 *et seq.*; E. Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (Zürich, Polygraphischer Verlag, 1949), pp. 37–38; Morelli, *op. cit.*, p. 352; R. Monaco, *Manuale di diritto internazionale pubblico*, 2nd. ed., (Turin, Union tipografico-editrice torinese, 1971), p. 574.

⁶⁰² See, for example, Scerni, *loc. cit.*, p. 476 and Sereni, *Diritto internazionale* (*op. cit.*), pp. 1524–1554.

⁶⁰³ See, among others, de Visscher, *loc. cit.*, pp. 107, 109 *et seq.*; W. van Hille, “Etude sur la responsabilité internationale de l’Etat”, *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. X, No. 3 (1929), p. 566; Spiropoulos, *op. cit.*, p. 286; J. Basdevant, “Règles générales du droit de la paix”, *Recueil des cours . . . 1936–IV* (Paris, Sirey, 1937), vol. 58, p. 550; A. Sanchez de Bustamante y Sirvén, *Droit international public* (Paris, Sirey, 1936), vol. III, p. 526; Verdross, *Völkerrecht*, (*op. cit.*), p. 411; Ross, *op. cit.*, pp. 243, 245 *et seq.*; R. Redtslob, *Traité de droit de gens* (Paris, Sirey, 1950), pp. 242, 252; M. Sørensen, “Principes de droit international public”, *Recueil des cours . . . 1960–III* (Leyden, Sijthoff, 1961), vol. 101, p. 218; Schüle, *loc. cit.*, *Wörterbuch . . . vol. III*, pp. 84–85; Dahm, *op. cit.*, p. 213; von Münch, *op. cit.*, pp. 142 *et seq.*; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 404; Ténékidès, *loc. cit.*; pp. 785–786; N. A. Maryan Green, *International Law, Law of Peace* (London, MacDonald and Evans, 1973), p. 259; Favre, *op. cit.*, p. 643; Schlochauer, *loc. cit.*, pp. 273 *et seq.*; H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1975), p. 658.

⁵⁹⁷ Either directly or through the regional agencies referred to in Article 53 of the Charter.

⁵⁹⁸ The examples of the sanctions ordered in 1935 by the League of Nations against Italy at the time of its action against Ethiopia, and in 1977 by the United Nations against South Africa for its policy of *apartheid*, are extremely well known. As regards the sanctions against Italy, the Legal Sub-Committee of the Council of the League of Nations indicated that the friendship and non-aggression treaties existing between Italy and other Members of the League, as well as most-favoured-nation clauses, must be interpreted as being subordinate to Articles 16 and 20 of the Covenant.

⁵⁹⁹ The situation might in some respects be different in a case where the subject of the sanctions is not a Member State. Even in that case,

of self-protection.⁶⁰⁴ The lawfulness of conduct adopted by way of sanction is *a fortiori* supported by those writers who contend that it would even be out of place to speak of a circumstance precluding *by way of exception* the wrongfulness of the act of the State.⁶⁰⁵ Finally, the conduct considered in this article is implicitly acknowledged as lawful by writers who, without dealing expressly with this particular issue, recognize, in respect of the consequences of internationally wrongful acts, the faculty, or in some cases the duty, to adopt conduct other than that which would be required under an international obligation; these writers either speak generally of sanctions⁶⁰⁶ or of reactions to an internationally wrongful act by means of reprisals and other coercive measures.⁶⁰⁷

(16) State practice, international judicial decisions and doctrine thus confirm beyond all doubt the proposition that a State's conduct is not internationally wrongful if, although not in conformity with the requirements of an obligation binding that State to another State, it is justified as being the application of a measure of legitimate reaction to an internationally wrongful act committed by that other State. In the Commission's view there is no doubt that, in such a case, the prior existence of the internationally wrongful act of the State which is the subject of the measure precludes the wrongfulness of the legitimate reaction against it.

(17) That being so, there remains the question as to what happens if, in the application of legitimate countermeasures against a State which has previously committed an internationally wrongful act against another State, these countermeasures have the effect of infringing the rights of a third State towards which application of such a

measure is in no way justified. This is by no means a theoretical case. It happens frequently in international relations that the action of a State which applies a legitimate countermeasure against another State, which is aimed directly at that State, nevertheless causes injury to a third State. In situations of this kind, the State that has taken the action sometimes invokes as justification vis-à-vis the third State whose rights have been unduly infringed the fact that in the circumstances it would have been difficult, if not physically impossible, for it to inflict the necessary reactive measure or sanction on the State that had committed the internationally wrongful act without at the same time injuring the third State. It has been argued, for example, that during the bombardment of a town or port of an aggressor State by way of reprisal it was not always possible to avoid injury to aliens or their property. It has also been argued that the aircraft of the State which were detailed to apply the sanction might, in the circumstances, find themselves in practice forced to cross the airspace of a third State, in violation of its sovereignty, in order to reach the targets of the punitive action in the territory of the State which was the subject of the sanction. It is hardly necessary to add that these cases of what might be called indirect infringement of a right of a third State may just as easily occur in cases of application of countermeasures involving no use of armed force. What is more, there are other cases in which reprisals against a State guilty of an offence of the kind described above have in fact been aimed against an innocent third State, directly and deliberately.

(18) Consequently, the legitimate application of a sanction against a given State can in no event constitute *per se* a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction was justified. International jurisprudence has had occasion to express this principle clearly and precisely in the decision, referred to earlier, of the Portugal/Germany Arbitration Tribunal concerning the "Cysne" case.⁶⁰⁸

(19) Claiming that Great Britain had violated international obligations laid down in the "Declaration concerning the Laws of Naval War" signed in London on 26 February 1909 (called the "London Declaration"), Germany unilaterally added to the list of items to be included under the heading of "absolute contraband" items which, according to article 23 of the Declaration, were not to be added to the list, since they were not to be "exclusively* used for war". Germany thereupon destroyed the Portuguese vessel *Cysne*, which was carrying such items. In its decision of 30 June 1930, the Portugal/Germany Arbitration Tribunal, after agreeing with Germany that "an act contrary to international law may be justified, by way of reprisals, if motivated by a like act", stated:

However, the German argument, which is sound up to this point, overlooks an essential question which can be put in the following terms: *Could the measure which the German Government was entitled to take, by way of reprisals against Great Britain and its allies, be applied to neutral vessels and specifically to Portuguese vessels?*

The answer must be in the negative, even according to the opinion of German scholars. This answer is the logical consequence of the rule that reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the*

⁶⁰⁴ See, for example, D. Anzilotti, *Corso di diritto internazionale*, 4th ed.: S.I.O.I., *Opere di Dionisio Anzilotti* (Padua, CEDAM, 1955), pp. 419 *et seq.*, and Quadri, *op. cit.*, pp. 264 *et seq.*, and 584. Naturally, self-protection as a circumstance precluding wrongfulness is relevant in this context only in so far as it is a reaction to an internationally wrongful act.

⁶⁰⁵ See above, para. (10) of the introductory commentary to chapter V of the present draft and foot-note 555.

⁶⁰⁶ For example, State and Law Institute of the Academy of Sciences of the Soviet Union, *Kurs Mezhdunarodno Prava* (International Law Course), gen. ed. F. I. Kozhevnikov *et al.* (Moscow, Nauka, 1969), vol. V, pp. 434 *et seq.*; L. A. Modzhorian, "Otvetsvennost v sovremennom mezhdunarodnom prava" (Responsibility in modern international law), *Soviet Yearbook of International Law*, 1970 (Moscow, Nauka, 1972), pp. 143 *et seq.*

⁶⁰⁷ For example, L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. H. Lauterpacht (London, Longmans, Green, 1955), vol. II, pp. 135 *et seq.*; Y. de la Brière, "Evolution de la théorie et de la pratique en matière de représailles", *Recueil des cours . . . 1928-II* (Paris, Hachette, 1929), vol. 22, pp. 241 *et seq.*; E. [Speyer] Colbert, *Retaliation in International Law* (New York, King's Crown Press, 1948), pp. 60 *et seq.*; C. G. Fenwick, *International Law*, 4th ed. (New York, Appleton-Century-Crofts, 1965), pp. 636-637; Ballardore Pallieri, *op. cit.*, pp. 249-250; Cheng, *op. cit.*, pp. 97-98; J.-C. Venezia, "La notion de représailles en droit international public", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXI, No. 1 (January-March 1960), pp. 471 *et seq.*; K. J. Partsch "Repressalie", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1962), vol. III, p. 103; C. Cepelka, *Les conséquences juridiques du délit en droit international contemporain* (Prague, Charles University, 1965), pp. 42 *et seq.*, 61-62; M. B. Akehurst, *A Modern Introduction to International Law* (London, Allen and Unwin, 1970), pp. 14-15; F. Kalshoven, *Belligerent Reprisals* (Leyden, Sijthoff, 1971), pp. 20 *et seq.*, 22 *et seq.* Even those among these writers who deny entirely the legitimacy of the use of armed reprisals recognize the legitimacy of reprisals not involving the use of force.

As regards codification drafts prepared by learned writers, see articles 7 to 10 of the draft convention on international responsibility by B. Graefrath and P. A. Steiniger: "Kodifikation der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), No. 8 (1973), pp. 227-228.

⁶⁰⁸ See above, para. (8) of this commentary.

provoking State are permissible. Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible. By contrast, the measures taken by the German State in 1915 against neutral merchant vessels were aimed directly and deliberately against the nationals of States innocent of the violations of the London Declaration attributed to Great Britain and its allies. Consequently, not being in conformity with the Declaration, they constituted acts contrary to the law of nations, unless one of the neutral States had committed against Germany an act contrary to the law of nations that could make it liable to reprisals. There is no evidence of any such act having been committed by Portugal, and the German claim relies exclusively on the acts committed by Great Britain and its allies. Hence, in the absence of any Portuguese provocation warranting reprisals, the German State must be held not to have been entitled to violate article 23 of the Declaration in respect of Portuguese nationals. Accordingly, it was contrary to the law of nations to treat the cargo of the *Cysne* as absolute contraband.⁶⁰⁹

The views of learned writers on this point confirm the soundness of the principle set forth in this decision.⁶¹⁰

(20) In the light of the foregoing considerations, the Commission has drafted article 30 as follows:

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

This wording, together with the title of the article ("Countermeasures in respect of an internationally wrongful act"), brings out the fact that the Commission clearly had in view here "an act of a State" which: (a) is a "consequence" of "an internationally wrongful act" committed by another State, and (b) "constitutes a measure legitimate under international law against that other State". The words in question spell out the requirements which seem necessary in a general rule on the subject. Where these requirements are met, the rule precludes the wrongfulness of the act in question where the act is "not in conformity with an obligation" of the said State towards the State which has previously committed an internationally wrongful act.

(21) The term "countermeasures" which appears in the title of the article and the term "measure" used in the text have been preferred to others, and particularly to the term "sanction", as a means of preventing any misunderstanding, in view of the two distinct cases universally covered by the rule set forth in the article, namely: (a) the case in which the "act of a State" in question is a reactive measure applied directly and independently by the injured State against the State which has committed an internationally wrongful act against it; and (b) the case in which the "act of a State" is a reactive measure applied on the basis of a decision taken by a competent international organization which has entrusted the application of that measure to the injured State itself, to another State, to a number of States or to all the member States of the organization. The Commission has thus made allowance

for the trend in modern international law to reserve the term "sanction" for reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular for certain measures which the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of international peace and security.

(22) As has been seen, the terms "countermeasures" and "measure" used in the present article refer both to action by a State within the framework of sanctions ordered by a competent international organization on the basis of the rules by which it is governed and to action that a State is authorized to take, under general international law, in reaction to an internationally wrongful act committed against it by another State. In both cases, as the article states, the measures in question must constitute "a measure legitimate under international law" against the State which has previously committed the internationally wrongful act. The word "constitutes" was carefully selected in order to emphasize that the legitimacy of the measure must be objectively established by reference to international law. As indicated in other paragraphs of this commentary, there is a whole series of internationally wrongful acts which, under international law, do not justify resort—or at any rate, immediate resort—to punitive measures or enforcement, but merely create the right to demand reparation for injuries. In a case of this kind, the injured State may not normally employ countermeasures of the kind indicated unless it has been unduly refused reparation, and if it does employ them without having first attempted and failed to obtain reparation, it cannot claim to describe subjectively as "legitimate" the action it has taken. It should also be noted that the forms that the "countermeasures" in question may lawfully take in international law also vary, as has been seen, according to the characteristics of the internationally wrongful act to which they constitute the reaction. What is more, the conditions governing the various forms of reaction permissible under international law are not necessarily the same in all cases. For example, the condition of prior submission of a demand for reparation, and even the principle of proportionality between the offence reacted against and the reaction itself, do not play the same role in the case of reprisals and in the case of sanctions adopted collectively in a competent international organization.

(23) It is not for the present article, however, to define the various forms which may be taken by the reactive measures or sanctions to which it refers, nor to determine the conditions for their application, nor to specify the situations in which one or another of these forms is applicable. The Commission reserves the right to undertake the study of these questions in the context of part 2 of the draft articles, dealing with the content, forms and degrees of international responsibility—in other words, when it comes to determine the various new legal situations created by the commission of the internationally wrongful acts to whose definition it has devoted part 1 of the draft. In order to justify the rule proposed in article 30, it is sufficient to presume that international law permits, in certain cases and under certain conditions, the adoption of countermeasures against an internationally wrongful act committed previously, and that these countermeasures may, in a given

⁶⁰⁹ United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), pp. 1056–1057. [Translation by the Secretariat.]

⁶¹⁰ See, among others, Strupp, *loc. cit.*, pp. 188–189 and the authors he cites; J. Hatschek, *Völkerrecht* (Leipzig, Scholl, 1923), pp. 405 *et seq.*; Cheng, *op. cit.*, p. 98; J. Stone, *Legal Controls of International Conflict* (London, Stevens, 1959), p. 290; Venezia, *loc. cit.*, pp. 495 *et seq.*; Partsch, *loc. cit.*, p. 104; Schlochauer, *loc. cit.*, pp. 273–274. See also art. 6, para. 3, of the resolution adopted in 1934 by the Institute of International Law (*Annuaire de l'Institut de droit international*, 1934, (*op. cit.*), p. 710).

case, constitute conduct not in conformity with what would otherwise be required by an international obligation.

(24) Finally, the Commission wishes to point out that preclusion of wrongfulness as provided for in article 30 in respect of certain acts of State relates only to acts against the State whose prior internationally wrongful act warrants the countermeasure in question. As has already been pointed out,⁶¹¹ the fact of having applied such a countermeasure cannot possibly have the effect of precluding the wrongfulness of any injury thereby caused to a third State. The wrongfulness of any such injury may on occasions be precluded notwithstanding, but on the ground of other circumstances which come into play in the case in point.

Article 31. Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Commentary

(1) "*Force majeure*" and "fortuitous event" are circumstances frequently invoked in international life as grounds for precluding the wrongfulness of an act of the State. In learned works too, they are often given priority in any analysis of such grounds. This does not mean that the terms "*force majeure*" and "fortuitous event" are always used in the same sense by government pleaders, by international judges and arbitrators and by different writers.⁶¹² The different meanings given to these terms create confusion which is sometimes made worse by the use of the expression "*force majeure*" as a synonym for "state of emergency" (*état de nécessité*). Before posing the question of the validity and the conditions of application of the circumstances envisaged in this draft article as precluding the wrongfulness of an act of the State, the Commission therefore considered it necessary first to formulate some brief considerations with a view to distinguishing as clearly as possible between these circumstances, taken as a whole, and the others that are examined in this chapter, and then seeing whether a distinction should also be made between the notions of *force majeure* and fortuitous event.

(2) The distinction to be made between *force majeure* and fortuitous event, on one hand, and the circumstances provided for in articles 29 (Consent) and 30 (Countermeasures in respect of an internationally wrongful act) on the other, is easy and presents no real problem. The circumstance that precludes the wrongfulness of an act committed by a State in these situations is the existence, in the case in point, of certain conduct by the State subjected to the act. This conduct consists either in

the expression of consent to the commission by another State of an act which would otherwise be contrary to an international obligation of that State, or in the prior commission of an international offence which justifies the application of a legitimate countermeasure against the offender. A situation similar to the latter case occurs when the circumstance invoked is that to be dealt with in article 34 of this chapter, namely, self-defence. But this does not apply to *force majeure* or fortuitous event. The State subjected to an act committed in these conditions is not involved; it has neither given its consent to the commission of the act nor previously engaged in conduct which constitutes an international offence. In any case, its conduct is irrelevant in determining the existence of the circumstance in question. In this respect, on the other hand, *force majeure* and fortuitous event have a point in common with two other circumstances, "distress" and "state of emergency", which the Commission will deal with in draft articles 32 and 33 respectively. This point in common is precisely the irrelevance of the prior conduct of the State against which the act to be justified by invoking the circumstances covered by the present article was committed.

(3) There are also other points in common between "*force majeure*" and "fortuitous event", on the one hand, and "distress" on the other, just as there are between "*force majeure*" and "fortuitous event" and "state of emergency" (*état de nécessité*). Each of these terms is used to indicate a situation facing the subject taking the action, which leads it, as it were *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it. But the similarity ends there. When the ground for claiming that conduct not in conformity with an international obligation was not wrongful is the fact that the conduct was adopted in a situation of "distress", the situation is normally one in which the person acting as an organ of the State was exposed to an extremely grave danger to his life or to the lives of persons entrusted to his care, and had no way of escaping that danger but to adopt conduct not in conformity with an international obligation of the State of which he was an organ.⁶¹³ In these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand. In other words, there is unquestionably an *element of will* in the decision of the organ to act contrary to the requirements of international law. Similarly, it is even more obvious that in the case of an act or omission committed on the pretext of a state of emergency with the alleged intention of saving the very existence of the State, or at least some of its vital interests, from grave and imminent danger,⁶¹⁴ the *voluntary* nature of the act or omission is not only undeniable but also logically in-

⁶¹³ Such is, for example, the case of the pilot of an aircraft whose sole means of avoiding disaster is to land at the nearest airport, violating the airspace of another State, or of the captain of a warship which will sink unless he seeks immediate refuge in a port he is not authorized to enter, etc.

⁶¹⁴ For example, ensuring the survival of part of the population afflicted by a natural disaster by requisitioning foreign means of transport or supplies; avoiding the bankruptcy of the State by deferring payment of a State debt; preventing the outbreak of civil war by seizing, on foreign territory, those who are preparing to provoke it; preventing massive pollution of its coast by sinking on the high seas a foreign vessel which is spilling oil, etc.

⁶¹¹ See above, paras. (17)–(19) of the present commentary.

⁶¹² See, in this connexion, the information furnished in the study prepared by Secretariat Survey (see foot-note 485, above).

herent in the excuse given, irrespective of the value to be objectively attributed to that excuse. Anyone invoking a state of emergency is perfectly aware of having deliberately chosen to act in a manner not in conformity with an international obligation.

(4) *Force majeure* and fortuitous event, on the other hand, are generally invoked to justify *involuntary*, or at least unintentional, conduct. It is common to all cases of *force majeure* and fortuitous event that the State which is required to fulfil an international obligation—or the organ whose conduct constitutes an act of that State—is led to act in a manner not in conformity with the obligation because of an irresistible force or an unforeseen external event against which it has no remedy and which makes it “materially impossible” for it to act in conformity with the obligation or even, at times, to be aware of the fact that it is adopting conduct different from that required by the obligation.⁶¹⁵ The Commission therefore took the view that this involuntary or unintentional aspect of the conduct attributable to the State adopted in the case in point is the common feature of situations to be included under the common denomination of “*force majeure*” and “fortuitous event”.

(5) Having thus identified the characteristic which, in its opinion, differentiates the circumstances dealt with in article 31 from those dealt with in the other articles in this chapter, the Commission took up the question whether it was necessary to specify later on the distinctive features of each of the two situations taken separately—that of *force majeure* and that of fortuitous event—and, if necessary, to include a separate provision for each of them. However, it was obliged to conclude that no clear and definitive distinction between the two situations emerged from State practice and international judicial decisions or from legal literature, that the use of the two terms was far from uniform, and that even within the Commission itself there were very marked differences of opinion on the subject, largely due to the fact that the members are from different systems of law based on different criteria. One group of members saw the distinction to be made between a situation of *force majeure* and a situation of fortuitous event as relating mainly to the *cause* of the situation envisaged: in the first case, the cause was a “force” or “constraint” whose “irresistible” nature was stressed, and in the second case, it was the “unforeseen” occurrence of a given “event”. Some members of the same group also limited cases of *force majeure* or irresistible force to constraints exerted by natural factors, whereas others included in such cases constraints attributable to human action. Again, a second group of members of the Commission stressed the respective *effects* of a situation described as “*force majeure*” and a situation described as “fortuitous event”, the effect in one instance being the material impossibility of acting otherwise than in breach of an international obligation, and in the other instance, the impossibility of knowing that the conduct adopted in

⁶¹⁵ There is, for example, nothing voluntary about the situation in which, because of a storm or damage, the pilot of a State aircraft loses control and, despite all his efforts to avoid doing so, enters the airspace of another State, just as there is nothing intentional in the conduct of a pilot who, as a result of atmospheric disturbances which have made his flight instruments useless, unwittingly finds himself over foreign territory. Nor is there anything voluntary or intentional in the fact that a State is unable to hand over specific property to another State, in conformity with the provisions of a treaty, because that property has suddenly been destroyed by natural or other causes beyond its control.

the circumstances was not that required by the obligation.⁶¹⁶

(6) Upon reflection, however, the Commission decided that there was no need to continue a purely theoretical debate on the subject, that it should be left to legal science to continue the analysis with a view to distinguishing between the notions covered by the two terms, and that no account should be taken of the distinction for the purely normative purposes of establishing the rule to be adopted. The Commission accordingly decided not to devote two separate articles to the cases of *force majeure* and fortuitous event, but to deal with both these closely related situations together, within the framework of a single article. The article thus covers both the two cases of “material impossibility” in which the State may be placed and the two types of cause liable to be at the origin of the impossibility. In the opinion of the Commission, this material impossibility, either to avoid acting in a manner not in conformity with an international obligation or to know that one is acting in such a manner, is in fact the essential constituent element of the circumstance which is thus globally defined and has the effect of precluding the wrongfulness of a State act committed in such conditions, whatever form they may take. In so deciding, the Commission has simply drawn on the relevant criteria prevailing in international practice and judicial decisions.

(7) The “factor” (“irresistible force” or “unforeseen external event”) in both cases of material impossibility dealt with in this article may thus be due to nature, such as a natural catastrophe or disaster of any kind,⁶¹⁷ or to human action—loss of sovereignty or simply loss of control over a portion of State territory, for example.⁶¹⁸ This same external factor may have the effect of rendering the performance of the international obligation *definitively* impossible,⁶¹⁹ just as it may render it only *temporarily* impossible;⁶²⁰ it may prevent the State from

⁶¹⁶ Accordingly, both groups would have agreed to classify under “*force majeure*” a situation in which an “irresistible force” made it materially impossible for the State, or the person acting for the State, to comply with the international obligation, and to classify under “fortuitous event” situations in which an unforeseen event would have the effect of making it impossible for them to know that they were acting in breach of the obligation. But the conclusion was found to be different as regards the designation to be given, for example, to a situation brought about by an “irresistible force” in which it was impossible to be aware of the wrongfulness of the conduct adopted or to a situation in which it was materially impossible to act in conformity with an international obligation owing to the unforeseen occurrence of an external event.

⁶¹⁷ Mention has already been made of atmospheric disturbances which have the effect of diverting a State aircraft from its normal course, against the will or intention of the pilot, into the airspace of another State, and of an earthquake destroying property (a work of art, for example) which a State is required to hand over or return to another State. There is also the case of flood or drought destroying products to be delivered to a foreign State under a trade agreement, etc.

⁶¹⁸ For instance, where a State has undertaken to hand over to another State products to come from the soil or subsoil of a specific region, and this region has subsequently passed into the sovereignty of a third State or has been devastated by military operations carried out by a third State, or has been removed from the control of the State by an insurrection, etc.

⁶¹⁹ This would be the case, for example, in the event of the total destruction of property to be handed over to a given State or the violation of a frontier.

⁶²⁰ This would be the case if the unforeseen destruction of the means of transport to be used made it temporarily impossible to transfer particular food-stuffs to another State.

honouring an obligation *to act*,⁶²¹ or an obligation *not to act*.⁶²² In short, all sorts of situations may come into consideration, but they all have one feature in common: the State organs are involuntarily placed in a situation which makes it *materially impossible* for them either to adopt conduct in conformity with the requirements of an international obligation incumbent on their State or to realize that the conduct they are engaging in is not of the character required. It was precisely with regard to the presence in all the situations in question of this common feature that the Commission posed the question whether an act of the State committed in such conditions should or should not be considered as effecting a "breach" of the obligation in question, in other words, as constituting an internationally wrongful act giving rise to responsibility.⁶²³

(8) Turning to consideration of the positions taken in the matter of State practice, the Commission noted, first, that the preparatory work of the Conference for the Codification of International Law (The Hague, 1930) does not give as much help on this question as it has been found to do on others. That is because the request for information submitted to States by the Preparatory Committee of the Conference did not specifically raise the question whether or not *force majeure* or fortuitous event—in other words, the impossibility of "conforming to an international obligation" or of "realizing that the conduct adopted was not in conformity" with the obligation—was a circumstance precluding the wrongfulness of the act of the State or the responsibility otherwise incurred by the act. However, the Swiss Government, in its reply on point V of the request for information, concerning State responsibility for acts of the executive, was careful to specify that:

An exception to international responsibility should also be allowed in the case of purely fortuitous occurrences or cases of *vis major**, it being

⁶²¹ This would be so if, for example, an earthquake destroyed property to be handed over to another State, or if an insurrection removed part of a State's territory from its control and thus prevented it, in that part of its territory, from adopting the necessary measures to protect foreign agents or other aliens.

⁶²² Suffice it to mention the example given earlier of damage or a storm which drives a State aircraft into foreign airspace.

⁶²³ It should be explained that situations describable as cases of "*force majeure*" or "fortuitous event" may be relevant in international law for reasons other than the possibility that they preclude the wrongfulness of an act of the State: for instance, because they satisfy a condition giving rise to a specific obligation of the State. There are international agreements which link the creation of international obligations "to act" to the existence of a situation of *force majeure*. For example, the Agreement on Co-operation with regard to Maritime Merchant Shipping, signed at Budapest on 3 December 1971, requires the State to assist foreign vessels driven towards its ports by bad weather. Similarly, the Agreement on the Rescue of Astronauts, of 22 April 1968, imposes on a State on whose territory astronauts land unintentionally an obligation to assist them and return them promptly to the representatives of the launching State. Article 40 of the 1961 Vienna Convention on Diplomatic Relations requires the State on whose territory a foreign diplomatic agent proceeding to a third State may find himself, for reasons of *force majeure*, to accord certain immunities to that agent. In other cases, *force majeure* may be at the origin of an obligation of the State "not to act"—for instance, an obligation not to confiscate enemy vessels remaining in its ports for reasons of *force majeure* after hostilities have broken out: article 2 of The Hague Convention No. VI, of 18 October 1907, relative to the status of enemy merchant ships at the outbreak of hostilities (Secretariat Survey, para. 5 *et seq.*, 81, 99 and 100). Clearly, however, such "primary" rules must not be taken as evidence that *force majeure* and fortuitous event are to be regarded as circumstances precluding the wrongfulness of an act of the State. They can do no more than provide indirect confirmation of this conclusion in some instances.

understood that the State might nevertheless be held responsible if the fortuitous occurrence or *vis major* were preceded by a fault, in the absence of which no damage would have been caused to a third State in the person or property of its nationals.⁶²⁴

A similar view emerged, either explicitly or implicitly, from the positions taken by other Governments on cases in which the State might incur international responsibility through having failed to prevent acts of private individuals which caused damage to foreign States or to the person or property of their nationals.⁶²⁵

(9) The positions taken by States in the preparatory work on the 1969 Vienna Convention are even more enlightening in this connexion. Article 58 of the draft articles on the law of treaties adopted by the Commission in 1966⁶²⁶ provided that the permanent disappearance or destruction of an object indispensable for the execution of a treaty could be invoked as a ground for terminating the treaty or suspending its operation, if they rendered its execution permanently or temporarily impossible. In the commentary to that article, it was explained that:

The Commission appreciated that such cases might be regarded simply as cases where "*force majeure*" could be pleaded as a defence exonerating a party from liability* for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performing recurring obligations of a treaty, it is desirable to recognize, as part of the law of treaties, that the operation of a treaty may be suspended temporarily.⁶²⁷

Thus, as early as 1966, the Commission regarded *force majeure*, in the sense of a real impossibility of fulfilling an obligation, as a circumstance precluding the responsibility of the State. What is more, at least in the case of *force majeure* represented by the destruction or disappearance of an object indispensable for the fulfilment of the obligation, it attributed this preclusion of responsibility to the termination or suspension of the obligation.

(10) At the United Nations Conference on the Law of Treaties, Mexico submitted a proposal to extend the scope of the article to all situations in which the result of the *force majeure* would be to render fulfilment of the

⁶²⁴ League of Nations, *Bases of Discussion . . .* (*op. cit.*), p. 241. Reproduced in Secretariat Survey, para. 61.

⁶²⁵ The replies of Governments and representatives' statements in the Third Committee of the Conference show that the disagreement which subsisted on the point whether the State should adopt in respect of foreigners, preventive measures equal or sometimes superior, to those adopted for the protection of its own nationals, or "normal" preventive measures, did not prevent the supporters of the two divergent views from agreeing that in cases where *force majeure* or fortuitous event has made it materially impossible for the State to take the necessary preventive measures, its responsibility is precluded. See the replies to points V, No. 1 (c) and VII (a) and (b), of the list of points submitted to States by the Preparatory Committee of the Conference: League of Nations, *Bases of Discussion . . .* (*op. cit.*), respectively pp. 62 *et seq.* and pp. 93 *et seq.*; and *Supplement to Vol. III* (*op. cit.*), pp. 13, 14 and 18–19. For representatives' statements in the Third Committee of the Conference on Bases of Discussion Nos. 10, 17 and 18, see League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March–12 April 1930), vol. IV, *Minutes of the Third Committee* (C. 351 (c).M.145 (c). 1930.V), pp. 143 *et seq.* and 185 *et seq.*, in particular, the statements of the representative of China (*ibid.*, p. 186) and the representative of Finland (*ibid.*, p. 185). For a detailed analysis of the replies and statements see Secretariat Survey, paras. 69–70.

⁶²⁶ See *Yearbook . . . 1966*, vol. II p. 255, document A/6309/Rev.1, part II, chap. II.

⁶²⁷ *Ibid.*, p. 256, para. (3) of commentary to article 58.

obligation impossible.⁶²⁸ In support of this proposal, the representative of Mexico argued that article 58 of the Commission's draft referred only to a particular and, in his view, rare case of impossibility of performance of a treaty for reasons of *force majeure*, whereas there were many more frequent cases, such as the impossibility of delivering a particular product owing to a strike, the closing of a port or because of war, or the impossibility of making certain payments because of serious financial difficulties, etc.⁶²⁹ Since some of these examples were such as to raise doubts that the "impossibility" in question would be a case of absolute impossibility of fulfilling an obligation laid down by a treaty, many representatives were not prepared to regard it as a circumstance which would justify not only preclusion of the wrongfulness of State conduct not in conformity with the requirements of a treaty but also the right to invoke impossibility of performance as ground for terminating or suspending the treaty. In their view, that would have seriously endangered the security of treaty relations between States. That explains why the Mexican proposal was finally withdrawn and the Conference, in article 61, paragraph 1, of the text it adopted for the 1969 Vienna Convention, stipulated as the sole ground for terminating or suspending a treaty "the permanent disappearance or destruction of an object indispensable for the execution of the treaty". It seems none the less certain, however, that the discussions which took place on this point revealed a general belief that impossibility, or at the very least material impossibility, of complying with a treaty obligation constituted a circumstance precluding the wrongfulness of the conduct adopted by the State having the obligation.

(11) The practical cases in which States have invoked the "impossibility" of acting in conformity with an international obligation or of realizing that their conduct was not in conformity with that obligation as a circumstance that should preclude the wrongfulness of acts committed by them are innumerable. But in few of these cases have they pleaded a circumstance consisting unquestionably of a genuine "material impossibility" of acting in conformity with an obligation. This is understandable. It is uncommon for a State to be in an unavoid-

able situation in which it is really materially impossible for it to act in conformity with an international obligation incumbent on it, and a State often speaks of impossibility when in fact it faces only serious difficulty. Further, if such a case occurred and if the impossibility was obvious, it is unlikely that the State towards which the obligation existed would persist in arguing that the obligation had been breached and in invoking the consequences. What is beyond any doubt, however, is that when a party has been able to prove the real existence of a situation of *material* impossibility, the legal effects of that situation have not been contested by the other party to the dispute. Where there has been contention, it has generally centred on the factual existence of the situation invoked, not on its validity as a circumstance precluding the wrongfulness of an act of the State in cases in which its existence has been established.

(12) As has been pointed out, the impossibility of fulfilling an international obligation as a result of the existence of a situation of *force majeure* or fortuitous event sometimes occurs in relation to an obligation "not to act", in other words, to refrain from committing a certain act. Examples of a situation of this kind include that of a State aircraft which, because of damage, loss of control of the aircraft or a storm, is forced into the airspace of another State without the latter's authorization, either because the pilot's efforts to prevent this happening have been unsuccessful or because he could not know what was happening. Recognition that the existence of such a circumstance precludes the wrongfulness of the act is clearly apparent from the positions taken by States in the numerous cases of this kind that have occurred in practice. During the 1914-1918 war, the belligerents often invoked factors such as fog, cloud and atmospheric disturbance as reasons for aircraft unintentionally flying off their course and passing over neutral territory without the knowledge or fault of the pilot. This happened when Allied aircraft making for Friedrichshafen flew over Swiss territory in November 1914. The First Lord of the Admiralty said in Parliament, on 26 November, that the Allied pilots had violated Swiss airspace unintentionally because high altitude and lack of visibility had prevented them from realizing that they were off course. When the town of Goes, in the Netherlands, was bombed by a German zeppelin airship, the German Government stated that the pilots had lost their way because of cloud. Similar excuses were offered for violations of Danish, Norwegian and Swedish airspace. It should be noted that some of them were rejected by the countries concerned, but solely on the ground that the alleged physical circumstances had not existed in the case in point, and not because these countries refused to recognize the actual principle of the justification.⁶³⁰ On the other hand, in cases in which occurrences such as the bombing of La-Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, were ascribed to negligence on the part of the airmen and not to fortuitous events, the belligerents undertook to punish the offenders and make reparation for the damage sustained.⁶³¹

(13) Particularly interesting for the present purposes is the exchange of notes between the Yugoslav Government and the Government of the United States of America

⁶²⁸ The proposal first provided that a country might invoke *force majeure* as ground for terminating a treaty when the result of the *force majeure* was to render fulfilment of its obligations under the treaty permanently impossible. It then provided that *force majeure* might be invoked only as ground for suspending the operation of the treaty when impossibility of fulfilment was temporary. (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 182-189, document A/CONF.39/14, para. 531 (a)).

⁶²⁹ The representative of Mexico therefore concluded that:

"*Force majeure* was a well-defined notion in law; the principle that 'no person is required to do the impossible' was both a universal rule of international law and a question of common sense. Its application had not caused courts any special difficulties and it was unnecessary to draw up a list of the situations covered by the that rule.

According to paragraph (3) of the . . . commentary to the article, such cases might be regarded simply as cases in which *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But not to incur responsibility for an act or its omission was to have the right of performance or non-performance of an act. *If in the case of force majeure a State did not incur any responsibility, that was because so long as force majeure lasted, the treaty must be considered suspended.*" (*Ibid.*, First Session, Summary records of the plenary meetings and the meetings of the Committee of the Whole, (United Nations publication, Sales No. E.68.V.7), pp. 361-362, Sixty-second meeting of the Committee of the Whole, paras. 3-4.)

⁶³⁰ See Secretariat Survey, paras. 250-256.

⁶³¹ *Ibid.*, paras. 255-256.

which took place following certain cases of *United States military aircraft entering the airspace of Yugoslavia in 1946*. In a note dated 30 August 1946 from the Yugoslav Chargé d'Affaires to the American Department of State, the United States Government was asked "... to prevent these flights, *except in the case of emergency or bad weather**, for which arrangements could be made by agreement between the American and Yugoslav authorities".⁶³² In his reply of 3 September 1946, the Acting Secretary of State of the United States said that:

The Yugoslav Government has already received assurances from the United States Government that United States planes will not cross Yugoslav territory without prior clearance from Yugoslav authorities, *except when forced to do so by circumstances over which there is no control, such as bad weather, loss of direction, and mechanical trouble*.⁶³³

(14) In 1948, two Turkish military aircraft entered Bulgarian airspace; one was shot down and the other forced to land. The Turkish Government protested on the ground that the violation of the Bulgarian frontier had not been intentional, but was due to the rainy weather which had prevented the pilots from realizing that they had left Turkish airspace. The Bulgarian Government's answer was that the aircraft were flying in conditions of excellent visibility. Hence the discussion was concerned not with the validity, which was in no way disputed, of the principle that conditions constituting *force majeure* or a fortuitous event preclude the wrongfulness of an act of the State not in conformity with an international obligation is committed under such conditions, but solely with the factual existence of those conditions in the case in point.⁶³⁴

(15) On 17 March 1953, the United States Government sent two notes, to the Hungarian Government and the Government of the USSR respectively, concerning the case of the *Treatment in Hungary of Aircraft and Crew of the United States of America*. An American aircraft bound for Belgrade entered Hungarian airspace and was forced to land in Hungary, where its crew were interned. The American notes maintained that the crossing of the Hungarian frontier had not been intentional and that the pilot had not realized that he had entered Hungarian airspace. But the chief interest of the two notes lies in the care taken by the writer to indicate a series of facts intended to prove that, in the circumstances, even the most experienced pilot could not have noticed the mistake. The notes stated that:

The airplane and crew attempted at all times to follow the course so given for Belgrade, but while the crew, and in particular the pilots, believed that the plane was flying that course, it was actually blown by winds the existence and direction of which the pilots did not then know or have any warning of, and the velocity of these winds accelerated the speed of the plane considerably beyond the speed at which the pilots believed the plane was flying. The plane, therefore, flew somewhat north of the expected course and covered a distance considerably greater than the pilots then thought or had reason to believe they were covering.⁶³⁵

⁶³² United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502. Reproduced in Secretariat Survey, para. 144.

⁶³³ *Ibid.*, p. 504, and Secretariat Survey, para. 145.

⁶³⁴ See Secretariat Survey, para. 147.

⁶³⁵ *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of United States of America* (note to the Hungarian Government of 17 March 1953), p. 14. On the following page, the American Government added:

"The crew selected for the flight were competent for the purpose . . . The aircraft and its equipment . . . were in sound flying condition".

Thus, to preclude the international wrongfulness of the conduct of the pilot, the American Government did not think it enough that there had been an error on his part, but considered it necessary to prove that that error had been due to an unforeseeable external event.

(16) With regard to the maritime sphere, after stating the principle of the right of "innocent passage" of ships of all States through the territorial sea of a foreign State, article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides, *inter alia*, in paragraph 3, that:

Passage includes stopping and anchoring, only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.⁶³⁶

Moreover, a similar provision is to be found in article 18, paragraph 2 of the "Informal Composite Negotiating Text/Revision 1", drawn up in April 1979 by the President of the Third United Nations Conference on the Law of the Sea and by the chairmen of the main committees of the Conference.⁶³⁷ There are also other conventions in which *force majeure* is treated as a circumstance capable of rendering inoperative an obligation "not to act" and, consequently, of precluding the wrongfulness of an act of the State not in conformity with such an obligation. For example, article 7, paragraph 1 of the Convention on Transit Trade of Land-Locked States, signed at New York on 8 July 1965, provides that:

Except in cases of *force majeure** all measures shall be taken by Contracting States to avoid delays in or restrictions on traffic in transit.⁶³⁸

It is hardly necessary to point out that such provisions of treaty law are in no way an exception to some other principle of general international law. In these provisions, *force majeure* is admittedly a constituent element of the "primary rules" laid down therein, but the very fact that it has been incorporated in these rules is clearly an express confirmation, in relation to particular cases, of a general principle of customary international law whereby *force majeure* has the effect of precluding wrongfulness.

(17) However, *force majeure* and fortuitous event have been invoked in the practice of States as justifications for the impossibility of fulfilling the requirements of international obligations "not to act" in areas other than the air or sea, matters referred to above—more particularly, in connexion with the non-fulfilment of international obligations concerning treatment of the person or property of foreign nationals. In 1881, for example, during the war between Chile and Peru, the Chilean military authorities occupying the town of Quilca twice confiscated the goods of Italian traders. Following claims by the Italian Chargé d'Affaires at Santiago, the Chilean

⁶³⁶ United Nations, *Treaty Series*, volume 516, p. 214. It is interesting to note that in the English text the term "*relâche forcée*" has been rendered by the term "*force majeure*". Attention should also be drawn to the distinction the provision makes between a situation of "*force majeure*" and a situation of "distress". The provision of the Convention follows that of the corresponding article of the draft articles on the law of the sea adopted by the International Law Commission in 1956. (*Yearbook . . . 1956*, vol. II, page 258, document A, 3159, chap. II, sect. III, art. 15).

⁶³⁷ Article 18, para. 2 of that text reads as follows:

"... [innocent] passage [through the territorial sea] includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or *distress** or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress". (A/CONF.62/WP.10/Rev.1, p. 27).

⁶³⁸ United Nations, *Treaty Series*, vol. 597, p. 52.

Government agreed to return the improperly confiscated goods or pay their value where they had been destroyed, but it refused any damages, alleging that reparation for loss and damage was payable only by those who "act in bad faith". Mancini, the Italian Minister for Foreign Affairs, replied that the Chilean authorities had to prove not only that there had been "good faith" on their part but also that they had made every effort to prevent the violation of neutral property. This opinion signifies that the conduct of the Chilean authorities was to be regarded as proper only if, in addition to acting in good faith, they had avoided acting negligently. The soundest case would obviously have been that a *fortuitous* event, regardless of any negligence on the part of the local authorities, had made it impossible to distinguish the neutral goods from the mass of enemy goods.⁶³⁹

(18) In 1906 an American citizen, Lieutenant England, serving on the U.S.S. *Chattanooga*, was mortally wounded as his ship entered the Chinese harbour of Chefoo by a bullet from a French warship which was engaged in rifle practice as the *Chattanooga* was passing by. The United States Government sought and obtained reparation, having maintained that:

While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the *unavoidable class** whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire.⁶⁴⁰

An analysis of the case shows both Governments to have concluded that the killing of Lieutenant England, although accidental, could not have occurred unless the officers of the French warship had failed to be diligent. It was therefore impossible to regard the occurrence as a truly "fortuitous event". That is what the United States Secretary of State meant by his comment that the case could not be regarded as belonging to the "unavoidable class" whereby no responsibility is entailed. This shared conclusion was nevertheless based on the likewise shared and definite belief that an act committed by a State organ in a situation which might rightly be defined as a "fortuitous event" does not entail the international responsibility of the State.

(19) Material impossibility of fulfilling an international obligation may also supervene in connexion with an obligation "to act", or to engage in conduct of commission. By the way of an example, reference was made earlier in this commentary to the case of the destruction of goods or property which a State is required to hand over or return to another State.⁶⁴¹ International practice provides a typical example of an international dispute concerning the existence or non-existence of a situation in which it was materially impossible to fulfil an international obligation "to act" under the Treaty of Versailles. The treaty, amended on this specific point by a subsequent agreement, provided that Germany would

deliver a certain quantity of coal annually to France. In 1920, however, the amount of coal supplied by Germany was considerably less than provided for in the instruments in force. Reporting the situation to the French Parliament and announcing his intention of taking appropriate measures, Mr. A. Millerand, the President of the Council and Minister for Foreign Affairs, said on 6 February 1920:

Moreover, it is impossible for Germany to claim that, if it has not fulfilled its commitment, it is because *it would have been materially impossible for it to do so*.^{*} Precise information made available to us shows that, during this month of January, Germany consumed over eight million tons of coal for a population of 60 million, whereas during the same month, for a population of 40 million, France did not have even half that amount: it had only 3,250,000 tons. In other words, every German had more coal for heating purposes than did every Frenchman. We cannot accept such a situation.⁶⁴²

This statement implicitly recognized, *a contrario*, that if it really had been "materially impossible" for Germany to fulfil its commitment, there would have been no breach of the obligation.⁶⁴³

(20) The problem of the repercussions of material impossibility on an obligation to restore property has also been discussed by international judicial and arbitral bodies. For example, the Permanent Court of Arbitration, in its award of 24/27 July 1956 in the *Ottoman Empire Lighthouse concession* case, rejected claim No. 15 by France for compensation for a French company which owned a lighthouse requisitioned by the Greek Government in 1915. The lighthouse had been destroyed during the First World War by Turkish bombardment; because of this occurrence, which the Court deemed to be a case of *force majeure*, the Greek Government had found it impossible to restore the lighthouse to the state it was in before the requisition.⁶⁴⁴

(21) *Force majeure* as a circumstance precluding the wrongfulness of an act of the State not in conformity with the requirements of an international obligation incumbent on the State has often received consideration in connexion with failure to *pay a State debt*, both at conferences for the conclusion of major multilateral conventions and in particular disputes. For example, in the work of the 1907 Conference for the revision of the system of arbitration established by the 1899 Convention for the Pacific Settlement of International Disputes, the representative of Haiti stated that disputes concerning the appreciation of circumstances of *force majeure* which temporarily made it materially impossible for a State to pay a debt should come within the competence of the arbitration court. He gave the following reason:

For the circumstances of *force majeure*, that is to say, of the facts independent of the will of man, may, in paralysing the will to do, frequently prevent the execution of obligations . . .

⁶³⁹ See A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1962), vol. 1, p. 128.

⁶⁴⁰ In connexion with the effects of *force majeure* on obligations to deliver certain products, it may be recalled that a number of commodity agreements allow the States parties thereto to withdraw from the agreement or suspend its operation in respect of themselves if circumstances beyond their control prevent them from fulfilling their obligations under the agreement. See, for instance, the 1956 (modified in 1958) and 1963 International Olive Oil Agreements (article 39, para. 2 (a)) and the other agreements cited in Secretariat Survey, paras. 54 *et seq.*

⁶⁴¹ See United Nations, *Reports of International Arbitral Awards*, vol. XII, (United Nations publication, Sales No. 63.V.3), pp. 219–220, and Secretariat Survey, para. 484.

⁶³⁹ For example, flood water, caused by a tidal wave, entering the harbour premises where the neutral goods were situated alongside enemy goods and destroying any markings whereby the goods could be recognized. For a description of the case, see S.I.O.I.-C.N.R., (*op. cit.*), pp. 867 *et seq.*

⁶⁴⁰ M. M. Whiteman, *Damages in International Law* (Washington, D.C., U.S. Government Printing Office, 1937), vol. 1, p. 221. See Secretariat Survey, para. 130.

⁶⁴¹ See foot-note 617, above.

I cannot imagine a great creditor nation which, in virtue of the arbitral decision, would forget to consider as "of bad faith" the debtor State unable to meet its obligations as the result, say, of an inundation, of a volcanic eruption, of failure of crops, etc. The testimony of contemporaneous history is against any such admission"⁶⁴⁵

Although some representatives challenged the assertion that these situations of *force majeure* were frequent and therefore needed to be mentioned specifically in the revised Convention, no one questioned the principle that when a genuine situation of *force majeure* occurred, i.e. a situation in which it was absolutely impossible to fulfil the obligation, the State rendered materially insolvent should not be considered as failing to meet its obligation.

(22) Failure to pay a debt has led to many international disputes in which *force majeure* has been expressly invoked by the debtor State as a circumstance justifying its conduct. Yet a detailed analysis of these cases demonstrates that, in a number of instances, the situations concerned are ascribable to the notion of "necessity" rather than to that of material impossibility of performance.⁶⁴⁶ Nevertheless, situations of material impossibility of performing an obligation owing to external factors beyond the control of the State having the obligation can occur as regards payment of debts. From this point of view, the Judgments of the Permanent Court of International Justice in the *case concerning the payment of various Serbian loans issued in France* and the *case concerning the payment in gold of the Brazilian federal loans contracted in France* certainly constitute a valid precedent for the clarification of certain aspects of the circumstance precluding wrongfulness which is the subject of this article.⁶⁴⁷

⁶⁴⁵ See J. B. Scott, *The Proceedings of The Hague Peace Conference: The Conference of 1907* (New York, Oxford University Press, 1921), vol. II, p. 296; Secretariat Survey, para. 105.

⁶⁴⁶ In the *Russian Indemnity* case, for example, the Permanent Court of Arbitration, in its award of 11 November 1912, rejected the argument of *force majeure* advanced by Turkey to justify its failure to pay its debt. However, the various details of the case show that the situation was not one of "material impossibility" of paying the debt, but possibly one of "necessity". This also emerges from the following passage of the Court's award:

"The plea of *force majeure*, adduced as a major defence, can be invoked in public international law as well as in private law . . . The Imperial Russian Government expressly agrees . . . that the obligation upon a State to perform treaties may be weakened 'if the very existence of the State becomes endangered, if the observation of international duty is . . . self-destructive'". [Translation by the Secretariat.]

(United Nations, *Reports of International Arbitral Awards*, vol. XI, (United Nations publication, Sales No. 61.V.4), p. 443; Secretariat Survey, para. 394.)

Force majeure as a circumstance making performance of an obligation impossible was expressly invoked and discussed at length in another case, that of the *Société Commerciale de Belgique*, brought before the Permanent Court of International Justice. There, however, the Greek Government argued that it was impossible for it to pay the Belgian company a particular sum of money due to it under an arbitral award of internal law "without jeopardizing the country's economic existence and the normal functioning of its public services". Thus, in speaking of "*force majeure*" and the "impossibility" of engaging in the conduct required by the obligation, the Greek Government probably had in mind not a "material impossibility" but rather the impossibility of paying the sum in question without thereby injuring a fundamental interest of the State, i.e. a situation which might be subsumed under the head of "necessity". (*P.C.I.J., Series C, No. 87*, pp. 141 and 190; see also Secretariat Survey, para. 278).

⁶⁴⁷ In both cases, the disputed obligation was an obligation of internal public law and not an international obligation proper, but the failure to make due payment gave rise to an international dispute, since the State of which the creditors were nationals took steps to protect them diplomatically. Moreover, in its Judgments on these two cases, the Court treated *force majeure* as a general principle valid in relation to any

(23) In the *Case concerning the payment of various Serbian loans issued in France*, the French Government, which had taken proceedings on behalf of its creditor nationals, maintained that the Kingdom of the Serbs, Croats and Slovenes was obliged to pay the sums due to the creditors of the Serbian loans on a gold franc basis, whereas the Kingdom maintained that it could pay them on a paper franc basis. In support of its contention, the Serb-Croat-Slovene State first invoked a point of equity, namely, that the treatment of Serbia's French creditors had never been any different from the treatment of French creditors by France itself. It then invoked a point of law, that of the existence of a circumstance of "*force majeure*" consisting of the material impossibility of making a payment in gold francs.⁶⁴⁸ In its Judgment of 12 July 1929, the Court ruled that the war had undoubtedly made it difficult for Serbia to perform its obligation, but had not made it absolutely impossible for it to do so. The Court pointed out that the content of the contractual obligation was not to pay in gold francs, but to pay at its discretion either the amount of its debt in gold francs or the equivalent in paper francs of a sum calculated in gold francs; there was accordingly no material impossibility of performing the obligation in question. But the Court implicitly acknowledged that if the obligation to pay "*in specie*" had been explicitly stipulated, there would have been a genuine material and absolute impossibility of performance, and in that case non-performance could not have constituted a breach of the obligation.⁶⁴⁹

(24) The Permanent Court of International Justice took the same attitude in the *Case concerning the payment in gold of the Brazilian Federal loans contracted in France*. Proceeding once again on behalf of its nationals, the French Government maintained that the loans contracted by the Brazilian State should be repaid on the basis of their gold franc value, whereas the Brazilian Government maintained that they should be repaid on a paper franc basis. In that connexion, the Government of Brazil also referred to the "*force majeure*" and "impossibility" which it considered prevented it from paying the sums due as calculated in gold francs.⁶⁵⁰ The French Government did not agree that in the case in point there had been any genuine impossibility of making payment.⁶⁵¹ In its Judgment of 12 July 1929, the Court upheld the French Government's argument on that point, but in doing so, it in no way refuted the view that the existence of a circumstance making the performance of an obligation "absolutely impossible" precluded the wrongfulness of an act of the State not in conformity with the requirements of the obligation in question.⁶⁵²

(25) In State practice and international jurisprudence, *force majeure* and the fortuitous event have also been invoked as circumstances precluding the wrongfulness of

system of law, and not as a principle established by a specific internal legal order.

⁶⁴⁸ See the statement made by Counsel for the Serb-Croat-Slovene State on 22 May 1929 (*Serbian Loans, P.C.I.J., Series C, No. 16-III*, pp. 211-212).

⁶⁴⁹ *P.C.I.J., Series A, No. 20/21, Judgment No. 14*, pp. 33-40.

⁶⁵⁰ Case of the Brazilian Government dated 2 July 1928 (*P.C.I.J., Series C, No. 16-IV*, pp. 153-156 and 158). See also the Brazilian Counter-Case of 30 September 1928 (*ibid.*, p. 240).

⁶⁵¹ Counter-Case of the French Government dated 1 October 1928 (*ibid.*, pp. 255 and 257). See also the Case of the French Government dated 29 June 1928 (*ibid.*, p. 186) and the oral statement by its Counsel (*ibid.*, p. 109).

⁶⁵² *Brazilian Loans, P.C.I.J., Judgment No. 15, Series A, No. 21*, p. 120.

an act of the State in connexion with the special category of obligations "to act" which is represented by the so-called international obligations "of prevention".⁶⁵³ It is precisely in relation to these obligations that "fortuitous event", in particular, can operate as a circumstance precluding the wrongfulness of an act of a State which is not in conformity with an international obligation "to act". Where the international obligation is to ensure that an event caused by another person does not occur, what may be "fortuitous" is the occurrence of the event itself. In other words, the manifestly unexpected and unforeseeable nature of the event makes its occurrence a "fortuitous event", and it is this feature which may have made it impossible for the State organs to comply with the obligation or to realize that their conduct might not have had the effect of preventing the event, as the obligation required. Since this quality of "fortuitous event", if present, removes the possibility of the State being charged with culpable negligence,⁶⁵⁴ it may be valid justification at the international level for any failure to prevent the occurrence of the event.

(26) Among the many examples, mention might be made of the *Prats* case. In 1862, during the American Civil War, a British ship and its cargo were burned by the Confederates. The cargo belonged to a Mexican citizen, Salvador Prats, who brought a claim against the United States of America which was referred to the Mexico/United States Mixed Commission, established under the Convention of 4 July 1868. The American and Mexican Commissioners concurred in dismissing the claim. The United States Commissioner, Wadsworth, argued that his country's Government could not be required to protect aliens and their property in territory withdrawn from its control and subject to that of the insurgents so long as that state of affairs continued.⁶⁵⁵ The Mexican Commissioner, Palacio, particularly stressed the notion of "possibility" as limiting the obligation of protection, and in that connexion, commented as follows:

... Possibility is, indeed, that last limit of all the human obligations; the most stringent and inviolable ones cannot be extended to more ... [To exceed] this limit would be equivalent to impossibility; and so the jurists and law writers, in establishing the maxim *ad impossibile nemo tenetur*, have merely been the interpreters of common sense

...
Under such a state of things [state of war], it is not in the power of the nation to prevent or to avoid the injuries caused or intended to be caused by the rebels ... and as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no

⁶⁵³ This term is used to denote those international obligations which require the State to act in such a way as to prevent the occurrence of events injurious to foreign States and aliens; these events may have their origin either in natural causes or, more frequently, in the activities of private individuals, or, at all events, of persons whose acts are not attributable to the State itself.

⁶⁵⁴ This remark does not, of course, imply that the cases in which the State may not be accused of culpable negligence and held internationally responsible for not having prevented the occurrence of an event should be confined to those in which the event in question, because of its unexpected and unforeseeable nature, takes on the shape of a genuinely "fortuitous event". There may be other convincing reasons for ruling out the existence of culpable negligence, in view also of the fact that the degree of diligence required for prevention varies according to the content of the obligation and the specific aspects of each particular case.

⁶⁵⁵ See J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. III, p. 2889, and Secretariat Survey, para. 341.

responsibility without *fault (culpa)*, and it is too well known that there is no fault (*culpa*) in having failed to do what was impossible. The *fault* is essentially dependent upon the will, but as the will completely disappears before the force, whose action cannot be resisted, it is a self-evident result that all the acts done by such force ... can neither involve a fault nor an injury nor a responsibility.

[There is nothing] strange [in speaking] of violence (*vis major*) when the question is of nations, and even of very powerful ones.⁶⁵⁶

(27) In 1864, during the American Civil War, some 20 members of the Confederate Army managed to slip through the frontier defences between Canada and the United States; having arrived at Saint Albans in Vermont, they destroyed property there, looted the village and then returned to Canada with their spoils. The United States Government claimed that the Canadian authorities had failed in their duty to prevent military operations taking place against the United States from Canadian soil. The British Government replied that no negligence was attributable to the Canadian authorities and that what had occurred could in no way have been foreseen. In its decision in the *Saint Albans Raid* case, the American and British Claims Commission, set up under the Treaty of 8 May 1871, rejected the United States claim and pointed out in particular that the Canadian authorities could not have discovered the preparations for the raid, which had been planned and arranged in the greatest secrecy.⁶⁵⁷

(28) During more or less the same period, a vessel carrying Mr. Wipperman, the United States Consul in Venezuela, ran aground on an unfrequented stretch of the Venezuelan coast. Indian tribes attacked the vessel and looted the Consul's belongings. The United States Government demanded reparation from Venezuela, claiming that the latter had failed in its duty to protect a foreign consul. The dispute was referred to the United States/Venezuelan Claims Commission set up under the Convention of 5 December 1885. On behalf of the Commission, Commissioner Findlay rejected the American claim on the ground that there could be no possible parallel between the case of a consul residing in a large city who was attacked by hostile individuals whom the police or army ought to keep under control, and:

... the *accidental** injury suffered by an individual in common with others, not in his character as consul, but as passenger on a vessel which has been unfortunate enough to be stranded on an unfrequented coast, subject to the incursions of savages which *no reasonable foresight could prevent** ... there is nothing ... to show that the Government had any notice of the incursion or any cause to expect that such a raid was *threatened** ... the raid was one of those *occasional and unexpected*

⁶⁵⁶ Moore, *op. cit.*, pp. 2893 *et seq.* and Secretariat Survey, para. 341. Among the many cases in which similar views are expressed, see the Egerton and Barnett, the British Claims in Spanish Zone of Morocco Claims, and the Home Insurance Co. cases in Secretariat Survey, paras. 354, 412-420 and 426-429 respectively.

Further pertinent statements of position can also be found in the case of German Reparations under Article 260 of the Treaty of Versailles, which involved the effect of *force majeure* on Germany's obligation to take possession of certain undertakings or concessions owned by German nationals (Secretariat Survey, paras. 409-411).

⁶⁵⁷ Commissioner Frazer, whose opinion was accepted by the majority of the Commission, observed:

"The raid upon Saint Albans was by a small body of men, who entered that place from Canada without anything to indicate a hostile purpose *Such was the secrecy with which this particular affair was planned** that I can not say it escaped the knowledge of Her Majesty's officers in Canada because of *any want of diligence on their part** which may possibly have existed. I think rather it was because *no care** which one nation may reasonably require of another in such cases *would have been sufficient to discover it**." See Moore, *op. cit.*, vol. IV, p. 4054; reproduced in Secretariat Survey, para. 339.

outbreaks against which ordinary and reasonable foresight could not provide.*⁶⁵⁸

(29) Commissioner Findlay took a similar position in his opinion in the *Brissot et al.* case. Rejecting Venezuela's responsibility for damage suffered by the American vessel, *Apure*, which was attacked by a group of rebels while it was carrying General García, President of one of the states forming part of the Republic of Venezuela, the Commissioner pointed out that the Venezuelan Government:

... surely had no means of knowing of or anticipating such a murderous outbreak*... General García and his detachment of troops on board the *Apure*... certainly do not appear to have apprehended any difficulty at this particular point. *The attack was in the nature of an ambush and complete surprise**. It would be wholly unwarranted... to hold Venezuela responsible for not anticipating and preventing an outbreak of which the persons most interested in knowing and the very actors on the spot had no knowledge.⁶⁵⁹

(30) Finally, there is the decision of 19 May 1931 of the British/Mexican Claims Commission, established under the Convention of 19 November 1926, in the *Gill* case. John Gill, a British national residing in Mexico, had his house destroyed as a result of sudden and unforeseen action by opponents of the Madero Government. The Commission maintained that a Government could not be held responsible for failure to prevent an injurious act where that failure was due not to negligence but to its being genuinely impossible for the Government authorities to take immediate protective measures in the face of a "situation of a very sudden nature".⁶⁶⁰

This case, like the others already cited, therefore confirms that according to international jurisprudence—and indeed, the practice of Governments—failure by a State to prevent an event injurious to a foreign State or to aliens ceases to be internationally wrongful if the event in question was so unexpected and unforeseeable that its occurrence in such circumstances was bound to be viewed as a fortuitous event.

(31) "Material impossibility" as a justification for the non-performance of international obligations "of prevention" has also been invoked with regard to situations other than those in which the State having the obligation had lost control of territory, as the result of an insurrection or for other reasons. Reference may be made on this point to the *Corfu Channel* case and the conflict between the views expressed by the majority of the International Court of Justice in its Judgment of 9 April 1949 and by Judge Krylov in his dissenting opinion. In its Judgment the Court stated that although it had not been proved that Albania had itself laid the mines in the waters of the Channel, it certainly could not have been ignorant of their existence. Accordingly, Albania at least had the obligation to notify foreign vessels of their presence; it could and should have done so immediately, even if the mines had been laid only a short time before the disaster that they caused for the British warships. That grave omission therefore engaged Albania's international responsibility.⁶⁶¹ Judge Krylov, on the other hand, denied in his dissenting opinion that Albania had breached the

obligation to warn the British ships of the danger to them. Even if Albania had known of the existence of the minefield before the date of the incident, the Albanian coastal guard service could not, he claimed, have warned the British ships on that day since it had neither the time nor the technical means to do so.⁶⁶² The majority opinion of the Court and the dissenting opinion therefore differed only on the point of fact whether it was materially possible for the Albanian authorities to warn the British ships of their danger in time. They agreed, however, that if it had actually been "materially impossible" for Albania to warn the British vessels, Albania could not have been charged with any breach of the obligation and, consequently, with any internationally wrongful act.

(32) A careful analysis of the opinions expressed by the authors of scholarly works⁶⁶³ reveals that the latter are virtually unanimous, despite differences in use of terms and definitions of notions, in maintaining that the wrongfulness⁶⁶⁴ of an act of the State is precluded if the State found it *materially impossible* to adopt conduct other than the conduct which it did adopt in a given case and which was not in conformity with its international obligation. Some writers expressly assert that a material impossibility of performing the obligation precludes the wrongfulness of an act which is not in conformity with that obligation,⁶⁶⁵ others—and this really amounts to the same thing—stress the need for the conduct to have been "voluntary", "freely adopted", and so on, for there to be wrongfulness and, consequently, responsibility.⁶⁶⁶ Many authors mention *force majeure* as a circumstance precluding wrongfulness and, whatever meaning and scope they may give the expression, they unquestionably include in *force majeure* the idea of a situation that makes it absolutely impossible for the State to comply with the

⁶⁶² *Ibid.*, p. 72, and Secretariat Survey, para. 306.

⁶⁶³ See in particular the treatment of the subject in Secretariat Survey, paras. 487 to 560.

⁶⁶⁴ Some writers speak of "responsibility being precluded". On this point, see the remarks above in the introductory commentary to the present chapter of the draft.

⁶⁶⁵ For example, Cheng (*op. cit.*, p. 223) writes:

"An unlawful act must be one emanating from the free will of the wrongdoer. *There is no unlawful act** if the event takes place independently of his will and in a manner uncontrollable by him, in short if it results from *vis major*: for the obligation, the violation of which constitutes an unlawful act, ceases when its observance becomes impossible". See also Ténékidès, *loc. cit.*, p. 785.

⁶⁶⁶ For instance, G. Sperduti ("Sulla colpa in diritto internazionale", Istituto di Diritto internazionale e straniero della Università di Milano, *Comunicazioni e studi* (Milan, Giuffrè, 1950), vol. III, p. 103) states that *force majeure* precludes wrongfulness. He adds the following comment:

"*Force majeure* exerts, with respect to an abstract entity's responsibility... an influence analogous to violence against the person of organs with regard to the validity of legal instruments: in both cases, in view of the psychological impossibility of determining (*vis absoluta*) or freely determining (*vis compulsiva*) to act as one should, the activity originated by the individual organ either may not be regarded as an activity of the entity or in any event, because of the unusual circumstances, does not give rise to the consequences ensuing from the activities of the entity". [Translation by the Secretariat.]

Similarly, Jimenez de Aréchaga (*loc. cit.*, p. 544) writes that "there is no responsibility if a damage ensues independently of the will of the State agent and as a result of *force majeure*". In the opinion of M. Sibert (*Traité de droit international public* (Paris, Dalloz, 1951), vol. II, p. 311), if the injurious act is to be imputed to its author "it must result from his free determination". Similarly, in the view of G. Schwarzenberger ("The fundamental principles of international law", *Recueil des cours*... 1955-I (Leyden, Sijthoff, 1956), vol. 87, p. 351), if there is to be responsibility "the illegal act" must be "voluntary". See also Quadri, *op. cit.*, p. 589, and Brownlie, *Principles*... (*op. cit.*), p. 423.

⁶⁵⁸ See Moore, *op. cit.*, vol. III, pp. 3040–3043, and Secretariat Survey, paras. 349–350.

⁶⁵⁹ Moore, *op. cit.*, vol. III, p. 2969 and Secretariat Survey, para. 352.

⁶⁶⁰ United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No.: 1952. V.3), p. 159, and Secretariat Survey, para. 463.

⁶⁶¹ *I.C.J. Reports 1949*, p. 23, and Secretariat Survey, para. 303.

obligation.⁶⁶⁷ In addition, preclusion of the wrongfulness of the conduct adopted by the State in conditions which make it absolutely impossible for it to fulfil its obligation is implicitly but necessarily recognized by writers who, although they do not expressly mention the concepts of *force majeure* and impossibility of performance, exclude the possibility of the State being held responsible in cases in which it cannot be charged with either malice or negligence. Negligence can scarcely be attributed to a State whose conduct is dictated by circumstances in which, regardless of its will, it is absolutely impossible for it to act otherwise.⁶⁶⁸

(33) Doctrine has not contributed a great deal to defining "fortuitous event", and thus to differentiating it from "*force majeure*". It has been largely taken up⁶⁶⁹ with the debate between those who hold the view that the international responsibility of States for acts not in conformity with an international obligation is an "objective" responsibility⁶⁷⁰ and those who hold the contrary view, that a precondition for the existence of an internationally wrongful act of the State giving rise to responsibility is, if not intention, at least negligence, in the conduct of the State organ.⁶⁷¹ Writers, and particularly the greater number who subscribe to the second proposition, have concentrated on defining "negligence" and determining the dividing line between conduct which remains "excusable", although not in conformity with an international obligation, and conduct which must be regarded as a genuine "breach" of that obligation. Obviously, however, for the advocates of this second approach a fortuitous event comes beyond any shadow of doubt under the heading of circumstances which exclude culpable negligence by that organ and therefore preclude the international wrongfulness of its act or omission. Moreover, it should not be thought that those writers who see international responsibility as a responsibility independent of the "fault" of the organ which engages in the conduct go so far as to repudiate something as logical as preclusion of the State's responsibility for conduct adopted in a situation of fortuitous event. On the contrary,

they include the authors of some of the most recent and searching studies, who take an open stand in support of such preclusion.⁶⁷²

(34) It should also be noted that two codification drafts expressly mention *force majeure* as a circumstance precluding, in international law, either the wrongfulness of an act committed by a State or the international responsibility flowing from that act i.e., the draft prepared by García Amador for the Commission and the draft prepared by Graefrath and Steiniger. Even though the term "*force majeure*" seems to be used in these drafts in a wider sense than that of a circumstance making the performance of an obligation *materially* impossible, it is self-evident that it must include situations of material impossibility.⁶⁷³ Moreover, although other codification drafts do not expressly mention *force majeure* as a circumstance precluding wrongfulness, that does not necessarily mean it has no value as a circumstance precluding the wrongfulness of an act of a State, particularly since these drafts make no mention of other circumstances precluding wrongfulness either.⁶⁷⁴

(35) Although fortuitous event is not specifically mentioned as a circumstance precluding the wrongfulness of an act of a State in the codification drafts, the fact remains that several of them generally make the existence of the international responsibility of the State conditional upon whether the acts giving rise to that responsibility, or at least acts of omission,⁶⁷⁵ are vitiated by bad faith or negligence. Other drafts lay down the same condition in regard to the more restricted field with which they are concerned, namely, acts causing injury to the person or property of aliens.⁶⁷⁶ Again, others do so in connexion with acts which are not in conformity with obligations of prevention.⁶⁷⁷ These drafts therefore implicitly include

⁶⁷² Luzzatto (*loc. cit.*, p. 93) maintains that obligations to make reparation can arise out of acts of the State despite the fact that those acts cannot possibly be regarded as "wrongful", since they involve neither bad faith nor negligence. But he also points out that such an obligation may not exist where the act of the State was due to *force majeure* or a fortuitous event.

⁶⁷³ Article 17, para. 1 of the revised preliminary draft submitted to the Commission in 1961 by F. V. García Amador reads:

"An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials". (*Yearbook . . . 1961*, vol. II, p. 48, document A/CN.4/134 and Add. 1, addendum).

Article 10, para. 6 of B. Graefrath and P. A. Steiniger's draft reads:

"Die Entschädigungspflicht entfällt bei höherer Gewalt sowie im Falle eines Staatsnotstandes." [The obligation to make reparation does not apply in cases of *force majeure* or stage of emergency.] (*loc. cit.*, p. 228).

⁶⁷⁴ For a review of the subject, see Secretariat Survey, paras. 561 *et seq.*

⁶⁷⁵ See the second para. of article 1 of the draft prepared by K. Strupp (*Yearbook . . . 1969*, vol. II, p. 151, document A/CN.4/217 and Add. 1, annex IX), and article 3 of the draft prepared by A. Roth (*ibid.*, annex X).

⁶⁷⁶ See article 1 of the draft adopted by the Japanese branch of the ILA and the International Law Association of Japan (*ibid.*, p. 141, annex II), and article I of the resolution prepared in 1927 by the Institute of International Law (*Yearbook . . . 1956*, vol. II, pp. 227–228, document A/CN.4/96, annex 8).

⁶⁷⁷ See articles 10, 11, 12 and 14 of the draft which the Harvard Law School prepared in 1929 (*ibid.*, p. 229, annex 9) and article 3, paras. 1 (a) and (b), and 5–13 of the draft which it prepared in 1961 (*Yearbook . . . 1969*, vol. II, pp. 143 *et seq.*, document A/CN.4/217 and Add. 1, annex VII), and article 7 of the revised preliminary draft drawn up by Gracia

(Continued on following page.)

⁶⁶⁷ See, for example, Basdevant, *loc. cit.*, p. 555; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939), pp. 62–63; Delbez, *op. cit.*, p. 368; R. Luzzatto, "Responsabilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. 51, No. 1 (1968), p. 93; D. Ruzić, *Droit international public* (mémentos Dalloz), 3rd ed. (Paris, Dalloz, 1978), p. 56; Giuliano, *op. cit.*, p. 601.

Very many authors have referred to "*force majeure*" as a circumstance justifying conduct not in conformity with the State's obligations concerning the treatment of aliens; see Secretariat Survey, paras. 538 *et seq.* The position taken by J. Goebel deserves attention for the following statement: "The concept of *vis major* is a doctrine of municipal law which has been transferred to international jurisprudence to enable a State to escape liability where it otherwise would be responsible." ("The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil war", *American Journal of International Law* (New York), vol. 8, No. 4 (October 1914), p. 813).

⁶⁶⁸ On the other hand, some authors (Quadri and Sperduti, for example) see no justification for the converse proposition, namely, that the requirement that the State's act be committed voluntarily necessarily implies that the State has not been negligent. Some supporters of the argument that *force majeure* is a circumstance precluding wrongfulness are at the same time, like Personnaz, Delbez and Ruzić, advocates of the view that the absence of "fault" or "negligence" is not sufficient to preclude wrongfulness.

⁶⁶⁹ A full account appears in Secretariat Survey, paras. 488 *et seq.* See also the very discerning review of the various positions given by Luzzatto, in "Responsabilità . . ." *loc. cit.*, pp. 53 *et seq.*

⁶⁷⁰ For the principal examples, see Secretariat Survey, foot-notes 703–722.

⁶⁷¹ *Ibid.*, foot-notes 683–702.

fortuitous event among the circumstances in which international responsibility does not arise.

(36) From the survey of State practice, international judicial decisions and doctrine, it can, in the opinion of the Commission, be concluded that in international law too there is a well-established and unanimously recognized principle that an act of the State not in conformity with what would otherwise be required of it by an international obligation does not constitute an internationally wrongful act of that State if, as a result of a situation of *force majeure* or fortuitous event, the State is in a position of *material impossibility* of acting otherwise or of realizing that it is not acting in conformity with the obligation. One or two further remarks may help towards clarifying the conditions under which this conclusion is warranted. Firstly, the *force majeure* must actually be *irresistible* and the occurrence of the external event must be objectively *unforeseen*; in other words, the State must have no real possibility of escaping the effects of such a force or event. Secondly, the State on which the obligation is incumbent *must not itself have contributed, intentionally or through negligence, to the occurrence of the situation of material impossibility* which prevents it from complying with the obligation or from realizing that the conduct adopted is not in conformity with the obligation. For example, a State may not invoke the destruction of property which it was required to hand over to another State as justification for not having done so if it has itself knowingly destroyed the property or caused it to be destroyed, or if it has negligently failed to prevent it from being destroyed. Likewise, it may not invoke engine damage as a pretext for its aircraft having entered the airspace of another State if the damage is attributable to its own action or its negligence. Admittedly, at the moment when it adopts the conduct not in conformity with the international obligation incumbent upon it, it cannot act otherwise or know that its conduct breaches the obligation, but the fact that it is in that situation is its own doing and, therefore, it cannot use the situation to justify or excuse the conduct.⁶⁷⁸

(37) If the conditions specified above are met, the undoubted effect of the material impossibility resulting from *force majeure* or fortuitous event is to preclude the wrongfulness of an act of the State committed in those conditions, even though that act is not in conformity with what is otherwise required of the State by the obligation. An obligation rendered unperformable for reasons of *force majeure* or fortuitous event is an obligation which subsists, but is made definitively or temporarily in-

operative in that instance. No breach of this obligation can occur in such circumstances. The objective element of a wrongful act being non-existent, there is no internationally wrongful act.

(38) In connexion with the comment in the previous paragraph, the Commission wishes to point out that in cases where an act of the State has a continuing character, the question arises as to what the effect would be if the situation of *force majeure* or fortuitous event which existed at the beginning of the act ceased during its continuance. In the Commission's view, whether the State's conduct consists of an action or an omission, it will, if it remains unchanged, undoubtedly become an internationally wrongful act once the situation of *force majeure* or fortuitous event ceases to exist.⁶⁷⁹ In the case of an obligation "not to act", to refrain from discharging oil at sea, for example, any such discharge which is due to *force majeure* or a fortuitous event and is therefore not wrongful, will become wrongful if it continues once the situation of *force majeure* or fortuitous event has ceased. In the case of an obligation "to act", to supply coal or some other product of the sub-soil, for instance, a failure to supply that is excusable if it is due to a calamity or other natural cause will become wrongful as soon as conditions allow the extraction and supply of the product to be resumed.⁶⁸⁰ In other words, the wrongfulness of the act of the State is precluded only in relation to that part of the continuing act which takes place while the situation of *force majeure* or fortuitous event subsists.

(39) Some members of the Commission, while agreeing in principle that the wrongfulness of an act committed by the State in circumstances covered by the provisions of the present article is precluded, still questioned whether it was right that, where an act committed in conditions of *force majeure* or fortuitous event nevertheless caused material damage, all of the burden should fall on the State which suffered the damage either itself or in the person of its nationals. They thought it unfair that the damage, although in some ways the consequence of imponderables, should be borne solely by its victims, who were quite as innocent as those who caused it. In the opinion of those members, it would be proper to envisage at least some sharing of the burden. The Commission endorsed these views, pointing out that the article formulated here precludes the wrongfulness of an act of the State which is not in conformity with an international obligation and is committed as a result of *force majeure* or a fortuitous event and that it consequently precludes the attribution to

(Foot-note 677 continued.)

Amador in 1961 (*Yearbook* . . . 1961, vol. II, p. 47, document A/CN.4/134 and Addendum). It may be interesting to note that this last provision, in dealing with determination of the international responsibility of the State for injuries caused an alien through the conduct of individuals, expressly stipulates that the circumstances to be taken into account in regard to such determination "shall include, in particular, the extent to which the injurious act could have been foreseen* . . ."—which implies that a fortuitous event is necessarily excluded from those cases in which responsibility can be established, since a fortuitous event is, by definition, an *unforeseeable* event.

⁶⁷⁸ This is the condition to which the Swiss Government referred (see para. 8 of this commentary, above) when, in its reply on point V of the request for information submitted to States by the Preparatory Committee of the 1930 Codification Conference, it expressly mentioned fortuitous occurrences and *vis major* as circumstances precluding international responsibility, but with the proviso "that the State might nevertheless be held responsible if the fortuitous occurrence or *vis major* were preceded by a fault, in the absence of which no damage would have been caused to a third State in the person or property of its nationals"*.

⁶⁷⁹ In 1915, two German zeppelin airships entered the airspace of the Netherlands, a neutral State; at one particular moment their position was signalled to them and they were required to land, but they continued on their course. The Netherlands Government contended that, even though the two airships might have flown over Netherlands territory as a result of a chance error, their conduct was no longer justified once they had been acquainted with their situation. The German Government recognized the merits of the Netherlands protest and expressed its regrets. See Hackworth, *op. cit.*, vol. VII (1943), pp. 551–552.

⁶⁸⁰ In the *Société Commerciale de Belgique* case, Counsel for the Belgian Government maintained that "in obligations relating to fungible things, such as a sum of money, there is never any *force majeure*; there can only be a more or less prolonged state of insolvency which does not affect the legal obligation to pay". [Translation by the Secretariat]. (*P.C.I.J.*, Series C, No. 87, p. 270.) Yet there may very well be a situation of *force majeure* which prevents payment at a given moment, but by its very nature that situation is temporary. Once it has ceased, the obligation automatically becomes operative again, and if the State having the obligation then continues in breach of its obligation, it is acting wrongfully.

that State of responsibility for a wrongful act; however, it does not exclude the possibility that different rules may operate in such cases and place upon the State obligations for total or partial compensation that are not connected with the commission of a wrongful act. In the opinion of the Commission, a thorough study of such obligations could be made within the framework either of part 2 of the report on State responsibility for wrongful acts or of the report on liability arising out of acts not prohibited by international law.

(40) As to the *formulation of the article*, the Commission wishes to point out that the wording of *paragraph 1* emphasizes, by the use of the adjective “irresistible” qualifying the word “force”, that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means. The adjectives “unforeseen” and “external” preceding the word “event” make it clear that the event in question must be one to the occurrence of which the State has remained a stranger,⁶⁸¹ and that the occurrence must have been neither foreseen nor of an easily foreseeable kind. The expression “beyond its control” confirms, in regard to the event, what has just been stated with respect to the adjective “irresistible”, which precedes the word “force”. The event must be an act which occurs and produces its effects without the State being able to do anything which might rectify the event or might avert its consequences. The adverb “materially” preceding the word “impossible” is intended to show that, for the purposes of the article, it would not suffice for the “irresistible force” or the “unforeseen external event” to have made it *very difficult* for the State to act in conformity with the obligation or to know that its conduct was in breach of the obligation. In other words, the Commission has sought to emphasize that the State must not have had any option in that regard. Finally, the words “*Which made it* materially impossible for the State . . .” are intended to bring out the fact that there must have been a *causal link* between the “irresistible force” or “unforeseen external event” and the “material impossibility” experienced by the State.

(41) *Paragraph 2* stipulates that “Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility”. Its purpose is to specify the other condition required in order for the provisions of paragraph 1 to operate. If the State contributes in any way—intentionally or also through negligence—to the occurrence of the situation of material impossibility created by the *force majeure* or fortuitous event, the wrongfulness of the act committed by the State is not precluded, even in the presence of other factors genuinely beyond its control.

(42) Lastly, the Commission considered whether, bearing in mind the comments already made on this point, it should add to the article a third paragraph stating that preclusion of the wrongfulness of an act of a State committed in the circumstances indicated in paragraphs 1 and 2 does not affect the possibility that the State committing the act may, on grounds other than that of responsibility for a wrongful act, incur certain obli-

gations, such as an obligation to make reparation for damage caused by the act in question. It found, however, that a stipulation of that kind would also have to apply to other circumstances precluding wrongfulness dealt with in the present chapter. It therefore decided that at its next session, after completing its consideration of the various circumstances precluding the international wrongfulness of an act of the State, it would examine the advisability of inserting such a proviso in this chapter.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

Commentary

(1) This article deals with another circumstance which may preclude wrongfulness in international law, namely, that of the “distress” of the author of the conduct which constitutes the act of State whose wrongfulness is in question. “Distress” means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question.

(2) In the cases of *force majeure* and fortuitous event covered by article 31 of the draft, the organ or person acting on behalf of the State finds it materially impossible to act other than in a manner not in conformity with the obligation. It follows that the conduct adopted in conditions of *force majeure* is involuntary, as has been pointed out. The individual who is acting has no choice: an irresistible force compels him to adopt the conduct which is not in conformity with the conduct required by the international obligation incumbent on his State. Similarly, the conduct adopted in a situation of fortuitous event is, if not involuntary, at least not intentional as regards its non-conformity with an international obligation. In the case of distress, on the other hand, there is theoretically a choice, so that the conduct adopted is not entirely involuntary. However, this choice is not a “real choice” or “free choice” as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the “possibility” of acting in conformity with the international obligation is therefore only apparent. In practice, it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress. For this reason, writers who have considered this have often defined it as one of “relative impossibility” of complying with the international obligation; having thus brought it into a closer relationship with the case of

⁶⁸¹ On the other hand, the use of the word “external” is not intended to signify that the event in question must necessarily take place beyond the frontiers of the State. The Commission decided to retain the word “external”, which some members considered superfluous, in order to obviate any doubts about the point which it wished to make.

“material” or “absolute” impossibility, they have usually dealt with it in connexion with *force majeure*.⁶⁸²

(3) Moreover, the Commission must point out that, in the situations of “distress” envisaged in this article, the choice that may theoretically be open to the agent of the State committing the act is not between respecting international commitments of the State and safeguarding a higher interest of that State. The extreme and imminent danger is a danger to the person of the State organs adopt the conduct constituting, in the case in point, the act of the State, and not to the existence of the State itself or to one of its vital interests. What is then involved is situations of “necessity” with respect to the actual person of the State organs, and not any real “necessity” of the State. This other characteristic element of the situations of “distress” dealt with in the present article thus enables us to distinguish them from situations of “state of emergency” which will be dealt with in the following article: i.e., situations of grave and imminent danger to the State and its vital interests.

(4) In international practice, distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea—for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster. In practice, there have also been cases involving the violation of a land frontier in order to save the life of a person in danger.⁶⁸³

(5) The many instances of violation of the airspace of a foreign State⁶⁸⁴ where the existence of a grave danger to the very life of the person of the organ which was responsible for complying with an international obligation of its State has been invoked to justify the conduct of the organ which was not in conformity with the obligation, include one particularly significant case, namely, that of the entry into the airspace of Yugoslavia in 1946 by military aircraft of the United States of America. On 9 and 19 August 1946, two United States military aircraft entered Yugoslav airspace without authorization and were attacked by the Yugoslav air defences. The first aircraft managed to make a forced landing and the second crashed. The United States Government maintained that the two aircraft had entered Yugoslav airspace solely in order to escape extreme danger, and it lodged a protest

with the Yugoslav Government against the attack on the aircraft. The response of the Yugoslav Government was to denounce the systematic violation of Yugoslav airspace, which it claimed could only be intentional, in view of the frequency with which it happened. However, in a note dated 30 August 1946, the Yugoslav Chargé d’Affaires informed the American Department of State that Marshal Tito had forbidden any firing on aircraft which flew over Yugoslav territory without authorization and had presumed that:

For its part, the Government of the United States of America would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities.⁶⁸⁵

In his reply dated 3 September 1946, the American Acting Secretary of State reiterated the assertion that:

No American planes have flown over Yugoslavia intentionally without advance approval of Yugoslav authorities *unless forced to do so in an emergency*.^{*} I presume that the Government of Yugoslavia recognizes that in case a plane and its occupants are jeopardized, the aircraft may change its course so as to *seek safety*,^{*} even though such action may result in flying over Yugoslav territory without prior clearance.⁶⁸⁶

Hence the two Governments did in fact agree that violation of air boundaries was justified when such conduct was necessary in order to save the aircraft and its occupants.

(6) These principles are confirmed by cases of violation of a sea boundary. On the night of 10–11 December 1975, for example, British naval vessels entered Icelandic territorial waters. According to the United Kingdom Government, the vessels in question had done so in search of “*shelter from severe weather, as they have the right to do under customary international law*.”⁶⁸⁷ Iceland, on the other hand, maintained that British naval vessels were in its waters for the sole purpose of provoking an incident. But—and this is what concerns us here—Iceland did not contest the point of law that if the British vessels had been in a situation of distress, they would have been authorized by right to enter Icelandic territorial waters.⁶⁸⁸

(7) The conventions codifying the law of the sea also provide for distress as a circumstance justifying conduct which would otherwise be wrongful. In its commentary on article 31, the Commission has already cited article 14, paragraph 3, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which, as a consequence of the right of innocent passage through foreign territorial

⁶⁸² Concerning unauthorized entry into the airspace of a foreign State by an aircraft of a State in distress, it has been written, for example, that:

“The entry may be ‘intentional’ in the sense that the pilot knows he is entering foreign airspace without express permission, but the probable alternatives, such as a crash landing or ditching, expose the aircraft . . . to such unreasonable great risk that the entry must be regarded as forced by circumstances beyond the pilot’s control (*force majeure*).” (O. J. Lissitzyn, “The treatment of aerial intruders in recent practice and international law”, *American Journal of International Law* (Washington, D. C.), vol. 47, No. 4 (October 1953), p. 588.)

⁶⁸³ As for example in a case of the violation of the Austrian border by Italian soldiers in 1862. See S.I.O.I.—C.N.R., *op. cit.*, p. 869, and Secretariat Survey, para. 121.

⁶⁸⁴ In addition to the cases mentioned in paragraphs 141, 142 and 252 of Secretariat Survey, see those cited by Lissitzyn, *loc. cit.*, pp. 559 *et. seq.* See also the cases cited by Hackworth, *op. cit.* vol. II (1941) p. 305.

⁶⁸⁵ See para. (13) of the commentary to article 31, above.

⁶⁸⁶ United States of America. *Department of State Bulletin (op. cit.)*, p. 504; in Secretariat Survey, para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to the International Court of Justice in connexion with another aerial incident case (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

⁶⁸⁷ United Nations. *Official Records of the Security Council*, Thirtieth Year, 1866th meeting. See Secretariat Survey, para. 136.

⁶⁸⁸ It may be interesting to note that, although it is not a circumstance precluding the international wrongfulness of an act of the State, “distress” has always been considered, exceptionally, as justification for the entry of foreign private vessels into ports of another State, or for the right of “stopping” and “anchoring”. In these cases, however, the wrongfulness thus precluded was wrongfulness under internal law. See the cases (including the famous one of the *Enterprise*) cited in Secretariat Survey, paras. 328–331. Again with regard to private vessels, see the position adopted by the United Kingdom Government in its Memorial of 28 August 1958 to the International Court of Justice in connexion with the *Aerial Incident of 27 July 1955 case (I.C.J. Pleadings, (op. cit.)*, pp. 358–359).

seas, permits stopping and anchoring in so far as they are rendered necessary by *force majeure* or distress.⁶⁸⁹ A similar provision appears in article 18, paragraph 2, of the 1979 "Informal Composite Negotiating Text/Revision I" on the law of the sea; this too provides for "stopping" in order to save persons, ships or aircraft in distress.⁶⁹⁰ Other conventions or draft conventions also provide for distress as a circumstance that may justify conduct different from what would normally be required. Similar provisions appear in, for example, the international conventions on the prevention of pollution of the sea. The International Convention for the Prevention of Pollution of the Sea by Oil, of 12 May 1954, stipulates in article IV, paragraph 1 (a), that the prohibition on the discharge of oil into the sea shall not apply if it takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea".⁶⁹¹ Similarly, the Convention on the Prevention of Marine Pollution by Dumping of Wastes, of 29 December 1972, provides in article V that the prohibition on the dumping of such wastes and other matter shall not apply:

When it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of *force majeure* caused by stress of weather, or in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat⁶⁹²

Many other multilateral conventions also contain provisions of this kind, which simply reflect well established principles of general international law.

(8) The Commission therefore found that a body of State practice exists, as revealed by the positions adopted by States in particular disputes and in concluding international agreements. In accordance with this practice, if a State organ adopts conduct that is not in conformity with an obligation not to cross the sea or air frontier, or possibly the land frontier, of another State without the latter's authorization, or conduct that is not in conformity with other specific obligations of the law of the sea, that conduct is not an internationally wrongful act if the organ in question was compelled to adopt it in order to save its own life or that of persons entrusted to its care. Accordingly, the Commission found that three questions arise: (a) Should it be concluded that there is a rule of general application, valid for conduct not in conformity with any international obligation regardless of the content of the obligation, or merely that there is a rule whose application must be regarded as limited to the field in which it has been expressly accepted in practice? (b) Is it only danger to the life of the organ and of the other persons mentioned that can preclude the wrongfulness of conduct not in conformity with a particular obligation, or should wrongfulness be precluded also in cases of danger to another paramount interest of those persons? (c) Should the interest safeguarded by adopting conduct not in conformity with an international obligation be proportionate to the interest protected by the obligation—an interest which is then sacrificed?

(9) Doctrine is divided on the answer to the first of these

questions.⁶⁹³ Distress has in fact been invoked as a circumstance precluding the wrongfulness of an act of the State only in specific cases where the obligation in question was not to enter the sea or airspace of another State without its authorization. Yet we have seen that certain conventions have extended the applicability of this principle to somewhat different areas, and the *ratio* of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases. Would a governmental organ pursued by insurgents or rioters who are determined to destroy it be committing an internationally wrongful act if it sought safety by entering a foreign embassy without permission? Other cases could be considered, but it is clear that the area within which they would fall is bound to be limited by the very nature of the situation envisaged, namely, where a State organ commits an act that is not in conformity with an international obligation in order to save its life or the lives of persons entrusted to its care, in a situation of serious danger. Moreover, in order to save its life or the lives of persons in its care in a situation of distress, a person-organ will not be exposed to breaches of many of the international obligations of its State, and particularly the more important of them.

(10) As to the second question, we have seen that the practice is usually to speak of a situation of distress, which may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the persons concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State, of which he is an organ, but for the purposes of the security of international relations, consideration must also be given to the inadvisability of an excessive increase in the instances in which the wrongfulness of acts of the State is precluded.

(11) With regard to the third question, it seems to the Commission beyond doubt that the wrongfulness of an action or omission not in conformity with an international obligation cannot be precluded unless there is some common degree of value between the interest protected by that action or omission and the interest ostensibly protected by the obligation; what is more, the interest sacrificed must in fact be less important than that of protecting the life of the organ or organs in distress. It would be unacceptable to attempt to justify conduct which, in order to save the life of a person or of a small group of persons, endangered the lives of a much greater number of human beings, or might prejudice higher interests of other States or of the international community as a whole.⁶⁹⁴ For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious

⁶⁸⁹ See para. (16) of the commentary to article 31, above.

⁶⁹⁰ For reference, see foot-note 637, above.

⁶⁹¹ United Nations, *Treaty Series*, vol. 327, p. 8. See Secretariat Survey, para. 91.

⁶⁹² IMCO publication, Sales No. 74.01.E, p. 19. See Secretariat Survey, para. 92.

⁶⁹³ For example, Quadri (*op. cit.*, p. 226) formulates the rule in general terms, whereas P. Lamberti Zanardi envisages its application in regard to specific obligations only, "Necessità [Diritto internazionale]", *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, pp. 905–906.

⁶⁹⁴ One member of the Commission rightly drew attention to the fact that the interests which might be jeopardized by the action committed by the State organ in distress are not necessarily represented by the saving of human lives. There are other important interests that may enter into account.

breakdown might cause a nuclear explosion at a port in which it sought refuge. In the Commission's opinion, the influence of this factor on the applicability of the principle cannot be ignored.

(12) In the light of the foregoing, the Commission, in drafting article 32, has specified in *paragraph 1* that:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme⁶⁹⁵ distress, of saving his life or that of persons entrusted to his care.

The concluding part of the paragraph defines the situation referred to in the provision by making it clear that it is a situation of "extreme distress" in which "the author of the conduct"⁶⁹⁶ which constitutes the act of that State" not in conformity with the international obligation of the latter "had no other means of saving his life or that of persons entrusted to his care".

⁶⁹⁵ By using this adjective, which is in fact virtually superfluous, the Commission has sought to strengthen the idea of limiting the situation to cases of ultimate peril.

⁶⁹⁶ The term "author of the conduct" should therefore be understood as meaning the organ, or more generally the person, whose conduct is attributable to the State according to the criteria laid down in chapter II of the draft.

(13) The Commission has sought to indicate *expressis verbis* that in order for wrongfulness to be precluded in conformity with paragraph 1 of the article it is necessary, as stated in *paragraph 2*, (a) for "the State in question" not to have "contributed" to the occurrence of the situation of extreme distress" or (b) for "the conduct in question" not to have been "likely to create a comparable or greater peril". If one or the other of these two conditions has not been fulfilled, that is sufficient to set aside any possibility of precluding wrongfulness as provided for in paragraph 1. The condition that the State in question must not have contributed to the occurrence of the situation of extreme distress is analogous to that stipulated in article 31, paragraph 2, for the case of *force majeure* or situations of fortuitous event, and it reflects the same considerations. On the other hand, the condition that the conduct in question must not have been "likely to create a comparable or greater peril" is a condition peculiar to distress as a circumstance precluding wrongfulness in international law—one which we shall encounter again when dealing with "necessity"

(14) Lastly, the Commission wishes to point out that the considerations set forth in paragraph 42 of the commentary to article 31 also apply to the provisions of article 32 concerning distress as a circumstance precluding wrongfulness in international law.

Chapter IV

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

A. Introduction

76. The Commission described in an earlier report⁶⁹⁷ the circumstances in which it had come to undertake the study of treaties to which an international organization was a party, as well as the method it had decided to follow in doing so. A number of General Assembly resolutions—resolution 3315 (XXIX), of 14 December 1974, section I, paragraph 4 (d); resolution 3495 (XXX), of 15 December 1975, paragraph 4 (d); resolution 31/97, of 15 December 1976, paragraph 4 (c) (ii); resolution 32/151, of 19 December 1977, paragraph 4 (c) (ii)—have recommended that the Commission should continue its work on this topic. General Assembly resolution 33/139 of 19 December 1978 recommended, in section I, paragraph 4 (c), that the Commission should:

(c) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations with the aim of completing, as soon as possible, the first reading of these draft articles.

77. At its twenty-sixth,⁶⁹⁸ twenty-seventh,⁶⁹⁹ twenty-ninth⁷⁰⁰ and thirtieth sessions,⁷⁰¹ the Commission adopted provisions corresponding to articles 1 to 38 of the Vienna Convention on the Law of Treaties.⁷⁰² At its thirtieth session, the Commission also quickly considered articles 39 to 41 as submitted by the Special Rapporteur in his seventh report⁷⁰³ and referred them to the Drafting Committee, but did not have time to consider them further.

78. At its thirty-first session, the Commission, at its 1546th to 1553rd and 1557th to 1559th meetings, considered the texts of articles 42 to 60 as submitted by the Special Rapporteur in his eighth report (A/CN.4/319)⁷⁰⁴ and referred all those articles to the Drafting Committee. On the Committee's report, the Commission adopted articles 39 to 60 at its 1576th meeting.

79. The texts of all the draft articles on treaties concluded between States and international organizations or between international organizations adopted previously, followed by the texts of articles 39 to 60, adopted by the

⁶⁹⁷ *Yearbook . . . 1974*, vol. II (Part One), pp. 290 *et seq.*, doc. A/9610/Rev.1, chap. IV.

⁶⁹⁸ *Ibid.*, pp. 294 *et seq.*, document A/9610/Rev.1, chap. IV, sect. B.

⁶⁹⁹ *Yearbook . . . 1975*, vol. II, pp. 169 *et seq.*, document A/10010/Rev.1, chap. V, sect. B.

⁷⁰⁰ *Yearbook . . . 1977*, vol. II (Part Two), pp. 95 *et seq.*, document A/32/10, chap. IV, sect. B.

⁷⁰¹ *Yearbook . . . 1978*, vol. II (Part Two), pp. 123 *et seq.*, document A/33/10, chap. V, sect. B.

⁷⁰² For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention is hereinafter referred to as the "1969 Vienna Convention".

⁷⁰³ *Yearbook . . . 1978*, vol. II (Part One), document A/CN.4/312.

⁷⁰⁴ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

Commission at its thirty-first session, with the commentaries thereto, are reproduced below, in order to facilitate the work of the General Assembly.⁷⁰⁵

80. The articles considered and adopted by the Commission at its thirty-first session are those of part IV (Amendment and modification of treaties) (articles 39 to 41) and a substantial portion of those of part V (Invalidity, termination and suspension of the operation of treaties) (articles 42 to 60). There remain for the Commission to consider and adopt only a few articles of part V (articles 61 to 72) and the eight articles of parts VI and VII.

81. As in the case of the articles it had already considered, the Commission was able to transfer many articles of the 1969 Vienna Convention to the draft with only minor changes of wording; some it was even able to adopt as they stood. These are articles which simply develop the principles of consensus underlying the 1969 Vienna Convention and are valid for the will to be bound of any entity capable of assuming international commitments, whether it be a State or an international organization. In the case of one or two articles the Commission had to solve some rather awkward drafting problems, but it avoided elaborating on the wording of the 1969 Vienna Convention except in the interests of clarity in the text.

82. Certain articles, however—in particular, articles 45 and 46—raised important questions of substance concerning the limited international capacity of international organizations as compared with that of States and the way in which it should be regulated. In the view of some members of the Commission, this limited capacity should be reflected in more forceful provisions than those governing the capacity of States; in particular, an organization should not be allowed by its conduct to acquiesce in the validity of a treaty held to be void (article 45), and all the rules of an organization concerning the expression of its consent to be bound by a treaty should be regarded as of fundamental importance (article 46). The Commission explored formulas designed to adapt the solutions worked out at the United Nations Conference on the Law of Treaties to the particular case of the consent of international organizations, but its members were not unanimous in accepting them.

83. It will be seen that some draft articles (article 52, for example) do not actually depart from the wording agreed at the Conference on the Law of Treaties in regard to

⁷⁰⁵ See section B below. Subsection 1 contains the texts of all the provisions hitherto adopted by the Commission. Subsection 2 contains the texts of the provisions adopted at the thirty-first session and the commentaries thereto. For the commentaries to the articles adopted at the thirtieth session, see foot-note 701 above; for the commentaries to the articles adopted at the twenty-ninth session, see foot-note 700 above; for the commentaries to the articles adopted at the twenty-sixth and twenty-seventh sessions, see respectively foot-notes 698 and 699 above.

treaties between States, but nevertheless entail fairly substantial commentaries, either to remind the reader of the rationale and scope of the articles concerning treaties between States or to illustrate the practical situations in which those provisions can be applied to treaties between international organizations or between States and international organizations.

84. In the Commission's opinion, because of the length and complexity of the set of draft articles being prepared on this topic, sufficient time should be allowed for the preparation of the observations and comments in the light of which the Commission will undertake, at the appropriate time, the second reading of the draft articles under consideration. The Commission accordingly reached the conclusion that the articles of the present draft should be submitted for observations and comments before the draft as a whole is adopted on first reading. Such a procedure, which the Commission has followed in the past with other drafts, for example, the draft articles on the law of treaties,⁷⁰⁶ would make it possible for the Commission to undertake the second reading without too much delay. As part of this general conclusion, the Commission decided at the thirty-first session, in accordance with articles 16 and 21 of its Statute, to transmit to Governments, through the Secretary-General, the draft articles on treaties between States and international organizations or between international organizations so far provisionally adopted, for their comments and observations. Furthermore, since the General Assembly recommended in paragraph 5 of resolution 2501 (XXIV), of 12 November 1969, that the Commission should study the present topic "in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice", the Commission also decided to transmit the draft articles so far provisionally adopted on the topic to those organizations for their comments and observations; in the light of Commission practice regarding its work on the topic, the organizations in question are the United Nations and the intergovernmental organizations invited to send observers to United Nations codification conferences. At its next session the Commission intends, following completion of the first reading of the entire draft, to request the comments and observations of Member States and of international organizations on the draft articles adopted at that session and, in so doing, to set a date by which comments and observations on the whole draft should be received, bearing in mind the convenience of having such comments and observations at the Commission's disposal before the session to be held in 1981.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

85. The text of articles 1 to 4, 6⁷⁰⁷ to 19, 19 *bis*, 19 *ter*, 20, 20 *bis*, 21 to 23, 23 *bis*, 24, 24 *bis*, 25, 25 *bis*, 26 to 36, 36 *bis*⁷⁰⁸ and 37 to 60, adopted by the Commission at its

⁷⁰⁶ See *Yearbook . . . 1966*, vol. II, pp. 174-175, document A/6309/Rev.1, part II, paras. 16-18.

⁷⁰⁷ The draft does not include a provision corresponding to article 5 of the 1969 Vienna Convention.

⁷⁰⁸ The Commission agreed at its thirtieth session (1512th meeting) to take no decision on article 36 *bis* and to consider the article further in the light of the comments made on its text by the General Assembly, Governments and international organizations.

twenty-sixth, twenty-seventh, twenty-ninth, thirtieth and thirty-first sessions, and the text of articles 39 to 60 with the commentaries thereto adopted by the Commission at its thirty-first session, are reproduced below for the information of the General Assembly.

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

PART I

INTRODUCTION

Article 1. Scope of the present articles

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.

Article 2. Use of terms

1. For the purpose of the present articles:

- (a) "treaty" means an international agreement governed by international law and concluded in written form:
 - (i) between one or more States and one or more international organizations, or
 - (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

- (b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b *bis*) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b *ter*) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for the purpose of negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, expressing the consent of the State to be bound by such a treaty, or performing any other act with respect to such a treaty;

(c *bis*) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for the purpose of negotiating, adopting or authenticating the text of a treaty, communicating the consent of the organization to be bound by a treaty, or performing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State,
- (ii) an international organization

which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

- (i) a State,
- (ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" or "third international organization" means a State or an international organization not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or by the rules of any international organization.

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than State or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations shall not affect:

(a) the legal force of such agreements;

(b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

(c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1 CONCLUSION OF TREATIES

Article 6. Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

Article 7. Full powers and powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

Article 8. Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

Article 9. Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the participants in the drawing-up of the treaty except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

Article 10. Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and international organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those international organizations of the text of the treaty or of the final act of a conference incorporating the text.

Article 11. Means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty is established by signature, exchange of instruments constituting a treaty act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Article 12. Signature as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

(a) the treaty provides that signature shall have that effect;

(b) the participants in the negotiation were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect; or

(b) the intention of that organization to give that effect to the signature appears from the powers of its representative or was established during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the participants in the negotiation so agreed;

(b) the signature *ad referendum* by a representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature.

Article 13. An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty

1. The consent of States and international organizations to be bound by a treaty between one or more States and one or more international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those States and those organizations were agreed that the exchange of instruments should have that effect.

2. The consent of international organizations to be bound by a treaty between international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those organizations were agreed that the exchange of instruments should have that effect.

Article 14. Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) the participants in the negotiation were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by an act of formal confirmation when:

(a) the treaty provides for such consent to be established by means of an act of formal confirmation;

(b) the participants in the negotiation were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was established during the negotiation.

3. The consent of a State to be bound by a treaty between one or more States and one or more international organizations, or the consent of an international organization to be bound by a treaty, is established by acceptance or approval under conditions similar to those which apply to ratification or to an act of formal confirmation.

Article 15. Accession as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;

(b) the participants in the negotiation were agreed that such consent might be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

2. The consent of an international organization to be bound by a treaty is established by accession when:

(a) the treaty provides that such consent may be established by that organization by means of accession;

(b) the participants in the negotiation were agreed that such consent might be given by that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be given by that organization by means of accession.

Article 16. Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting international organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting international organizations or to the depositary, if so agreed.

Article 17. Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles [19 to 23], the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting international organizations so agree.

2. Without prejudice to articles [19 to 23], the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting international organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

1. A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between one or more States and one or more international organizations when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. An international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between international organizations when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to an act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2 RESERVATIONS

Article 19. Formulation of reservations in the case of treaties between several international organizations

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 19 bis. Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 19 ter. Objection to reservations

1. In the case of a treaty between several international organizations, an international organization may object to a reservation.

2. A State may object to a reservation envisaged in article 19 bis, paragraphs 1 and 3.

3. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, an international organization may object to a reservation formulated by a State or by another organization if:

(a) the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty; or

(b) its participation in the treaty is not essential to the object and purpose of the treaty.

Article 20. Acceptance of reservations in the case of treaties between several international organizations

1. A reservation expressly authorized by a treaty between several international organizations does not require any subsequent acceptance by the other contracting organizations unless the treaty so provides.

2. When it appears from the object and purpose of a treaty between several international organizations that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between several international organizations otherwise provides:

(a) acceptance by another contracting organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;

(b) an objection by another contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty between several international organizations otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the

end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 20 bis. Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A reservation expressly authorized by a treaty between States and one or more international organizations or between international organizations and one or more States, or otherwise authorized, does not, unless the treaty so provides, require subsequent acceptance by the contracting State or States or the contracting organization or organizations.

2. When it appears from the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation formulated by a State or by an international organization requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides:

(a) acceptance of a reservation by a contracting State or a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;

(b) an objection to a reservation by a contracting State or a contracting organization does not prevent the treaty from entering into force

between the objecting State and the reserving State,
between the objecting State and the reserving organization,
between the objecting organization and the reserving State, or
between the objecting organization and the reserving organization
unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting State or organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21. Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 19 *ter*, 20 and 23 in the case of treaties between several international organizations, or in accordance with articles 19 *bis*, 19 *ter*, 20 *bis* and 23 *bis* in the case of treaties between States and one or more international organizations or between international organizations and one or more States:

(a) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving party, the provisions to which the reservation relates do not apply as between the two parties to the extent of the reservation.

Article 22. Withdrawal of reservations and of objections to reservations

1. Unless a treaty between several international organizations, between States and one or more international organizations or between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting organization only when notice of it has been received by that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the international organization which formulated the reservation.

4. Unless a treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or organization only when notice of it has been received by that State or organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23. Procedure regarding reservations in treaties between several international organizations

1. In the case of a treaty between several international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

2. If formulated when signing, subject to formal confirmation, acceptance or approval, a treaty between several international organizations, a reservation must be formally confirmed by the reserving organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Article 23 bis. Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States

1. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated by a State when signing, subject to ratification, acceptance or approval, a treaty mentioned in paragraph 1 or if formulated by an international organization when signing, subject to formal confirmation, acceptance or approval, a treaty mentioned in paragraph 1, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to a confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3 ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24. Entry into force of treaties between international organizations

1. A treaty between international organizations enters into force in such manner and upon such date as it may provide or as the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty between international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating organizations.

3. When the consent of an international organization to be bound by a treaty between international organizations is established on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 24 bis. Entry into force of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application of treaties between international organizations

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 25 bis. Provisional application of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more in-

ternational organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating State or States and organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally, of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION I OBSERVANCE OF TREATIES

Article 26. Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. Internal law of a State, rules of an international organization and observance of treaties

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

SECTION 2 APPLICATION OF TREATIES

Article 28. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29. Territorial scope of treaties between one or more States and one or more international organizations

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41], [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

SECTION 3 INTERPRETATION OF TREATIES

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in

which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4 TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS

Article 34. General rule regarding third States and third international organizations

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35. Treaties providing for obligations for third States or third international organizations

1. [Subject to article 36 bis,] 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.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

Article 36. Treaties providing for rights for third States or third international organizations

1. [Subject to article 36 bis,] 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 if 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 right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

[Article 36 bis.⁷⁰⁹ *Effects of a treaty to which an international organization is party with respect to third States members of that organization*

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise

⁷⁰⁹ See foot-note 708, above.

for them from the provisions of a treaty to which that organization is a party if:

- (a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or
- (b) the States and organizations participating in the negotiation of the treaty as well as the States members of the Organization acknowledged that the application of the treaty necessarily entails such effects.]

Article 37. Revocation or modification of obligations or rights of third States or third international organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of 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 an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.
3. When a right has arisen for a third State in conformity with paragraph 1 of 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.
4. When a right has arisen for a third international organization in conformity with paragraph 2 of 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 organization.
- [5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (a) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.]
- [6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.]
7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39. General rule regarding the amendment of treaties

1. A treaty may be amended by the conclusion of an agreement between the parties. The rules laid down in Part II apply to such an agreement.
2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:
 - (a) the decision as to the action to be taken in regard to such proposal;
 - (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.
5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:
 - (a) be considered as a party to the treaty as amended; and
 - (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41. Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless, in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION I GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty between two or more international organizations or of the consent of an international organization to be bound by such a treaty may be impeached only through the application of the present articles.
2. The validity of a treaty between one or more States and one or more international organizations or of the consent of a State or an international organization to be bound by such a treaty may be impeached only through the application of the present articles.
3. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any international organization or, as the case may be, of any State or any international organization, to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty between one or more States and one or more international organizations under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or,

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having renounced the right to invoke that ground.

3. The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization.

SECTION 2 INVALIDITY OF TREATIES

Article 46. Violation of provisions regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a

treaty between one or more States and one or more international organizations has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case referred to in paragraph 1, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest.

4. In the case referred to in paragraph 3, a violation is manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization.

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the other negotiating organizations, or to the negotiating States and other negotiating organizations, or to the negotiating States, as the case may be, prior to his communicating such consent.

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

Article 49. Fraud

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating organization, the State or the organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50. Corruption of a representative of a State or of an international organization

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52. Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

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

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty;
- (b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) the possibility of such a suspension is provided for by the treaty; or
- (b) the suspension in question is not prohibited by the treaty, and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter, and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

- (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it, either:
 - (i) in the relations between themselves and the defaulting State or international organization, or
 - (ii) as between all the parties;
- (b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

- (a) a repudiation of the treaty not sanctioned by the present articles; or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

2. TEXT OF ARTICLES 39 TO 60, WITH COMMENTARIES THERETO,
ADOPTED BY THE COMMISSION AT ITS THIRTY-FIRST SESSION

PART IV
AMENDMENT AND MODIFICATION OF
TREATIES

*Article 39. General rule regarding the amendment of treaties*⁷¹⁰

1. A treaty may be amended by the conclusion of an agreement between the parties. The rules laid down in Part II apply to such an agreement.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

Commentary

The purpose of article 39 of the Vienna Convention is to establish a simple principle: what the will of the parties has decided to do, it may also undo. Since the Convention does not lay down any particular rule as to the form of conclusion of treaties, it excludes the "*acte contraire*" principle, under which an agreement amending a treaty must take the same form as the treaty itself. That principle is valid for treaties between international organizations and treaties between one or more States and one or more international organizations. The Commission considered, however, that the permissiveness of the Vienna Convention extends only to form and that it was necessary to indicate this more clearly than the text of that convention does, but without changing its effect. First, the expression "by agreement" was replaced by the more explicit wording "by the conclusion of an agreement"; this change is not a departure from the Vienna Convention, since the latter provides that the rules laid down in Part II apply to such agreements. A paragraph 2 was then added; this contributes nothing new to the draft article, but states an essential rule relating to the consent of international organizations. The purpose of the two changes is to show that agreements amending treaties are themselves treaties, and as such subject to the rules of the present draft articles. Lastly, the proviso "except in so far as the treaty may otherwise provide" was omitted. Some members of the Commission had expressed doubts about it and it was said to serve no purpose, since the freedom of the parties in treaty matters is already safeguarded by the rules in Part II, as well as being reiterated in article 40. It is therefore unnecessary to refer to it yet again in article 39.

⁷¹⁰ Corresponding provision of the Vienna Convention:

"Article 39: General rule regarding the amendment of treaties

"A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

*Article 40. Amendment of multilateral treaties*⁷¹¹

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Commentary

The purpose of article 40 of the Vienna Convention is to deal with certain features peculiar to amendments to multilateral treaties, as regards both the amendment procedure and the situation of States with respect to the original treaty and the amended treaty. The rules which it lays down are valid for the treaties covered by the present draft articles; only slight drafting changes have been introduced, in paragraphs 2, 3, 4 and 5, to take account of the participation of international organizations in the treaties in question.

⁷¹¹ Corresponding provision of the Vienna Convention:

"Article 40: Amendment of multilateral treaties

"1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

"2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in

"(a) the decision as to the action to be taken in regard to such proposal;

"(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

"3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State.

"(a) be considered as a party to the treaty as amended; and

"(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

Article 41. Agreements to modify multilateral treaties between certain of the parties only⁷¹²

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless, in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Commentary

Article 41 of the Vienna Convention, on *inter se* agreements, applies as it stands to the treaties governed by the present draft articles.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION I. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties⁷¹³

1. The validity of a treaty between two or more international organizations or of the consent of an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

⁷¹² Corresponding provision of the Vienna Convention:

"Article 41: Agreements to modify multilateral treaties between certain of the parties only

"1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- "(a) the possibility of such a modification is provided for by the treaty; or
- "(b) the modification in question is not prohibited by the treaty and
 - "(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - "(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

"2. Unless in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification of the treaty for which it provides."

⁷¹³ Corresponding provision of the Vienna Convention:

2. The validity of a treaty between one or more States and one or more international organizations or of the consent of a State or an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

3. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Commentary

(1) Purely for reasons of drafting, article 42, paragraph 1, of the Vienna Convention has been split, without any change of substance, into two separate paragraphs, dealing respectively with treaties between two or more international organizations and treaties between one or more States and one or more international organizations. The text of article 42, paragraph 2 of the Convention is reproduced unchanged as paragraph 3 of draft article 42.

(2) The Commission nevertheless discussed a number of problems concerning the exhaustive character of part V of the present draft articles. To begin with, it considered the problems of *succession* that may arise when an international organization either succeeds another organization or is transformed into a State. Such situations seldom arise and do not fall within the purview of the present draft articles. It will probably be advisable in due course to draft an article 73 even broader than article 73 of the Vienna Convention, reserving questions relating to State succession.

(3) A further question is whether certain rules of *special* international law, such as those deriving from the Charter of the United Nations, might not produce an effect on treaties between States and organizations subject to that special international law. While it would seem rash, or at the least premature, to envisage a ground for invalidity deriving from special international law, the same might not be true merely as regards the effect of suspending the operation of a treaty. By establishing that the Charter prevails over certain treaties, does not Article 103 of the Charter, to which article 30 of the Vienna Convention and draft article 30 refer, provide that the operation of such treaties will be partially suspended? Should it not therefore be provided, even more generally, that treaties which are the constituent instruments of international organizations *may*, in regard to certain treaties concluded by members of the organization, contain a rule analogous to that in Article 103? The Commission finally took the view that it was not called upon to consider hypothetical cases which would only arise under special international law, and that, as regards Article 103 of the Charter, when it had adopted all the articles proposed it could reconsider the question of adopting a draft article extending the proviso regarding the application of Article 103 to the whole draft. It rejected the idea that this proviso should also appear in a number of articles other than article 30.

"Article 42: Validity and continuance in force of treaties

"1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

"2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

Article 43. Obligations imposed by international law independently of a treaty⁷¹⁴

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any international organization or, as the case may be, of any State or any international organization, to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Commentary

The rule set out in article 43 of the Vienna Convention has been extended, by means of a few drafting changes, to the treaties which form the subject of the present draft articles. For there can be no doubt that rules of international law can apply to an international organization independently of any treaty to which it may have been a party. Article 43 is based on considerations similar to those governing article 38.

Article 44. Separability of treaty provisions⁷¹⁵

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with

⁷¹⁴ Corresponding provision of the Vienna Convention:

Article 43: Obligations imposed by international law independently of a treaty

"The invalidity, termination or denunciation of a treaty, the withdrawal of the party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

⁷¹⁵ Corresponding provision of the Vienna Convention:

Article 44: Separability of treaty provisions

"1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

"2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty, except as provided in the following paragraphs or in article 60.

"3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where

"(a) the said clauses are separable from the remainder of the treaty with regard to their application;

"(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

"(c) continued performance of the remainder of the treaty would not be unjust.

"4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

"5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted."

respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Commentary

The detailed rules of article 44 of the Vienna Convention derive from the general principles of consensus; in draft article 44, they are extended to the treaties dealt with in the present provisions by means of a slight drafting change in paragraph 4.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty⁷¹⁶

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty between one or more States and one or more international organizations under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or,

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or,

⁷¹⁶ Corresponding provision of the Vienna Convention:

Article 45: Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

"(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

"(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

(b) it must by reason of its conduct be considered as having renounced the right to invoke that ground.

3. The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization.

Commentary

(1) Article 45 of the Vienna Convention deals with the problem of the loss by a State of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. By implication, but quite clearly, it excludes the possibility of disappearance of a right to invoke unlawful coercion (articles 51 and 52) or violation of an absolute peremptory rule (article 53) as grounds for invalidating a treaty. The article recognizes that a State may renounce its right to invoke any ground for invalidating a treaty other than those two and any ground for terminating, withdrawing from or suspending the operation of a treaty. With regard to the means whereby the right may be renounced, article 45 mentions express agreement (subparagraph (a)) and acquiescence by reason of conduct (subparagraph (b)). The former has never caused any difficulty, but at the United Nations Conference on the Law of Treaties, the latter provoked discussion and some opposition.⁷¹⁷ based on the fear that the principle it established might operate to consolidate situations secured under cover of political domination. The Conference, following the view of the Commission, adopted subparagraph (b) as a statement of a general principle based on good faith and well founded in jurisprudence.⁷¹⁸ Furthermore, the articles submitted to the Conference did not provide for prescription and a number of proposals to introduce it were rejected by the Conference; this justified still further the maintenance of a certain flexibility in the means whereby States can manifest their renunciation.

(2) The Commission has retained, in draft article 45, paragraph 1, the rule laid down at the Conference for the consent of States. The Commission discussed the case of the consent of international organizations at length, and dealt with it in paragraphs 2 and 3.

(3) The question to be decided came down to whether the same régime should be applicable to international organizations as to States. Some members of the Commission thought it should, on the ground that inequalities between States and international organizations should not be created in treaty relations.

(4) Other members inclined to the view that the far-reaching structural differences between States and organizations made it necessary to provide special rules for the latter. The unity of the State, it was said, meant that the State could be regarded as bound by its agents, who possessed a general competence in international relations. If one of them (a Head of State, a Minister for Foreign Affairs, or in certain cases an ambassador) became aware of the facts contemplated in article 45, it was the State

which became aware of them; if one of them engaged in certain conduct, it was the State which engaged in that conduct. International organizations, on the other hand, had organs of a completely different kind; and unlike a State, an organization could not be held to be duly informed of a situation because any organ or agent was aware of it, or to be bound by conduct simply because any organ or agent had engaged in it. It was therefore considered that the Commission should retain only the case provided for in subparagraph (a) of paragraph 2, which no one disputed, and avoid any provision referring to the conduct of the organization.

(5) Other members of the Commission took the view that it was even more necessary for an organization than for a State that the organs able to bind it should be aware of the situation and that the "conduct" amounting to renunciation should be the conduct of those same organs; but they believed that for the security of the organization's treaty partners, and even out of respect for the principle of good faith, the rule laid down for States should be extended to international organizations, with the stipulation that the conduct of an organization duly aware of the facts might amount to the renunciation of certain rights. That solution, it was pointed out, would protect the organization's interests better; for without sacrificing any principles, it would be able to renounce a particular right in the simplest manner possible, usually by continuing to apply the treaty after becoming aware of the relevant facts.

(6) The Commission finally agreed to propose for international organizations a subparagraph (b) which retains the effects of their conduct. However, it eliminated the term "acquiesced", used of States in paragraph 1 of the draft article and in article 45 of the Vienna Convention, as having connotations of passivity and facility which it seemed necessary to avoid; and slightly modifying the wording of subparagraph (b), it referred to renunciation of "the right to invoke" the ground in question. However, in order to produce a balanced solution that would take account of the comments reported above a paragraph 3 was added, as a reminder that both express agreement and conduct are subject to the relevant rules of the organization. Some members, although having no objection to paragraph 3, said they found it unnecessary, while others thought it had the advantage of restating a general principle which must not be overlooked when applying paragraph 2 (b) to a specific case in the light of all the circumstances.

(7) For both international organizations and States, the Commission provided that the rules set out in draft article 45 should apply to all the cases contemplated in the text, i.e. to those covered by articles 46 to 50 and articles 60 and 62. One member of the Commission, however, considered that the situation dealt with in paragraphs 3 and 4 of article 46 ought not to be subject to paragraph 2 in the case of international organizations. Conduct governed by the relevant rules of an organization could not amount to renunciation of the right to invoke a manifest violation of a provision of the rules of the organization regarding competence to conclude treaties. But the remainder of the Commission considered that organizations differed widely and that, although the relevant rules of some organizations might be very strict regarding competence to conclude treaties, that was not necessarily true of all organizations; hence no general rule other than that stated in paragraph 3 could be laid down.

⁷¹⁷ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No.E.68.V.7), pp. 390-402, 66th meeting of the Committee of the Whole, paras. 46 *et seq.*, and 67th meeting.

⁷¹⁸ *Yearbook . . . 1966*, vol. II, pp. 239-240, document A/6309/Rev.1, Part II, chap. II, commentary to article 42.

SECTION 2 INVALIDITY OF TREATIES

Article 46. Violation of provisions regarding competence to conclude treaties⁷¹⁹

1. A State may not invoke the fact that its consent to be bound by a treaty between one or more States and one or more international organizations has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case referred to in paragraph 1, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest.

4. In the case referred to in paragraph 3, a violation is manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization.

Commentary

(1) The question of "unconstitutional treaties" or "imperfect ratifications" was the subject of much theoretical discussion between the advocates of monism and dualism, but seldom led to practical applications, at least until treaties relating to the integration of Western Europe reawakened interest in it. The Commission took an undogmatic position on the matter, making reasonable provision for the security of legal relations, in which it was followed by the United Nations Conference on the Law of Treaties, which approved the text that had become article 46 of the Vienna Convention by 94 votes to none with 3 abstentions.⁷²⁰ Having regard to the fact that in the relations between States during treaty-making there are universally recognized customs and practices and that certain agents (especially the Head of State and the Minister for Foreign Affairs) are empowered by international law to express the will of the State to be bound by a treaty, article 46 recognizes the invalidity of a treaty concluded in violation of the internal law of a State, but on two conditions: the rule violated must be one of fundamental importance and the violation must have been manifest, that is to say, "objectively evident to any

⁷¹⁹ Corresponding provision of the Vienna Convention:

"Article 46. Provisions of internal law regarding competence to conclude treaties

"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

"2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

⁷²⁰ *Official Records of the United Nations Conference on the Law of Treaties, Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, (United Nations publication, Sales No.E.70.V.6), p. 88, 18th meeting.

State conducting itself in the matter in accordance with normal practice and in good faith". In other words, the partners of a State, in their dealings with it, must show reasonable caution: the course of conduct to be followed is that which any State of good faith, acting in accordance with normal practice, would adopt.

(2) The Commission discussed at length the question of the application of a provision similar to article 46 of the Vienna Convention to a treaty governed by the draft articles in course of preparation. Should the rule laid down for the consent of States simply be extended to the consent of organizations? Should the Vienna Convention rule be retained for the consent of States, but a separate rule be provided for the consent of organizations? Or should a new rule be laid down for States and organizations, but without differentiating between them? All three solutions had their supporters in the Commission. Finally, it was generally agreed that the rule laid down in the Vienna Convention should be retained for the benefit of States, but that the consent of organizations could be treated somewhat differently. The two paragraphs of article 46 were therefore split up so as to deal separately with the case of States (paragraphs 1 and 2) and that of organizations (paragraphs 3 and 4). The title of the article was also changed in order to avoid any reference to "internal law" in regard to organizations, the Commission having discarded that expression in favour of "rules of the organization" (article 2, paragraph (j)). Thus, apart from a few drafting changes, the substance of paragraphs 1 and 2 of draft article 46, which relate to the consent of States, is identical with that of article 46 of the Vienna Convention.

(3) With regard to the consent of organizations (paragraphs 3 and 4), it seemed possible to dispense with one of the two conditions laid down in the Vienna Convention, namely, that of violation of a rule of fundamental importance. Some members of the Commission argued that all the rules of an organization which concerned the conclusion of treaties were of fundamental importance and that organizations should be better protected than States against their violation. Others, while not accepting this point of view, recognized that assessing the "fundamental" nature of a rule on this matter was a highly subjective process and that only the violation of a fundamental rule could be "manifest", so that in most cases the two conditions are reduced to one.

(4) But it was mainly the definition of the "manifest" character of a violation of a rule of the organization (paragraph 4) that occupied the Commission's attention. The cumulative effect of terms such as "manifest", "objectively" and "evident" is, indeed, simply to stress a single characteristic: the persuasive force of appearance. The whole weight of the wording of the Vienna Convention comes from the reference to "normal practice"; but what does this term mean? For some, it refers to the fact, already mentioned, that international practice is the same for all States and that it invests with exceptional importance the expression by certain privileged interlocutors (Heads of State or Government and Ministers for Foreign Affairs under article 7 of the Vienna Convention) of the will of a State to be bound by a treaty. But there are no such privileged interlocutors to give the consent on international organizations, which may, and in fact do, differ as regards the organs or agents responsible for their external relations; there is thus no "normal practice" of organizations. For others, the term "normal practice" in

treaty relations with a State merely denotes a normal standard of conduct in dealings, compounded of circumspection and trust, prudence and initiative. On this interpretation, one could speak of "normal practice" in regard to organizations as well as States.

(5) Eventually, the Commission concluded that the criteria for the "manifest" character of a violation could be defined by reference to the partners of an international organization in the conclusion of a treaty. It is not disputed that, if the partners are aware of the violation, the organization will be able to invoke it against them as a ground for invalidity; but it may also be accepted that if they *ought* to be aware of the violation, but in fact are not, the same applies. Either through lack of information or through indifference, they violate a reasonable standard of conduct, and the violation can therefore be invoked against them. Once again a principle borrowed from the law of responsibility operates in the law of treaties. Ultimately, it was the former that inspired article 46 of the Vienna Convention; and draft article 46, although couched in different terms remains faithful to the spirit of that article.

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty⁷²¹

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the other negotiating organizations, or to the negotiating States and other negotiating organizations, or to the negotiating States, as the case may be, prior to his communicating such consent.

Commentary

(1) Article 47 of the Vienna Convention concerns the case in which the representative of a State has received every formal authority, including full powers if necessary, to express the consent of the State to be bound by a treaty, but in addition has had his powers restricted by *instructions* to express that consent only in certain circumstances, on certain conditions or with certain reservations. Although the representative is bound by these instructions, if they remain secret and he does not comply with them, his failure to do so cannot be invoked against

⁷²¹ Corresponding provision of the Vienna Convention:

"Article 47: *Specific restrictions on authority to express the consent of a State*

"If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent."

the other negotiating States, and the State is bound. For the situation to be different, the other States must have been notified of the restrictions *before* the consent was expressed.

(2) This rule must be maintained in draft article 47 for the consent of States, with only a few drafting changes made necessary by the subject of the articles and without any change of substance. That is the purpose of paragraph 1 of article 47.

(3) The rule is also valid for the consent of international organizations, and has been formulated in paragraph 2 of draft article 47 with the corresponding drafting changes. In earlier articles of the draft, however, the Commission did not use the word "expressing", but the words "communicating" (article 2, paragraph 1 (*c bis*); article 7) or "establishing" (articles 11, 12 and 15), for the consent of an organization to be bound by a treaty. The word "communicate" has therefore been used in the text of paragraph 2 and in the title of draft article 47. The purpose of using different terminology is, as the Commission has already pointed out, to emphasize that:

The consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization, and that the action of its representative should be to transmit that consent; he should not, at least in the present draft article, be empowered to determine by himself the organization's consent to be bound by a treaty.⁷²²

Nevertheless, there is nothing to prevent the competent organ of an organization from expressing the consent of the organization while at the same time giving the organization's representative the necessary instructions to "communicate" that consent only if certain conditions are met: for example, the absence of reservations by the other partners, expression of the consent of certain States prior to any communication by the organization, etc.

Article 48. Error⁷²³

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

⁷²² *Yearbook . . . 1975*, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B.2, para. (11) of the commentary to article 7.

⁷²³ Corresponding provision of the Vienna Convention:

"Article 48: *Error*

"1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

"2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

"3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies."

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

Commentary

(1) With article 48 and the case of error, the Vienna Convention tackles what have sometimes been called cases of "vitiation of consent". It seemed to the Commission that this aspect of the general theory of treaties was also applicable to consent given by international organizations to be bound by a treaty. It therefore adopted draft article 48, which, apart from minor drafting changes in paragraphs 1 and 2, is identical with article 48 of the Vienna Convention.

(2) This does not mean, however, that the practical conditions in which it is possible to establish certain facts which bring the error regime of article 48 into operation will be exactly the same for organizations as for States. The Commission therefore considered the possible "conduct" of an organization and the conditions in which it should be "put on notice of a possible error". Paragraph 2, in which these terms occur, is certainly based on the fundamental idea that an organization, like a State, is responsible for its conduct and hence for its negligence. In the case of an international organization, however, proof of negligence will have to take different and often more rigorous forms than in that of a State because—to revert once more to the same point—international organizations do not have an organ equivalent to the Head of State or Government or Ministry for Foreign Affairs which can fully represent them in all their treaty commitments and determine the organization's "conduct" by its acts alone, thus constituting in itself a seat of decision to be "put on notice" of everything concerning the organization. On the contrary: in determining the negligence of an organization, it will be necessary to consider each organization in the light of its particular structure, to reconstitute all the circumstances that gave rise to the error and to decide, case by case, whether there has been error or negligent conduct on the part of the organization, not merely on the part of one of its agents or even of an organ. But after all, international jurisprudence on error by a State shows that the situation is not simple for States either, and that, as in all questions of responsibility, factual circumstances play a decisive role for States, as they do for organizations.

Article 49. Fraud⁷²⁴

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating organization, the State or the organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

(1) By making fraud (defined as fraudulent conduct by another negotiating State to induce a State to conclude a

⁷²⁴ Corresponding provision of the Vienna Convention:

Article 49: Fraud

"If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty."

treaty) an element invalidating consent, article 49 of the Vienna Convention sanctions a delictual act of the State even more severely than error. Although international practice provides only rare examples of fraud, there is no difficulty with the principle, and the Commission recognized that an international organization could be both defrauded and defrauding. It therefore proposes a draft article 49 based on article 49 of the Vienna Convention, with only such drafting changes as are necessary to extend the rule in that article to the case of international organizations.

(2) In itself, the idea of fraudulent conduct by an international organization undoubtedly calls for the same comments as were made on the subject of error. In the first place, there will probably be even fewer cases of fraudulent conduct by organizations than by States. It is perhaps in regard to economic and financial commitments that fraud is least difficult to imagine; for example, an organization aware of certain monetary decisions already taken but not made public, might by various manoeuvres misrepresent the world monetary situation to a State in urgent need of a loan, in order to secure its agreement to particularly disadvantageous financial commitments. But it must be added that the treaty instruments of organizations are usually decided upon and concluded at the level of collective organs, and it is difficult to commit a fraud by collective deliberation. Thus cases of fraud attributable to an organization will be rare, but it does not seem possible to exclude them in principle.

Article 50. Corruption of a representative of a State or of an international organization⁷²⁵

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Commentary

(1) Corruption of the representative of a State by another negotiating State as an element vitiating consent to be bound by a treaty seemed to the Commission, early in its work, a necessary, if extraordinary, case to mention. Unfortunately, corruption has since proved less exceptional than was then believed. Draft article 50 therefore provides for the case where the organization is either the victim of corruption or guilty of it, making the necessary drafting changes to the text and title of article 50 of the Vienna Convention. In addition, in order not to burden the text unnecessarily, the phrase "expression by a State or an international organization of consent" has been used instead of the phrases "the expression of a State's consent" and "the communication of an organization's consent".⁷²⁶

⁷²⁵ Corresponding provision of the Vienna Convention:

Article 50: Corruption of a representative of a State

"If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."

⁷²⁶ In regard to the latter wording, see para. (3) of the commentary to article 47, above.

(2) Here again, as in the case of articles 48 and 49, it must be recognized that active or passive corruption is not so easy for a collective organ as it is for an individual organ, and this should make the practice of corruption in international organizations more difficult. It must not be forgotten, however, that corruption within the scope of article 50 of the Vienna Convention (and draft article 50) can take many forms. A collective organ can never in fact negotiate; in technical matters, negotiation is always based on expertise or appraisals by specialists, whose opinions are sometimes decisive and may be influenced by corruption. Although States and organizations are unlikely to possess funds that do not have to be accounted for, they have other equally valued and effective assets, in particular, the power of nomination to high posts and missions. Although it is to be hoped that cases of corruption will prove extremely rare, there is no technical reason for excluding them, even where international organizations are concerned.

Article 51. Coercion of a representative of a State or of an international organization⁷²⁷

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Commentary

It can hardly be contested that coercion of an individual in his personal capacity may be employed against the representative of an organization as well as against the representative of a State; it should merely be pointed out that in general the representative of a State has wider powers than the representative of an organization, so that the use of coercion against him may have more extensive consequences. Drafting changes similar to those in draft article 50 have been made to the text and title of article 51 of the Vienna Convention.

Article 52. Coercion of a State or of an international organization by the threat or use of force⁷²⁸

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) The text of article 52 of the Vienna Convention has been used without change for the present draft article 52;

⁷²⁷ Corresponding provision of the Vienna Convention:

Article 51: Coercion of a representative of a State

"The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."

⁷²⁸ Corresponding provision of the Vienna Convention:

Article 52: Coercion of a State by the threat or use of force

"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

only the title needed rewording, to refer to the case of an international organization.

(2) The extension of article 52 to treaties to which one or more organizations are parties was nevertheless discussed at length by the Commission, which sought to assess the practical effect of such extension. Is it really conceivable that all, or at least many, international organizations may suffer, or even employ, the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations?

(3) In trying to answer that question, the Commission inevitably faced the question whether article 52 of the Vienna Convention covers only the threat or use of *armed* force or whether it covers coercion of every kind. This is a long-standing problem; it was formerly discussed by the Commission, which at that time confined itself to a cautious reference to the principles of the Charter. The question was taken up again at the United Nations Conference on the Law of Treaties, which considered amendments explicitly referring to political and economic pressure⁷²⁹ and ultimately adopted a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties as an annex to the Final Act. The Declaration solemnly condemns

the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.⁷³⁰

The General Assembly had discussed the question before the Vienna Conference took place (see resolution 2131 (XX) of 21 December 1965)⁷³¹ and has reverted to it on a number of occasions since 1969. In particular texts, it has prohibited the use of armed force and has condemned aggression (notably in resolution 3314 (XXIX) of 14 December 1974 titled "Definition of Aggression"), but it has repeatedly pointed out that this prohibition does not cover all forms of the illegal use of force, e.g. in the preamble to resolution 3314 (XXIX), in the preamble and the text of the annex to resolution 2625 (XXV), of 24 October 1970;⁷³² in resolution 2936 (XXVII), of 29 November 1972;⁷³³ in resolution 3281 (XXIX), of 12

⁷²⁹ *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. 172, doc. A/CONF. 39/14, para. 449.

⁷³⁰ *Ibid.*, p. 285, document A/CONF. 39/26, annex.

⁷³¹ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, para. 2 of which reads:

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind . . .".

⁷³² Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. See, in particular, the third principle:

"The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter:

" . . . armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."

⁷³³ Non-use of force in international relations and permanent prohibition of the use of nuclear weapons.

December 1974;⁷³⁴ in resolutions 31/91, of 14 December 1976,⁷³⁵ and 32/153, of 19 December 1977,⁷³⁶ etc.

(4) These numerous statements of position certainly support the view, expressed in the Commission, that the prohibition of coercion established by the principles of international law embodied in the Charter goes beyond armed force. Nevertheless, the Commission did not find it necessary to change the formulation of article 52, which is sufficiently general to cover all developments in international law. Moreover, even taking armed force alone, enough examples can be imagined to warrant extending the rule in article 52 of the Vienna Convention to international organizations.

(5) Any organization may be compelled to conclude a treaty under the pressure of armed force exerted against it in violation of the principles of international law. To mention only one example, the headquarters of an international organization might find itself in an environment of threats and armed violence, either during a civil war or in international hostilities; in those circumstances, it might be induced to consent by treaty to give up some of its rights, privileges and immunities, in order to avoid the worst. If the coercion was unlawful, for example in a case of aggression, the treaty would be void. Armed force can also be directed against the agents or representatives of any organization outside its headquarters, in which case an agreement concluded by the organization to free such persons from the effects of unlawful armed force would be void under draft article 52.

(6) It is obvious that the unlawful use of armed force by an organization is possible only if the organization has the necessary means at its disposal; hence only a few organizations are concerned. The problem is, nevertheless, sufficiently important to have been considered by the General Assembly on several occasions. In certain resolutions concerning the unlawful use of armed force, it has avoided the term "international organization", preferring the even broader expression "group of States".⁷³⁷ In 1970, in resolution 2625 (XXV), it set out the consequences of the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter" in the following terms: "No State or group of States has the right to intervene . . ." etc. Later, in resolution 3314 (XXIX) ("Definition of Aggression"), it reverted to this question in the explanatory note to article 1, as follows:

In this Definition the term "State" . . .

. . .

(b) Includes the concept of a "group of States" where appropriate. However the expression "group of States" is defined, it covers an international organization, so it can be concluded that the General Assembly provides sufficient authority for recognizing that an international organization may in theory be regarded as making unlawful use of armed force.

(7) It was also pointed out that the United Nations Charter itself, in acknowledging the action of regional agencies for the maintenance of peace and in requiring

their activities to be in conformity with the Charter, had recognized that those activities could in fact violate the principles of international law embodied in the Charter.

(8) In the light of all these considerations, the Commission proposes a draft article 52 which extends to international organizations the rule laid down for States in the Vienna Convention.

Article 53. *Treaties conflicting with a peremptory norm of general international law (jus cogens)*⁷³⁸

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

Commentary

(1) Article 53 involves only a slight drafting amendment to the corresponding article of the Vienna Convention.

(2) It is apparent from the draft articles that peremptory rules of international law apply to international organizations as well as to States, and this is not surprising. International organizations are created by treaties concluded between States, which are subject to the Vienna Convention by virtue of article 5 thereof; despite a personality which is in some respect different from that of the States parties to such treaties, they are none the less the creation of those States. And it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization. Moreover, the most reliable known example of a peremptory rule, the prohibition of the use of armed force in violation of the principles of international law embodied in the Charter, also applies to international organizations, as we have just seen in connexion with draft article 52.

(3) The Commission considered the question whether draft article 53 should retain the expression "international community of States" used in article 53 of the Vienna Convention. That expression could conceivably have been supplemented by a reference to international organizations, which would result in the phrase "international community of States and international organizations". But in law, this wording adds nothing to the formula used in the Vienna Convention, since organizations necessarily consist of States, and it has, perhaps, the drawback of needlessly placing organizations on the same footing as States. Another possibility would have been to use the shorter phrase "international community as a whole". On reflection, and because the most important rules of international law are involved, the

⁷³⁸ Corresponding provision of the Vienna Convention:

"Article 53: *Treaties conflicting with a peremptory norm of general international law (jus cogens)*

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

⁷³⁴ Charter of Economic Rights and Duties of States – in particular, arts. 1 and 32

⁷³⁵ Non-interference in the internal affairs of States.

⁷³⁶ *Idem*.

⁷³⁷ In the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX)), in article 12, the General Assembly used the term "groupings" of States.

Commission thought it worthwhile to point out that, in the present state of international law, it is States that are called upon to establish or recognize peremptory rules. It is in the light of these considerations that the formula employed in the Vienna Convention has been retained.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties⁷³⁹

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time, by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Commentary

Consultation with contracting States that are not parties to a treaty was provided for in article 54 of the Vienna Convention for the following reasons explained at the Conference on the Law of Treaties by the Chairman of the Drafting Committee:

... that question had been raised in the Drafting Committee, where it had been pointed out that there were a few cases in which a treaty already in force was not in force in respect of certain contracting States which had expressed their consent to be bound by the treaty but had postponed its entry into force pending the completion of certain procedures. In those rare cases, the States concerned could not participate in the decision on termination, but had the right to be consulted; nevertheless, those States were contracting States not parties to the treaty for the limited period in question.⁷⁴⁰

In order to extend this provision to international organizations, the last part of paragraph (b) of the article has been amended to provide for the two cases: treaties between international organizations, and treaties between one or more States and one or more international organizations.

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force⁷⁴¹

Unless the treaty otherwise provides, a multilateral

⁷³⁹ Corresponding provision of the Vienna Convention:

"Article 54: Termination of or withdrawal from a treaty under its provisions or by consent of the parties

"The termination of a treaty or the withdrawal of a party may take place:

"(a) in conformity with the provisions of the treaty; or
 "(b) at any time, by consent of all the parties after consultation with the other contracting States."

⁷⁴⁰ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (op. cit.)*, p. 476, 81st meeting of the Committee of the Whole, para. 6.

⁷⁴¹ Corresponding provision of the Vienna Convention:

"Article 55: Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

"Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force."

treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Commentary

This draft article reproduces the text of article 55 of the Vienna Convention without change, but it should be recognized that, for the time being, it can concern only very few cases. Its application is limited to multilateral treaties open to wide participation, and so far as treaties between international organizations are concerned, this case will be exceptional. As regards treaties between one or more States and one or more international organizations, there will be treaties between States which are open to wide participation by States and also to some international organizations on certain conditions. This practice is gaining ground in the economic sphere, particularly as regards commodity agreements. This possibility has been provided for in other articles of the draft, for example in article 9, paragraph 2.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal.⁷⁴²

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Commentary

The text of article 56 of the Vienna Convention has been adopted without change for this draft article. It will be remembered that in the final draft articles on treaties between States the Commission did not adopt the provision now in paragraph 1 (b);⁷⁴³ it was added at the Conference on the Law of Treaties.⁷⁴⁴ This was the provision that gave rise to the greatest difficulties of application for treaties between States, and will probably

⁷⁴² Corresponding provision of the Vienna Convention:

"Article 56: Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

"(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
 "(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

"2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."

⁷⁴³ *Yearbook . . . 1966*, vol. II, pp. 250-251, document A/6309/Rev.1, Part II, chap. II, art. 53 and commentary.

⁷⁴⁴ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 177, document A/CONF.39/14, paras. 485 *et seq.*

do so for the treaties which are the subject of the present draft articles. Which treaties are in fact by their *nature* denounceable or subject to withdrawal? In the case of treaties between international organizations, should treaties relating to the exchange of information and documents be included in this category? Treaties between one or more States and one or more international organizations include a class of treaties which, although having no denunciation clause, seem to be denounceable: the headquarters agreements concluded between a State and an organization. For an international organization, the choice of its headquarters represents a right whose exercise is not normally immobilized; moreover, the smooth operation of a headquarters agreement presupposes relations of a special kind between the organization and the host State, which cannot be maintained by the will of one party only. Other examples of treaties which might by their nature be the subject of withdrawal or denunciation are more questionable, except of course that of the denunciation by an international organization of an agreement whose sole purpose is to implement a decision of the organization which it has reserved the right to modify (see commentary to draft article 27).⁷⁴⁵

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties⁷⁴⁶

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time, by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Commentary

The drafting changes made to the text of article 57 of the Vienna Convention call for the same comments as the changes in article 54.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only⁷⁴⁷

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of

⁷⁴⁵ *Yearbook . . . 1977*, vol. II (Part Two), pp. 118–120, document A/32/10, chap. IV, sect. B, 2, commentary to article 27.

⁷⁴⁶ Corresponding provision of the Vienna Convention:

“Article 57: Suspension of the operation of a treaty under its provisions or by consent of the parties

“The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- “(a) in conformity with the provisions of the treaty; or
- “(b) at any time by consent of all the parties after consultation with the other contracting States.”

⁷⁴⁷ Corresponding provision of the Vienna Convention:

“Article 58: Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

“1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

- (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- (ii) is not incompatible with the object and purpose of the treaty.

2. Unless, in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Commentary

(1) No change has been made to the text of article 58 of the Vienna Convention, not even to make the title of the article correspond more precisely to the wording of the text, which provides for suspension of the operation of “provisions of the Treaty”, not of “the treaty” as a whole. But it follows from article 59 of the Convention that the Convention does not exclude the case of suspension of all the provisions of a treaty.

(2) There is no reason for not extending the provisions of article 58 of the Vienna Convention to treaties to which international organizations are parties.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty⁷⁴⁸

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter, and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

“(a) the possibility of such a suspension is provided for by the treaty; or

“(b) the suspension in question is not prohibited by the treaty and:

- “(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- “(ii) is not incompatible with the object and purpose of the treaty.”

2. Unless, in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.”

⁷⁴⁸ Corresponding provision of the Vienna Convention:

“Article 59: Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

“(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

“(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

“2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.”

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Commentary

There is no departure from the text or title of article 59 of the Vienna Convention. Article 59, like article 58, lays down rules which derive from a straightforward consensus approach and may therefore be extended without difficulty to the treaties which are the subject of the present draft articles.

*Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach*⁷⁴⁹

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it, either

(i) in the relations between themselves and the defaulting State or international organization, or

(ii) as between all the parties;

(b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in

whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Commentary

Article 60 of the Vienna Convention governs the effects of the breach of a treaty on the provisions of that treaty, and lays down principles in this matter which there is no reason not to extend to treaties to which international organizations are parties. Hence only minor drafting changes were needed in the text of article 60.

⁷⁴⁹ Corresponding provision of the Vienna Convention:

Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach

"1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

"2. A material breach of a multilateral treaty by one of the parties entitles:

"(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either

"(i) in the relations between themselves and the defaulting State, or

"(ii) as between all the parties;

"(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

"(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

"3. A material breach of a treaty, for the purposes of this article, consists in:

"(a) a repudiation of the treaty not sanctioned by the present Convention; or

"(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

"4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

"5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Chapter V

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction

86. Paragraph 1 of General Assembly resolution 2669 (XXV) of 8 December 1970 recommended that the Commission should "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate".

87. At its twenty-third session, in 1971, the Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work.⁷⁵⁰ The Commission also agreed that, to undertake the substantive study of the rules of international law relating to the non-navigational uses of international watercourses with a view to its progressive development and codification on a world-wide basis, all relevant materials on State practice should be compiled and analysed. The Commission noted that a considerable amount of such material had already been published in the Secretary-General's report, "Legal problems relating to the utilization and use of international rivers",⁷⁵¹ prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the United Nations Legislative Series.⁷⁵² In paragraph 2 of resolution 2669 (XXV), the General Assembly requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal problems relating to the question, "taking into account the recent application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies of this matter".

88. In section I, paragraph 5, of resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that "the International Law Commission, in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses".

89. At its twenty-fourth session, held in 1972, the Commission indicated its intention to take up the foregoing recommendation of the General Assembly when it came to discuss its long-term programme of work. At the same session, the Commission reached the conclusion that the problem of pollution of international waterways was one of both substantial urgency and complexity, and

accordingly requested the Secretariat to continue compiling material relating to the topic, with special reference to the problems of the pollution of international watercourses.⁷⁵³

90. In section I, paragraph 5, of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission's intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic. By the same resolution (section I, paragraph 6), the Secretary-General was requested "to submit, as soon as possible, the study on the legal problems relating to the non-navigational uses of international watercourses" requested by the General Assembly in resolution 2669 (XXV), and to present an advance report on the study to the Commission at its twenty-fifth session.

91. At its twenty-fifth session, the Commission gave special attention to the question of the priority to be given to the topic. Taking into account the fact that the supplementary report on international watercourses⁷⁵⁴ would be submitted to members by the Secretariat in the near future, the Commission considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report.⁷⁵⁵

92. By paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973, the General Assembly recommended that the Commission "should at its twenty-sixth session commence its work on the law of the non-navigational uses of international watercourses by, *inter alia*, adopting preliminary measures provided for under article 16 of its statute". By paragraph 6 of the same resolution, the General Assembly requested the Secretary-General to complete the supplementary report requested in resolution 2669 (XXV) in time to submit it to the Commission before the beginning of its twenty-sixth session.

93. At its twenty-sixth session, the Commission had before it the supplementary report on legal problems relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV).⁷⁵⁶

94. Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII), the Commission, at its twenty-sixth session, established a Sub-Committee on the law of the non-navigational uses of international watercourses, composed of Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara

⁷⁵⁰ See *Yearbook . . . 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

⁷⁵¹ *Yearbook . . . 1974*, vol. II (Part Two), p. 33, document A/5409.

⁷⁵² United Nations, *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation* (United Nations publication, Sales No. 63.V.4.).

⁷⁵³ See *Yearbook . . . 1972*, vol. II, p. 324, document A/8710/Rev.1, para. 77.

⁷⁵⁴ See para. 87 above.

⁷⁵⁵ See *Yearbook . . . 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 175.

⁷⁵⁶ *Yearbook . . . 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

and Mr. Tabibi, which was requested to consider the question and to report to the Commission.⁷⁵⁷ The Sub-Committee adopted and submitted a report that proposed the submission of a questionnaire to States regarding, *inter alia*, the scope of the proposed study, the uses of water to be considered and whether the problem of pollution should be given priority, the need to deal with flood control and erosion problems, and the inter-relationship between navigational uses and other uses.

95. The Commission considered the report of the Sub-Committee at its 1297th meeting, held on 22 July 1974, and adopted it without change.⁷⁵⁸ The Commission also appointed Mr. Richard D. Kearney Special Rapporteur for the question of the non-navigational uses of international watercourses.⁷⁵⁹

96. At its twenty-ninth session, the General Assembly adopted resolution 3315 (XXIX) of 14 December 1974, by which, in paragraph 4 (e) of section I, it recommended that the Commission should:

Continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report.

By a circular note dated 21 January 1975 the Secretary-General invited Member States to communicate to him, if possible by 1 July 1975, the comments on the Commission's questionnaire referred to in the above-mentioned paragraph of General Assembly resolution 3315 (XXIX), the final text of which, as communicated to Member States, read as follows:

- A What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?
- B Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- C Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?
- D Should the Commission adopt the following outline of fresh water uses as the basis of its study:
 - (a) Agricultural uses:
 1. Irrigation;
 2. Drainage;
 3. Waste disposal;
 4. Aquatic food production.
 - (b) Economic and commercial uses:
 1. Energy production (hydroelectric, nuclear and mechanical);
 2. Manufacturing;
 3. Construction;
 4. Transportation other than navigation;
 5. Timber floating;
 6. Waste disposal;
 7. Extractive (mining, oil production, etc.).
 - (c) Domestic and social uses:
 1. Consumptive (drinking, cooking, washing, laundry, etc.);
 2. Waste disposal;
 3. Recreational (swimming, sport, fishing, boating, etc.)?

⁷⁵⁷ *Ibid.*, vol. II (Part One), p. 301, document A/9610/Rev.1, para. 156.

⁷⁵⁸ *Ibid.*, para. 158, and annex to chap. V.

⁷⁵⁹ *Ibid.*, para. 159.

E Are there any other uses that should be included?

F Should the Commission include flood control and erosion problems in its study?

G Should the Commission take account in its study of the interaction between use for navigation and other uses?

H Are you in favour of the Commission taking up the problem of pollution of international watercourses at the initial stage in its study?

I Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a committee of experts?⁷⁶⁰

97. The Commission did not consider the topic at its twenty-seventh session, pending receipt of answers from Governments of Member States to the Commission's questionnaire.⁷⁶¹

98. The General Assembly, by paragraph 4(e) of its resolution 3495 (XXX) of 15 December 1975, recommended that the Commission should continue its study of the law of the non-navigational uses of international watercourses.

99. In 1976, at its twenty-eighth session, the Commission had before it the replies to the questionnaire received from the Governments of 21 Member States.⁷⁶² It also had before it a report submitted by Mr. Richard D. Kearney, then Special Rapporteur for the topic.⁷⁶³ That report was devoted to a consideration of Governments' replies to the questionnaire and the conclusions that might be drawn from them with regard to the scope and direction of the work on international watercourses. In view of the substantial variations among the replies to questions A, B and C,⁷⁶⁴ dealing with the scope of the Commission's work, and the large measure of agreement in the replies to the other questions, the major part of the report was devoted to a discussion of what was encompassed by the term "international watercourses".

100. At that session, the Commission discussed the question of the law of the non-navigational uses of international watercourses at its 1406th to 1409th meetings, held on 14, 15, 16 and 19 July 1976.

101. In the course of that discussion, attention was devoted mainly to the matters raised in the replies from Governments discussed in the report submitted by the Special Rapporteur concerning the scope of the Commission's work on the topic, and the meaning of the term "international watercourses". The report noted that there were considerable differences in the replies of Governments to the questionnaire regarding the use of the geographical concept of the international drainage basin as the appropriate basis for the proposed study, both in respect of uses and in respect of the special problems of pollution. Differences also appeared in the views expressed by members of the Commission in the debate on the Special Rapporteur's report. A consensus emerged that the problem of determining the meaning of the term "international watercourses" need not be pursued at the outset of the Commission's work. The relevant

⁷⁶⁰ *Yearbook . . . 1976*, vol. II (Part One), pp. 149-150, document A/CN.4/294 and Add. 1, para. 6.

⁷⁶¹ See *Yearbook . . . 1975*, vol. II pp. 183-184, document A/10010/Rev.1, para. 138.

⁷⁶² See *Yearbook . . . 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add. 1.

⁷⁶³ *Ibid.*, p. 184, document A/CN.4/295.

⁷⁶⁴ See para. 96 above.

paragraphs of the Commission's report on the work of its twenty-eighth session read as follows:

164. This exploration of the basic aspects of the work to be done in the field of the utilization of fresh water led to general agreement in the Commission that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses. In so doing, every effort should be made to devise rules which would maintain a delicate balance between those which were too detailed to be generally applicable and those which were so general that they would not be effective. Further, the rules should be designed to promote the adoption of régimes for individual international rivers and for that reason should have a residual character. Efforts should be devoted to making the rules as widely acceptable as possible, and the sensitivity of States regarding their interests in water must be taken into account.

165. It would be necessary, in elaborating legal rules for water use, to explore such concepts as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment, which would need to be taken into account in addition to the requirements of reparation for responsibility.⁷⁶⁵

102. The discussion in the Commission showed general agreement with the views expressed by Governments in response to the questions dealing with other issues. The Commission indicated that the Special Rapporteur could rely on the outline of uses suggested in connexion with question D,⁷⁶⁶ but taking into account the various suggestions made by Governments for additions to or variations in the outlines. Flood control, erosion problems and sedimentation should be included in the study, as well as the interaction between use for navigation and other uses. Pollution problems should as far as possible be dealt with in connexion with the particular uses that gave rise to pollution. The Commission also indicated that the Special Rapporteur should maintain the relationships already established with United Nations agencies and raise with the Commission the question of securing technical advice if and when such action appeared necessary.⁷⁶⁷

103. The General Assembly, in paragraphs 4(d) and 5 of resolution 31/97 of 15 December 1976, recommended that the International Law Commission should continue its work on the law of the non-navigational uses of international watercourses and urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit, as soon as possible, the written comments referred to in resolution 31/97.

104. At its twenty-ninth session, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses to succeed Mr. Richard D. Kearney, who had not stood for re-election to the Commission.⁷⁶⁸

105. By paragraph 4(d) of resolution 32/151 of 19 December 1977, the General Assembly recommended that the Commission should continue its work on the law

of the non-navigational uses of international watercourses. That recommendation was also made by the General Assembly by resolution 33/139 of 19 December 1978.

106. In 1978, at the thirtieth session of the Commission, replies received from the Governments of four Member States, submitted in accordance with General Assembly resolution 31/97, were circulated.⁷⁶⁹

107. At its 1526th meeting, held on 26 July 1978, the Commission heard a statement by Mr. Schwebel, Special Rapporteur, in which he spoke, *inter alia*, of recent activities within the United Nations relating to the topic of the law of the non-navigational uses of international watercourses. He also informed the Commission that, in co-operation with the Office of Legal Affairs, the secretariats of certain United Nations bodies, programmes and regional economic commissions, as well as certain specialized agencies and other international organizations, had been requested to provide recent information and materials relevant to the topic. At the same meeting, the Commission took note of the presentation made by the Special Rapporteur, expressed the hope that he would be able to proceed in the near future with the preparation of a report on the topic and decided to stress once again the invitation to Governments of Member States that had not already done so to submit their replies to the Commission's questionnaire, in pursuance of General Assembly resolution 31/97.⁷⁷⁰

108. During its current session, the Commission had before it the Special Rapporteur's first report on the topic (A/CN.4/320 and Corr. I),⁷⁷¹ as well as a reply received from one Member State (A/CN.4/324)⁷⁷² to the Commission's questionnaire on the topic.

109. At the Commission's 1554th meeting, held on 18 June 1979, the Special Rapporteur presented his first report. It contained four chapters. The first, introductory, chapter dealt with the nature of the subject, describing some salient physical characteristics of water which called for a singular treatment of the subject. Chapter II summarized some aspects of the history of the treatment of the subject hitherto, particularly by the Commission, and addressed the question of the scope of the Commission's work on it and the meaning of the term "international watercourses". It included a proposed draft article 1 entitled "Scope of the present article". Chapter III discussed the utility of "user agreements" as a means of affording States immediately concerned with a particular international watercourse the possibility of undertaking detailed obligations calibrated to the particular characteristics of that watercourse, although remaining within the framework of a proposed set of draft articles setting out general, residual rules of universal application. In that context, and for the purpose of focusing and facilitating the Commission's debate on the topic, the Special Rapporteur proposed the following draft articles: "User States" (article 2); "User agreements" (article 3); "Definitions" (article 4); "Parties to user agreements" (article 5); "Relation of these articles to user agreements" (article 6); and "Entry into force for an international

⁷⁶⁵ *Yearbook . . . 1976*, vol. II (Part Two), p. 162, document A/31/10.

⁷⁶⁶ See para. 96 above.

⁷⁶⁷ See *Yearbook . . . 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 166.

⁷⁶⁸ See *Yearbook . . . 1977*, vol. II (Part Two), p. 124, document A/32/10, para. 79.

⁷⁶⁹ See *Yearbook . . . 1978*, vol. II (Part One), document A/CN.4/314.

⁷⁷⁰ *Ibid.*, vol. II (Part Two), p. 148, document A/33/10, paras. 157-160.

⁷⁷¹ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

⁷⁷² *Idem.*

watercourse" (article 7). The last chapter concerned one fundamental area of obligations, that of the regulation of data collection and exchange. Three draft articles were proposed: "Data collection" (article 8); "Exchange of data" (article 9); and "Costs of data collection and exchange" (article 10). In presenting his report, the Special Rapporteur noted that he had received from the secretariats of various international organizations relevant information, documentation and materials submitted in response to the request referred to above.⁷⁷³ In addition, he drew attention to the fact that the Secretariat had provided him with an annotated list of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses.

110. The Commission devoted its 1554th, and 1577th and 1578th meetings, held from 18 to 20 June and on 26 and 27 July 1979, to consideration of the topic of the law of the non-navigational uses of international watercourses on the basis of the first report submitted by the Special Rapporteur. It engaged in a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole. A summary of that debate is set out in section B below.

B. Consideration of the topic at the current session

111. Members of the Commission agreed with the position taken by the Special Rapporteur that the multiple international legal problems posed by the uses of international watercourses were of the utmost interest and practical importance. Water was as vital for life as air, and was also a universal substance, moving over, through and under national boundaries. Water, in particular, was subject to depletion and degradation. Demand for water would continue to grow with the upsurge in world population, the spread of industrialization and urbanization, the expansion of agriculture, and increasing needs for power. In some cases water supplies could be expanded, but in others they might become polluted or exhausted, or simply be inadequate. In unregulated, water could flood, disrupting the lives of thousands.

112. It was generally recognized that the problems of fresh water were among the most serious confronting mankind. The importance of fresh water in the economic and social development of all countries, and even in the very maintenance of life, could not be overstated. If mankind was to manage its enormous water problems effectively, the international community must, it was said, progressively develop and codify the appropriate principles of international law, lay down procedures for its application and establish institutions for its continuing development.

1. NATURE OF THE TOPIC

113. As indicated by the Special Rapporteur in his report, the law of the non-navigational uses of international watercourses was a topic of a different nature from those currently under consideration by the Commission. The subject-matter of the topic of international watercourses comprised a unique physical phenomenon with distinguishing physical characteristics.

114. Note was taken of the three salient aspects of water described by the Special Rapporteur in his report: (a) the

hydrologic cycle; (b) self-purification; and (c) variations in quantity and flow.

115. While the idea of a complete hydrologic cycle—that water evaporated from the sea and land, was drawn into the atmosphere, fell as rain and snow, sank into the earth to reappear in watercourses, and then drained back into the sea—had been the subject of only relatively recent scientific attention and proof, its nature was simplicity itself once it had become apparent that, on a world basis, water leaving the land mass of the earth returned in an equal amount. That process continued inexorably. Variations in the patterns of departure and return occurred continuously and universally, but as far as water was concerned, whatever went up went down. Moreover, the cycle operated at a fairly rapid pace: once every 12 days practically all the water in the air fell and was replaced. The role of the watercourse in the hydrologic cycle was the channelling of surface water and some groundwater to the sea, the former being a more visible source of moisture for watercourses, but the latter being more important, since it constituted 97 per cent of the water on the earth excluding oceans, ice-caps and glaciers.

116. The second paramount quality of water, as found in the hydrologic cycle, was its ability to cleanse itself. The water flowing in rivers and streams was capable of self-purification either by dispersal, through its flowing motion or the introduction of fresh water, or by the chemical reaction of oxygen with wastes. But in the last-named form of self-purification, the supply of oxygen absorbed by a river from the air and plants could be exhausted, preventing the river from purifying itself if an overload of waste entered it.

117. The third aspect of water flowing in international watercourses was variation in its quantity and flow. As a resource, one of water's most extraordinary characteristics was its limited but forever renewable quantity. That fixed amount of fresh water in watercourse systems, like almost all resources, was unevenly distributed throughout the world, causing large deficiencies of water in many regions and large excesses in others. Meteorological, catchment and human factors all had an impact upon the quantity of water flowing in a watercourse system. Pollution, deforestation, acid rain, the transformation of vegetative cover and the reduction of the number of absorptive surfaces through urbanization were cited as examples of human activities having a substantially adverse effect upon the hydrologic cycle.

118. The unique qualities of water played an integral part in the various uses to which water could be put and must necessarily be considered when examining those various uses. Physical facts had to be recognized in deciding what rules should be established among nations for the use of fresh water. The international consequences of the physical characteristics of water could be said to be that water was not confined within political boundaries and that its nature was to transmit to one region changes, or effects of changes, occurring in another. It was therefore considered essential that the Commission should have a general understanding of the scientific and technical considerations involved in the topic. It would be necessary for the Commission to obtain scientific and technical advice in the course of its work on the topic.

2. SCOPE OF THE TOPIC

119. The Special Rapporteur recalled in his report that the Commission had discussed at its twenty-eighth

⁷⁷³ See para. 107 above.

session, on the basis of replies received from Governments to the Commission's questionnaire and of the former Special Rapporteur's report, the scope of the Commission's work on the topic and the meaning of the term "international watercourses."⁷⁷⁴ As in the replies to the questionnaire, divergent views had been expressed at that session regarding the use of the geographical concept of the international drainage basin as the appropriate basis for the proposed study, both with regard to uses and with regard to the special problems of pollution. A consensus had emerged, however, at that session that the problem of determining the meaning of the term "international watercourses" need not be pursued at the outset of the Commission's work on the topic.

120. The Special Rapporteur took the position that, although from a scientific and economic viewpoint use of the international drainage basin concept as a starting point for the development of principles to govern the uses of fresh water moving through international watercourses, would seem to be the appropriate method of taking into account the interrelationships that applied throughout the entire area drained by a river system, it was clear from the record as a whole that the General Assembly, in its relevant resolutions, and the Commission in its previous consideration of the matter, had not taken the position that the term "international watercourse" was—or was not—the practical equivalent of "international drainage basin". The Commission must, he stressed, be sensitive to the differences of opinion among Governments about taking the concept of the drainage basin as the foundation for work that would be of insufficient utility if its product failed to attract support from a significant group of riparian States. He therefore concluded that for the time being it was necessary to accept the ambiguity of the term "international watercourse", and to determine to what extent the Commission and States were prepared to resolve the problems that arose from the physical aspects of the hydrologic process in dealing with the specific uses of fresh water. The draft article he proposed on the question of scope accordingly did not choose between the principal definitions of the term.⁷⁷⁵ Finally, the Special Rapporteur suggested that, in drafting articles on the topic, the difficulty of differences concerning the meaning of the term "international watercourse" might be overcome by the inclusion of an "optional clause" whereby the scope of international watercourse obligations under the articles would be defined by reference either to successive and contiguous international rivers, lakes and canals, or to the foregoing plus their tributaries, including those found wholly in the territory of one State, i.e. the river system, or to the foregoing plus groundwater, i.e. the drainage basin.

121. For the most part, members of the Commission who addressed themselves to that question agreed with

the position previously taken by the Commission on the matter, and with the Special Rapporteur's conclusion that the determination of the term "international watercourse" need not be pursued at the current stage of the Commission's work on the topic. Nevertheless, some members expressed their preferences regarding the meaning to be attributed to the term "international watercourse", some favouring the geographical concept of the international drainage basin, others the concept of contiguous or successive international rivers. Some measure of support was expressed for the Special Rapporteur's suggestion that an optional clause be included in any set of draft articles on the topic as an effective solution to the problem presented by the difference of opinion on the question of definition, and no opposition to that suggestion was voiced.

122. On the other hand, a few members questioned whether the Commission's decision to defer consideration of the definition of an international watercourse had in fact been a wise one, since it would be difficult to establish rules without an appropriate definition of what was involved. Since there seemed to be some difference of opinion among members, and since the very content of the rules would depend upon the way in which an international watercourse was defined, it was essential, according to that view, for the Commission to consider the matter at the earliest opportunity.

123. Another view expressed was that it would have been more correct for the General Assembly to have referred, in its relevant resolutions, to "international rivers" rather than to "international watercourses". One member believed that the term "watercourses" could be understood as meaning only water flowing within a given course, thus excluding lakes and perhaps groundwater. On the other hand, it was submitted that the General Assembly had chosen the term "watercourse" rather than "river" to ensure that, at the least, lakes fed by or feeding rivers would be included in the scope of the Commission's work. As to groundwater, the scientific fact was that it normally flowed, and indeed provided the bulk of the water content of rivers.

124. Most members of the Commission and the Special Rapporteur generally supported the position taken by the Commission at its twenty-eighth session,⁷⁷⁶ namely, that the outline of fresh water uses in question D of its 1974 questionnaire,⁷⁷⁷ reflecting a comprehensive and specific approach to the question of uses, could serve as the basis for the study of the non-navigational uses of international watercourses, together with flood control, erosion problems and sedimentation. The suggestion to add salt water intrusion as an associated problem to be considered was commented upon favourably. Pollution problems, it was recalled, were to be dealt with as far as possible in connexion with the particular uses that gave rise to pollution. In the course of the debate it was recognized that the number of uses could not be readily limited. Most of the cities of the world that were not seaports were sited on rivers, often for economic, commercial or agricultural reasons, but almost as often for purposes of recreation or to enhance the urban environment. It was also urged that the Commission should concentrate on the use of the water of international watercourses, rather than on international watercourses as such, and that a closer

⁷⁷⁴ See para. 101 above.

⁷⁷⁵ The draft article proposed by the Special Rapporteur (A/CN.4/320 and Corr. 1, para. 2) read as follows:

"Article 1. Scope of the present articles

"1. The present articles apply to the uses of the water of international watercourses, and to associated problems such as flood control, erosion, sedimentation and salt water intrusion.

"2. The use of the water of international watercourses for navigation is embraced by these articles in so far as provisions of the articles respecting other uses of water affect navigation or are affected by navigation."

⁷⁷⁶ See para. 102 above.

⁷⁷⁷ See para. 96 above.

examination of the various uses of water be taken up by the Commission at its next session. Particular emphasis was placed on the desirability of taking up the use of water for irrigation and power production. It was suggested by some members that, in his future reports, the Special Rapporteur might focus on particular uses of international watercourses, and possibly prepare draft articles setting out the principles of law that applied or should apply to such uses. Others, however, thought that the Special Rapporteur should next address the general principles of international law concerning the non-navigational uses of international watercourses.

125. Those members of the Commission cautioned against formulating rules strictly on the basis of an examination of the individual uses of international watercourses. What was desirable was a set of norms and rules applicable to all kinds of uses of such watercourses. It was unrealistic to expect the Commission to master the technical intricacies of each particular use of water, formulate legal rules concerning each use that might not be applicable to a given watercourse not subject to the use in question, and only then attempt to formulate more general rules applicable to all uses. It was also maintained that the Commission's attention should be directed towards the uses of international watercourses or rivers, not to the uses of the water of such watercourses. In that connexion, doubt was expressed concerning the inclusion in the scope of the study of such "associated problems" as flood control, erosion and riparian environment.

126. With regard to the last-mentioned point, however, other members stressed that the problem of pollution was of the utmost concern to the international community and must of necessity be dealt with in any effort to formulate rules on the topic, although it should not be examined solely within the confines of the diverse uses of international watercourses. Furthermore, norms concerning the pollution of international watercourses would not be effective if they were limited in their application only to riparian States; as such norms would relate to a phenomenon affecting the entire ecosystem of a watercourse, they would have to be applicable throughout a river system.

127. As to the interaction between the use of an international watercourse for navigation and its non-navigational uses, most members who spoke on the matter thought that the use of water for navigation might well affect other uses of water, and vice versa. Navigational uses might result in the pollution of international watercourses. The requirements of navigation affected the quantity and quality of water available for other uses. For example, navigation required that certain levels of water be maintained and that there be passages through or round barriers in the watercourse. Thus the view was held that any draft articles prepared on the topic could not exclude the navigational uses of international watercourses because of their impact on the non-navigational uses. Yet it was maintained that many, if not most, international watercourses were not navigable and that it was mainly to such watercourses that any draft articles prepared on the topic should apply, since the major international rivers were already covered by agreements concluded between the riparian States. A distinction should be made, one member suggested, between international rivers, which were navigable watercourses and could be used by all States, and multinational rivers, which were not navigable watercourses and were used only by the riparian States.

3. QUESTION OF FORMULATING THE RULES ON THE TOPIC

128. In his report, the Special Rapporteur emphasized that one of the problems that must be faced in drafting rules on the non-navigational uses of international watercourses was the immense diversity of international watercourse systems. As there were international watercourses in almost every part of the world, their physical characteristics and the human needs they served were subject to the same extreme variations as were found in other respects throughout the world. While recognizing that each watercourse had its own unique features, the Special Rapporteur stressed that the diverse nature and uses of international watercourses should not be exaggerated, for they displayed common characteristics as well. He believed the Commission would find that certain principles of international law already existed either in inarticulate form in a large body of State practice or to some degree as part of accepted, general international law. Ingenuity would have to be displayed in striking the necessary balance between the particular and the general. The Special Rapporteur took the view that what was needed was a set of articles that laid down principles regarding the use of international watercourses in terms sufficiently broad to be applied to all international watercourses, while at the same time providing the means by which the articles it contained could be more sharply defined or modified to take into account the singular nature of an individual watercourse and the varying needs of the States whose territory it drained.

129. Most members of the Commission who spoke on the matter agreed that the formulation of general, universal rules on the law of the non-navigational uses of international watercourses was desirable and necessary. While such rules would be of a general nature, they should not be abstract principles, but should rather set out rights and obligations concerning the non-navigational uses of the watercourse.

130. A number of Commission members emphasized that the drafting of general principles on the law of the non-navigational uses of international watercourses must of necessity be carried out bearing in mind the existing rules of general customary international law applicable to the subject-matter. The many treaties on navigation, pollution and power production should be studied with a view to deducing such rules. Experience had shown that the regulation of a particular international watercourse could be settled under general international law. The general rules to be formulated by the Commission should be more than residual rules, since they would be founded on customary law. It was said to be generally recognized that, under modern international law, a State did not enjoy complete freedom in determining the use of the water of international watercourses within its territory. It would clearly not be the purpose of drafting general rules on the subject to iron out the natural inequalities in resources between States, or to depreciate the importance of the principle of national sovereignty over natural resources. But it was equally clear that there had always been in international law perceptions of a duty owed to neighbours regarding the way in which the natural resources of a territory were used. That was particularly compelling in regard to the uses of an international watercourse, as water constituted a *shared* natural resource. Another cardinal principle was the reasonable and equitable use of the water of an international watercourse. It was unthinkable that a

nation that lived on the banks of a river should lose that river entirely as a result of the application of modern technology in the interests of a higher riparian State. It was equally unthinkable that a lower riparian State should refuse to receive a natural flow of water by erecting a dam for the benefit of its own hydroelectric resources, thereby causing that water to flood valuable land in a neighbouring State. Both upper and lower riparians were obliged to take due account of the interests of the other.

131. Some members were of the view that the subject under study involved limitations on the territorial sovereignty of States, and that a golden mean must be found between absolute respect for the principle of territorial sovereignty and strict international limitations upon the use of international watercourses. It was said that, as a result of modern scientific knowledge and technology, the international system of dividing the whole human environment into territories of separate sovereign States was in many respects obsolete, and particularly in the case of water. The system of division of the world among States must therefore be complemented by a system of co-operation among States in respect of the natural paths of communication among their separate territories.

132. The view was also expressed that it was essential to adopt a cautious approach to the formulation of articles on a matter of such magnitude as the preservation and use of international watercourses. Upstream riparian States obviously had a right to use the waters in their territory, but they must not use them in such a way as to prejudice materially the rights of downstream riparian States, for the waters concerned represented a shared natural resource that must be protected by all the States concerned. Legal difficulties could be overcome if States displayed the necessary political will. Any draft articles on the topic could well serve, it was said, as guidelines for States wishing to enter into agreements for the use of a particular watercourse. A balanced approach had to be maintained in all cases. Hence the Commission's aim must be to regulate the use of international watercourses for the benefit of all, in an equitable manner. A body of legal rules governing the use of international watercourses had in fact emerged, it was maintained, but its content lay in bilateral and multilateral agreements between the States directly concerned. Some of those agreements were of major importance, but the existing agreements did not necessarily point the way to general rules that would be valid in all cases.

133. A few members of the Commission were doubtful whether the subject of the non-navigational uses of international watercourses was ripe for codification; they urged further reflection and the utmost care in dealing with the topic. It was stressed that, as each river had historical, social, geographical and hydrological peculiarities of its own, it was understandable that the law on the topic had not been fully developed. Although a duty to negotiate without any legal rules to govern the subject-matter of the negotiations might seem somewhat problematic, satisfactory results had none the less been achieved in regard to international rivers through negotiation. Experience indicated that, although certain principles were applicable to all nations, it was difficult to move rapidly beyond that minimum body of rules. The Commission, it was emphasized, should therefore proceed carefully, taking account of the principle of national sovereignty and also of the right of peoples over their natural resources, a right that called for observance of the rule that every State must behave in such a way as not to

damage the rights and interests of others. It was further stressed that, if general rules were formulated, they might prove to be so general that they would be of little value for codifying the law, and it was questionable whether the Commission would be able to elaborate a comprehensive code that would be broadly acceptable to States. Few States, if any, it was maintained, would agree that they should not be allowed to make the fullest possible use of water within their national boundaries. Full and responsible use by a State of an international watercourse was not necessarily inconsistent with protection of the interests of lower riparian States. Hence the emphasis should be placed on co-operation between States in the utilization of watercourses, rather than on limitation of the right of States to use them. A further exchange of views was required to determine whether it was necessary to draw up a general code for international watercourses.

4. METHODOLOGY TO BE FOLLOWED IN FORMULATING RULES ON THE TOPIC

134. The Special Rapporteur explained to the Commission that the main purpose of his first report was to present to it a conceptual and tactical framework for dealing with the law of the non-navigational uses of international watercourses. He had found the provisions of the 1923 Geneva Convention relating to the development of hydraulic power affecting more than one State⁷⁷⁸ of particular interest in that connexion, as its provisions contemplated further agreements to be entered into by States jointly concerned in the development of hydraulic power, i.e. what could be termed "implementing", "user" or "system" agreements, which would give pointed obligation to the general commitments under that Convention. It was his view that, similarly, any general principles of law formulated for the non-navigational uses of international watercourses must not only be supported by rules stating how those principles should be applied, but that such rules should also be supplemented by user agreements that took account of the characteristics and uses of the individual watercourse. Thus as a possible solution of the problem of formulating general rules of universal application to all international watercourses, while at the same time paying due regard to the wide diversity of such watercourses, the Special Rapporteur proposed that the draft articles to be prepared on the topic be structured to form what might be termed a "framework convention";⁷⁷⁹ such an instrument would set out general, residual principles of law on the non-navigational uses of international watercourses and would be coupled with "user" or "system" agreements that would enable the States of a particular watercourse to establish detailed arrangements and obligations governing its uses.⁷⁸⁰

⁷⁷⁸ League of Nations, *Treaty Series*, vol. XXXVI, p. 75.

⁷⁷⁹ The use of the phrase "framework convention" was used provisionally, as the final form of any draft articles on the topic would only be decided upon at a later stage.

⁷⁸⁰ The draft articles proposed by the Special Rapporteur (A/CN.4/320 and Corr.1, para. 2) read as follows:

"Article 2. User States

"For the purposes of these articles, a State which contributes to and makes use of water of an international watercourse shall be termed a user State."

135. Most members who spoke on the matter found the framework approach advocated by the Special Rapporteur generally acceptable. A continuing need was seen for user agreements between adjacent States or States with a community of interests in a particular source of water; reliance on general principles was not enough. It was held that any set of rules of general international law that the Commission might devise could serve only as a framework for more specific conventional rules to be established between the States most directly concerned. The task of formulating such a framework was deemed formidable: it had to include a careful analysis of the many existing conventional rules with a view to deducing their common legal elements and distinguishing the latter from purely organizational and regulatory matters. It was also said that, in formulating basic, general rules, the Commission should draw upon the wealth of literature and information available, in order to determine which rules were general and fundamental in character, and which were in the nature of particular regulations that might be covered by user agreements. Some user agreements in existence included a clause providing that the agreement should not affect the obligations and rights of the parties under international law. In such cases it was seen as difficult to distinguish fundamental from particular law, but it should nevertheless be possible to do so if reference were had to the terms of the agreements themselves and to the work of other bodies involved in the matter.

136. At the same time, a few members of the Commission questioned whether it was possible to formulate rules on the topic other than, perhaps, rules of the most general and minimal nature.⁷⁸¹

137. The Special Rapporteur, in his report, also examined the question of the relationship between the proposed "framework convention" and user agreements.⁷⁸²

"Article 3. User agreements"

"The present articles may be supplemented by user agreements among user States."

"Article 4. Definitions"

"For the purposes of the present articles:

"1. 'Contracting State' means a user State party to these articles which may or may not be party to a user agreement.

"2. 'Co-operating State' means a user State party to a user agreement which is not party to these articles.

"3. 'Non-contracting State' means a user State which is not party either to these articles or to a user agreement."

⁷⁸¹ See para. 133 above.

⁷⁸² The draft articles proposed by the Special Rapporteur (A/CN.4/320 and Corr.1, para. 2) read as follows:

"Article 5. Parties to user agreements"

"A user State not party to these articles may be party to a user agreement provided that one or more user States parties to the user agreement are parties to these articles."

"Article 6. Relation of these articles to user agreements"

"1. A user agreement shall be entered into within the framework of these articles.

"2. These articles shall apply to States parties to a user agreement with respect to matters not regulated by the user agreement."

"Article 7. Entry into force for an international watercourse"

"These articles shall enter into force for an international watercourse on the thirtieth day following the deposit of the second instrument of ratification or accession by a user State."

While it might be expected that a State that was prepared to enter into a user agreement would also be prepared to become bound by the framework convention, there might be States, he believed, which preferred to act only in the context of a specific international watercourse. There should be no objection in principle to authorizing such a user State to become party to a user agreement, subject to two qualifications. First, there would have to be one or more user States that were parties both to the convention and to a user agreement, to ensure that the user agreement was entered into within the framework of the convention. Secondly, the user agreement should reinforce that connexion by recognizing the principles and rules set forth in the convention as applicable, to the extent that provision on any matter was not made in the user agreement. Otherwise, according to the Special Rapporteur, the objective of establishing basic, if residual, principles through the medium of the convention would be sacrificed. He believed such an approach to be consonant with the Vienna Convention on the Law of Treaties,⁷⁸³ because third States would become residually bound by the framework convention only insofar as they agreed in a user agreement so to incorporate it by reference. Yet he recognized that the relationship could present considerable complexity and would require close examination. In any event, States not parties to the convention would remain free to enter into user agreements that would have no relationship to the convention.

138. It was generally agreed by those who referred in the debate to that aspect of the topic that at some point the relationship between the proposed draft articles on general principles and user agreements—existing and future—would have to be determined. It would be necessary to consider carefully the nexus between the fundamental rules to be drafted and the provisions for user agreements entered into within the framework of those rules. The particular relationship described by the Special Rapporteur was seen as a novel one, requiring further consideration. It was difficult to foresee how the relationship was to be expressed and exactly what it should be. According to one view, user agreements should be subordinate to the general rules laid down in the framework convention. Another view was that the rules to be included in such a convention should be formulated so as to supplement user agreements or fill lacunae therein, or to provide guidelines for the preparation of user agreements. Moreover, it was stressed that the provisions of the Vienna Convention must be borne in mind, as it was not possible to impose an obligation on States adjoining an international watercourse to abide by fundamental rules which they had not accepted, or to restrict the capacity of States to conclude agreements freely. At the same time, it was also said that, to the extent that the general obligations of the proposed convention could be interpreted as codifying existing customary international law, they would be applicable and binding on third States through international custom, as provided in article 38 of the Vienna Convention.

139. It was generally agreed that the question of the relationship or nexus between the draft articles to be prepared on general principles and the projected user agreements to be concluded within their framework was

⁷⁸³ 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".

not a matter of first priority, and that the question should be taken up again at a later stage in the Commission's work on the topic, as appropriate.

140. Attention was drawn to the need to clarify the concept of "user State". Such a State, according to the Special Rapporteur, could be considered to be one that contributed to or made use of, or that contributed to and made use of, the water of an international watercourse. A State contributing to water meant a State from which the water of an international watercourse derived, whereas a State making use of such water was understood to mean also the inhabitants, corporeal and incorporeal, of that State. During the debate, a number of members raised questions concerning possible activities of a State that might bring it into the classification of a user State. It was asked whether a State that used electricity generated in another State from the water of an international watercourse thus became a user State of that watercourse, whether a State that used the water of an international watercourse solely for navigation could be regarded as a user State of that watercourse and, in view of the facts of the hydrologic cycle, which States could be regarded as contributing to a watercourse. It was generally considered that further reflection would be required before such questions could be definitively answered.

5. COLLECTION AND EXCHANGE OF DATA WITH RESPECT TO INTERNATIONAL WATERCOURSES

141. As indicated above,⁷⁸⁴ the main purpose of the first report submitted by the Special Rapporteur was to present the Commission with a conceptual framework for dealing with the law of the non-navigational uses of international watercourses. Also included in that report, however, were proposals and considerations concerning one illustrative, substantive aspect of that law: regulation of data collection and exchange.⁷⁸⁵ The Special Rapporteur maintained that, in the light of relevant State practice and objective needs, a set of draft articles on the topic must deal with the problem of data collection and exchange and the costs thereof, and should include binding provisions designed to ensure the collection of a minimum amount of data adequate for fulfilment of the

⁷⁸⁴ See para. 134 above.

⁷⁸⁵ The draft articles proposed by the Special Rapporteur (A/CN.4/320 and Corr.1, para.2) read:

Article 8. Data collection

"1. A contracting State shall collect and record data with respect to precipitation and evaporation of water and with respect to the stage of flow, mean velocity and abstraction of the water of an international watercourse in its territory as follows:

- "(a) [to be completed]
- "(b) [to be completed]
- "(c) [to be completed]
- "(d) [to be completed]

"2. Each contracting State shall employ its best efforts to collect and record data in a manner which facilitates co-operative utilization of the data by contracting and co-operating States.

"3. User agreements may provide for the collection of such additional data, notably in respect of water quality and water-related disease, as may be significant for development, use and environmental protection of the international watercourse. They may specify the method of data collection and the nature of the records to be employed."

Article 9. Exchange of data

"1. Data collected under the terms of paragraphs 1 and 2 of

basic aims of watercourse management, but also to avoid unrealistically uniform regulation and to take advantage of the flexibility provided by user agreements.

142. The debate revealed a divergence of views on the matter among members of the Commission. While some members welcomed the formulation of draft articles on the regulation of data collection and exchange, others believed that provision for obligations of that nature might prove extremely burdensome for some countries and that such technical rules could not be drafted to cover all situations. It was not necessary, according to the latter view, to collect and exchange technical data on every international watercourse, as such activities were justified only with respect to those watercourses that were exploited. Furthermore, different kinds of data were relevant to different regions of the world. It was suggested that a general article could be drafted providing that the States concerned should co-operate in studying the situation with respect to certain international watercourses and in exchanging data.

143. Another view was that, while the broad principles underlying the suggestions for the collection and exchange of data were acceptable, particulars of the actual obligations would be better left for regulation by user agreements. Finally, it was said that, while provisions on the matter would be a necessary part of a set of draft articles on the topic, they would require more detailed examination in the future.

6. FUTURE WORK ON THE TOPIC

144. The Special Rapporteur initially indicated to the Commission that his future reports on the topic might well include draft articles on categories of uses (such as domestic or "consumptive" uses, irrigation, power, industrial uses other than power, fish and other aquatic food production, recreation and timber floating); specialized problems (such as flood control, erosion, sedimentation, salt-water intrusion and perhaps estuaries and drought); the interrelationship between categories of uses and between specialized problems; institutional arrangements for the co-operative use of international watercourses; and settlement of disputes. Problems of pollution were to be addressed in connexion with particular uses. In

article 8 of these articles shall be made available to contracting and co-operating States at regular intervals of _____

"2. Contracting and co-operation States shall use their best efforts to comply with requests from contracting and co-operating States for special data (data not included in the provisions of article 8, paragraph 1) and with requests from contracting and co-operating States for data collected prior to the entry into force of these articles for the contracting State requested or to the entry into force of the user agreement for the co-operating State requested.

"3. User agreements may regulate additional aspects of data exchange."

Article 10. Costs of data collection and exchange

"1. Costs of the collection and exchange of data pursuant to article 8, paragraph 1, and article 9, paragraph 1, shall be borne by the State providing the data.

"2. The requesting State shall bear the costs incurred by the requested State in fulfilling a request for special data, as defined in article 9, and in making available data collected prior to:

"(a) the entry into force of these articles for the contracting State requested or

"(b) the entry into force of the user agreement for the co-operating State requested.

"3. User agreements may provide for different or additional cost provisions relating to the collection and exchange of data."

the course of the debate, some members referred in particular to the need for procedures for the settlement of disputes and for procedures for international co-operation to deal with problems of international watercourses. It was also suggested that the responsibility of States for aquatic injury must be covered in any set of draft articles on the topic and that provision should be contemplated for technical assistance in that sphere, particularly to developing countries.

145. Later, at the 1577th and 1578th meetings, the Special Rapporteur presented, on the basis of the debate held at the current session, four possible approaches that he might follow in preparing his future reports, and invited comment on them by members of the Commission. The first approach mentioned was to proceed with the preparation of draft articles on particular uses, such as irrigation or power production, extracting such principles as there might be respecting each use for inclusion in a framework convention, but at the same time suggesting possible elements of complementary user agreements. The second approach was to concentrate on certain abuses of water and effects of the uses of water, such as pollution. A third possibility was to endeavour to draft general principles respecting international watercourses. The fourth approach was to address institutional arrangements for international co-operation in regard to international watercourses. Those approaches would be cumulative; the Special Rapporteur put them as alternatives simply to gain a sense of the direction in which the Commission thought he should proceed next.

146. The Commission's reaction was mixed. While some members favoured initial concentration on specific

uses such as irrigation or power production, others preferred that general principles of the law of the non-navigational uses of international watercourses should be addressed next. The Special Rapporteur expressed the hope that at its next session the Commission would in any event be able to crystallize what appeared to be a certain measure of agreement on the scope of the topic.

147. Bearing in mind the need for comprehension of the scientific and technical considerations involved in the topic, the Commission authorized the Special Rapporteur to explore with the Secretariat the possibilities of finding professional, technical advice, preferably within the existing resources and personnel of the United Nations system.

148. Finally, in view of the importance of the topic and the need to have at its disposal the views of as many Governments of Member States as possible, the Commission decided again to request, through the Secretary-General, the Governments of Member States that had not already done so⁷⁸⁶ to submit their written comments on the questionnaire formulated by the Commission in 1974.⁷⁸⁷

⁷⁸⁶ As at 3 August 1979, the Governments of the following 26 Member States had submitted replies to the Commission's questionnaire: Argentina, Austria, Barbados, Brazil, Canada, Colombia, Ecuador, Finland, France, Federal Republic of Germany, Hungary, Indonesia, Libyan Arab Jamahiriya, Netherlands, Nicaragua, Pakistan, Philippines, Poland, Spain, Sudan, Swaziland, Sweden, United States of America, Venezuela, Yemen and Yugoslavia.

⁷⁸⁷ See para. 96 above.

Chapter VI

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

A. Introduction

149. The Commission started its consideration of the topic "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" at its twenty-ninth session, pursuant to General Assembly resolution 31/76 of 13 December 1976.

150. At its thirtieth session, the Commission approved the result of the study undertaken by a Working Group on the subject and submitted it to the General Assembly at its thirty-third session, in 1978.⁷⁸⁸ At that session the Assembly discussed the results of the Commission's work in the Sixth Committee under two separate agenda items, namely, "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: Report of the Secretary-General" (item 116) and "the Report of the International Law Commission" (item 114).

151. On 19 December 1978, the General Assembly adopted, without a vote, resolution 33/139 on the latter item. In section I, paragraph 5, of that resolution, the Assembly recommended:

... that the International Law Commission should continue the study, including those issues it has already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in the light of comments made during the debate on this item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument . . .

It also invited all States to submit written comments on the preliminary study carried out by the Commission on the subject, for their inclusion in the Commission's report on the work of its thirty-first session.

152. With regard to the former agenda item, the Assembly adopted without a vote, on the same day, resolution 33/140. In a preambular paragraph, the Assembly noted

"with appreciation the study by the International Law Commission of 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 could constitute a further development of international diplomatic law",

and in operative paragraph 5, decided

... that the General Assembly will give further consideration to this question and expresses the view that, unless Member States indicate the desirability of an earlier consideration, it would be appropriate to do so

⁷⁸⁸ See *Yearbook . . . 1978*, vol. II (Part Two), pp. 138-147, document A/33/10, paras. 137-144. The report of the Working Group is hereinafter referred to as "1978 Report".

when the International Law Commission submits to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

153. At the current session, at its 1546th meeting on 6 June 1979, the Commission again established a Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, composed of the following members: Mr. Alexander Yankov (Chairman), Mr. Emmanuel Kodjoe Dadzie, Mr. Leonardo Díaz González, Mr. Jens Evensen, Mr. Laurel B. Francis, Mr. Willem Riphagen, Mr. Sompong Sucharitkul, Mr. Abdul Hakim Tabibi, Mr. Doudou Thiam and Mr. Nikolai Ushakov. The Working Group held three meetings, on 17, 24 and 27 July 1979.

154. The Working Group had before it comments by States received by the Secretariat pursuant to section I, paragraph 5, of resolution 33/139 and paragraph 3 of resolution 33/140 of the General Assembly (A/CN.4/321 and Add.1-5) and a working paper prepared by the Secretariat⁷⁸⁹ containing an analytical summary of the general views of Governments on the elaboration of a protocol on the subject and comments and observations of Governments, as well as the Commission's own observations, on specific issues relating to the subject.

155. On the basis of the documents mentioned in the preceding paragraph as well as other relevant material, the Working Group studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The result of this study is set out in sections B to D below. Section B gives an analysis of the general views on the elaboration of a protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, expressed by Governments after the submission by the Commission of the result of its preliminary study on the topic in 1978. Section C contains summaries of comments and proposals made by Governments since 1976 on specific issues relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. These summaries, together with the Commission's own observations, are grouped under each of the 19 headings which the Commission tentatively identified in 1978.⁷⁹⁰ Section D reproduces certain issues which the Working Group examined during the current session and considered necessary to be studied.

⁷⁸⁹ A/CN.4/WP.4. The main contents of the working paper provided a basis for the report of the Working Group (A/CN.4/L.310), which was subsequently incorporated, with changes, into this chapter.

⁷⁹⁰ *Yearbook . . . 1978*, vol. II (Part Two), p. 139, document A/33/10, para. 143.

B. General views on the elaboration of a protocol

156. Many Governments⁷⁹¹ expressed the view that the work of the Commission on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had shown that written legal rules on that question were either non-existent or quite inadequate. They stressed the need to elaborate a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. A number of these Governments considered that the Commission should undertake the task of its elaboration. They also thought that the Commission's work constituted a good basis for further efforts.

157. Many other Governments,⁷⁹² without referring to the work done by the Commission, also expressed the view that the existing conventions relating to the question were incomplete and that an additional protocol should therefore be elaborated.

⁷⁹¹ Algeria (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 18th meeting, para. 20; and ibid., Sessional fascicle, corrigendum*); Argentina (*ibid., Sixth Committee, 40th meeting, para. 44; and ibid., Sessional fascicle, corrigendum*); Bulgaria (*ibid., Sixth Committee, 19th meeting, para. 6, and 40th meeting, para. 31; and ibid., Sessional fascicle, corrigendum*); Byelorussian SSR (*ibid., Sixth Committee, 17th meeting, para. 7, and 39th meeting, para. 37; and ibid., Sessional fascicle, corrigendum*); Cyprus (*ibid., Sixth Committee, 16th meeting, para. 7; and ibid., Sessional fascicle, corrigendum*); Czechoslovakia (*ibid., Sixth Committee, 41st meeting, para. 58; and ibid., Sessional fascicle, corrigendum*); Germany, Federal Republic of (*ibid., Sixth Committee, 19th meeting, para. 33; ibid., Sessional fascicle, corrigendum; and A/CN.4/321 and Add.1-7 (reproduced in Yearbook . . . 1979, vol. II (Part One))*); Hungary (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 15th meeting, para. 12, and 36th meeting, para. 19; ibid., Sessional fascicle, corrigendum; and A/CN.4/321 and Add.1-7*); India (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 19th meeting, para. 55; and ibid., Sessional fascicle, corrigendum*); Kenya (*ibid., Sixth Committee, 38th meeting, para. 54; and ibid., Sessional fascicle, corrigendum*); Libyan Arab Jamahiriya (*ibid., Sixth Committee, 18th meeting, para. 31; and ibid., Sessional fascicle, corrigendum*); Mongolia (*ibid., Sixth Committee, 15th meeting, para. 4, and 41st meeting, para. 24; and ibid., Sessional fascicle, corrigendum*); Singapore (*ibid., Sixth Committee, 43rd meeting, para. 42; and ibid., Sessional fascicle, corrigendum*); Ukrainian SSR (*ibid., Sixth Committee, 18th meeting, para. 17; and ibid., Sessional fascicle, corrigendum*); USSR (*ibid., Sixth Committee, 14th meeting, para. 15, 37th meeting, para. 34, and 42nd meeting, para. 26; ibid., Sessional fascicle, corrigendum; and A/CN.4/321 and Add.1-7*).

⁷⁹² Afghanistan (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 19th meeting, para. 42; and ibid., Sessional fascicle, corrigendum*); Colombia (*ibid., Sixth Committee, 17th meeting, para. 9; and ibid., Sessional fascicle, corrigendum*); Cuba (*ibid., Sixth Committee, 19th meeting; ibid., Sessional fascicle, corrigendum; and A/CN.4/321 and Add.1-7*); Democratic Yemen (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 19th meeting, para. 58; and ibid., Sessional fascicle, corrigendum*); Egypt (*ibid., Sixth Committee, 17th meeting, para. 33; and ibid., Sessional fascicle, corrigendum*); Ethiopia (*ibid., Sixth Committee, 15th meeting, para. 16; and ibid., Sessional fascicle, corrigendum*); German Democratic Republic (*ibid., Sixth Committee, 16th meeting, para. 2; and ibid., Sessional fascicle, corrigendum*); Iran (*ibid., Sixth Committee, 19th meeting, para. 38; and ibid., Sessional fascicle, corrigendum*); Iraq (*ibid., Sixth Committee, 18th meeting, para. 3; and ibid., Sessional fascicle, corrigendum*); Poland (*ibid., Sixth Committee, 18th meeting, para. 8, and 38th meeting, para. 8; and ibid., Sessional fascicle, corrigendum*); Rwanda (*ibid., Sixth Committee, 41st meeting, para. 7; and ibid., Sessional fascicle, corrigendum*); Swaziland (*ibid., Sixth Committee, 45th meeting, para. 36; and ibid., Sessional fascicle, corrigendum*); Uganda (*ibid., Sixth Committee, 19th meeting, para. 60; and ibid., Sessional fascicle, corrigendum*).

158. Certain Governments,⁷⁹³ in favour of elaborating such a protocol, attached special importance to the question of the status of the diplomatic bag not accompanied by diplomatic courier.

159. One Government⁷⁹⁴ stated that it could consider the possibility of drafting such a protocol if its preamble acknowledged that the 1961 Vienna Convention on Diplomatic Relations⁷⁹⁵ was imperfect and that it needed to be fully and substantially revised in order to correct its defects.

160. A few Governments⁷⁹⁶ took the view that the study of the question of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should be pursued by the Commission or by the Sixth Committee. Certain others⁷⁹⁷ stated that they would not oppose further consideration of the subject by the Commission if other Governments insisted.

161. On the other hand, several Governments⁷⁹⁸ considered that the existing conventions dealt with the subject adequately and there was no need to elaborate an additional protocol on it. They generally emphasized that what was more important was stricter compliance with the provisions of the relevant conventions. One Government⁷⁹⁹ stated that no urgency attached to the question.

162. Certain Governments⁸⁰⁰ considered that the best course would be to wait until the Commission had completed its work on the subject before deciding what further action should be taken.

⁷⁹³ Costa Rica (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 19th meeting, para. 57; and ibid., Sessional fascicle, corrigendum*); Ethiopia (*ibid., Sixth Committee, 15th meeting, para. 16; and ibid., Sessional fascicle, corrigendum*); Germany, Federal Republic of (*A/CN.4/321 and Add.1-7*).

⁷⁹⁴ Tunisia (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 18th meeting, para. 14; and ibid., Sessional fascicle, corrigendum*).

⁷⁹⁵ See foot-note 801 below.

⁷⁹⁶ Austria (*A/CN.4/321 and Add.1-7*); Costa Rica (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 19th meeting, para. 57; and ibid., Sessional fascicle, corrigendum*).

⁷⁹⁷ Canada (*ibid., Sixth Committee, 16th meeting, para. 15; and ibid., Sessional fascicle, corrigendum*); Italy (*ibid., Sixth Committee, 17th meeting, para. 16; and ibid., Sessional fascicle, corrigendum*).

⁷⁹⁸ Austria (*ibid., Sixth Committee, 37th meeting, para. 6; and ibid., Sessional fascicle, corrigendum*); Canada (*ibid., Sixth Committee, 16th meeting, para. 15; ibid., Sessional fascicle, corrigendum; and A/CN.4/321 and Add.1-7*); Italy (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 17th meeting, para. 16; and ibid., Sessional fascicle, corrigendum*); Japan (*ibid., Sixth Committee, 19th meeting, paras. 51-52; and ibid., Sessional fascicle, corrigendum*); Kuwait (*A/CN.4/321 and Add.1-7*); Netherlands (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 19th meeting, paras. 14-15; and ibid., Sessional fascicle, corrigendum*); Spain (*ibid., Sixth Committee, 15th meeting, para. 7; and ibid., Sessional fascicle, corrigendum*); Switzerland (*A/CN.4/321 and Add.1-7*); United Kingdom (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 15th meeting, para. 20; ibid., Sessional fascicle; and A/CN.4/321 and Add.1-7*); United States (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 18th meeting, para. 27, and 40th meeting, para. 11; and ibid., Sessional fascicle, corrigendum*); Uruguay (*ibid., Sixth Committee, 19th meeting, para. 24; and ibid., Sessional fascicle, corrigendum*); Venezuela (*ibid., Sixth Committee, 19th meeting, para. 22, and 43rd meeting, para. 18; and ibid., Sessional fascicle, corrigendum*).

⁷⁹⁹ Israel (*ibid., Sixth Committee, 41st meeting, para. 34; and ibid., Sessional fascicle, corrigendum*).

⁸⁰⁰ France (*ibid., Sixth Committee, 20th meeting, para. 3; and ibid., Sessional fascicle, corrigendum*); Japan (*ibid., Sixth Committee, 19th meeting, para. 53; and ibid., Sessional fascicle, corrigendum*).

C. Comments and proposals relating to possible elements of a protocol

1. DEFINITION OF "DIPLOMATIC COURIER"

(1) *Observations of the Commission*

No definition of "diplomatic courier" as such is found in the existing conventions.⁸⁰¹ However, the following provisions may be considered as containing elements for a possible definition.

(a) 1961 Vienna Convention (article 27, paragraphs 1 and 5):

1. . . . In communicating with the Government and the other missions and consulates of the sending States, wherever situated, the mission may employ all appropriate means, including diplomatic couriers . . .

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag . . .

(b) 1963 Vienna Convention (article 35, paragraphs 1 and 5):

1. . . . In communicating with the Government of the sending State, missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, . . .

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag . . .

(c) Convention on Special Missions (article 28, paragraphs 1, 3 and 6):

1. . . . In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its other special missions or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers . . .

3. Where practicable, the special mission shall use the means of communication, including . . . the courier, of the permanent diplomatic mission of the sending State.

6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag . . .

(d) 1975 Vienna Convention (article 27, paragraphs 1 and 5, and article 57, paragraphs 1, 3 and 6):

Article 27

1. . . . In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions, delegations and observer delegations, wherever situated, the mission may employ all appropriate means, including couriers . . .

5. The courier of the mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag . . .

Article 57

1. . . . In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions,

permanent observer missions, special missions, other delegations and observer delegations, wherever situated, the delegation may employ all appropriate means, including couriers . . .

3. Where practicable, the delegation shall use the means of communication, including . . . the courier, of the permanent diplomatic mission, of a consular post, of the permanent mission or of the permanent observer mission of the sending State.

6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag . . . (1978 Report.)⁸⁰²

(2) *Comments of Governments*

(a) The diplomatic courier is a person carrying the diplomatic bag of a diplomatic mission communicating with its Government or other missions of the sending State, wherever situated. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 41; and ibid., Sessional fascicle, corrigendum.*)

(b) A diplomatic courier is a person authorized to deliver the diplomatic bag in relations between a diplomatic mission and the Government of its country, as well as between other missions and consulates of that Government, regardless of where they are situated. He shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag. (A/33/224, Annex, p. 65.)

(c) It would also be desirable to include in the protocol provisions to the effect that the meaning of the terms "diplomatic courier" and "diplomatic bag" will, where necessary, be assimilated to that of the terms "consular courier" and "consular bag", used in article 35 of the 1963 Vienna Convention; "courier of the special mission" and "bag of the special mission", used in article 28 of the Convention on Special Missions; and "courier of the mission", "bag of the mission", "courier of the delegation" and "bag of the delegation" used in articles 27 and 57 of the 1975 Vienna Convention. (*Ibid.*, p. 68.)

(d) The diplomatic courier is the person responsible for delivering the diplomatic bag. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 17th meeting, para. 12; and ibid., Sessional fascicle, corrigendum.*)

(e) The expression may be said to have the following meaning: "diplomatic courier" means the person who, duly authorized by his Government, is responsible for the custody and physical transport of the diplomatic bag, or for transmitting an oral message from the sending State to the premises of the appropriate mission or office in the receiving State. However, this issue should be linked to item 13 [below], concerning the definition of "diplomatic bag". Furthermore, and for the sake of completeness, whatever definitions clause is drafted should also envisage the definition of "transit State" and "receiving State". (A/CN.4/321 and Add.1-7, Chile, para. 1.)

2. FUNCTION OF THE DIPLOMATIC COURIER

(1) *Observations of the Commission*

The provisions of the existing conventions mentioned under heading (1) above are also relevant under this heading. Some members stressed the need to make it clear that the function of the courier was that of the State and

⁸⁰¹ The words "existing conventions" as used here mean the Vienna Convention on Diplomatic Relations (referred to as "1961 Vienna Convention"), the Vienna Convention on Consular Relations (referred to as "1963 Vienna Convention"), the Convention on Special Missions, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (referred to as "1975 Vienna Convention"). For the texts of these Conventions, see respectively United Nations, *Treaty Series*, vol. 500, p. 95; *ibid.*, vol. 596, p. 261; Annex to General Assembly resolution 2530 (XXIV); and *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. 207.

⁸⁰² See foot-note 788 above.

not of the individual. It was also pointed out that the function of the courier was not limited to the carrying of diplomatic bags; he might also carry messages orally. (1978 Report.)

(2) *Comments of Governments*

The existing multilateral conventions provide guidelines for defining the functions of the diplomatic courier. In performing his specific tasks, the diplomatic courier becomes the appropriate means used by a State to contact, in a safe and solemn manner, the particular diplomatic mission, consular office, permanent observer mission, special mission, or observer delegation which calls for its attention at the time. In practice, therefore, the courier has a number of functions, and hence the definition should be broad and flexible, rather than narrow and restricted to a list of various activities. (A/CN.4/321 and Add.1-7, Chile, para. 2.)

3. MULTIPLE APPOINTMENT OF THE DIPLOMATIC COURIER

(1) *Observations of the Commission*

No provision is found in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

There would appear to be no objection to the multiple appointment of the diplomatic courier, if circumstances necessitate it. (A/CN.4/321 and Add. 1-7, Chile, para. 3.)

4. PRIVILEGES AND IMMUNITIES OF THE DIPLOMATIC COURIER (GENERAL)

(1) *Observations of the Commission*

On the general question of the privileges and immunities to be granted to the diplomatic courier, certain members stressed the importance of according the fullest possible diplomatic status to the courier, whereas others took the view that such privileges and immunities should be strictly limited to the needs of his functions.

In connexion with the same general question, it was pointed out that the existing conventions did not cover cases where the courier had another status as well, such as that of a diplomatic agent or consular officer. (1978 Report.)

(2) *Comments of Governments*

(a) Special attention should be given to such questions as the exemption of couriers from customs duties and charges. (A/31/145, p. 14.)

(b) Where a diplomatic mission receives or dispatches mail via a diplomatic courier, the latter shall, in the territory of the receiving State, enjoy all the privileges and immunities of a diplomatic agent set forth in articles 29-36 of the 1961 Vienna Convention. (*Ibid.*, p. 16.)

(c) The diplomatic courier should be entitled to enjoy at least some of the privileges and immunities of a diplomatic agent. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 37; and ibid., Sessional fascicle, corrigendum.*)

(d) The protocol should provide for all the privileges and immunities granted to diplomatic representatives.

(*Ibid., Sixth Committee, 65th meeting, para. 42, and ibid., Sessional fascicle, corrigendum; A/CN.4/321 and Add.1-7, Czechoslovakia; ibid., Hungary; ibid., USSR.; Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 41st meeting, para. 58, and ibid., Sessional fascicle, corrigendum.*)

(e) Privileges and immunities should be granted to the diplomatic courier only to the extent necessary for the performance of his functions. (A/CN.4/321 and Add.1-7, Chile, para. 4; *ibid.*, Federal Republic of Germany.)

(f) No sufficient justification can be found for the exceptions made in article 27, paragraphs 6 and 7, or for the general rule contained in paragraph 5, of the 1961 Vienna Convention. The protocol should make it clear that the person carrying the bag was independent of the bag itself, so as to ensure that any measure taken by any State against the former was not extended to the latter. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 17th meeting, para. 13, and ibid., Sessional fascicle, corrigendum.*)

4 (a). PERSONAL INVIOABILITY

(1) *Observations of the Commission*

The existing conventions contain the following provisions:

(a) 1961 Vienna Convention (article 27, paragraph 5):

5. ... He [the diplomatic courier] shall enjoy personal inviolability ...

(b) 1963 Vienna Convention (article 35, paragraph 5):

5. ... He [the consular courier] shall enjoy personal inviolability ...

(c) Convention on Special Missions (article 28, paragraph 6):

6. ... He [the courier of the special mission] shall enjoy personal inviolability ...

(d) 1975 Vienna Convention (article 27, paragraph 5, and article 57, paragraph 6):

Article 27

5. ... He [the courier of the mission] shall enjoy personal inviolability ...

Article 57

6. ... He [the courier of the delegation] shall enjoy personal inviolability ... (1978 Report.)

(2) *Comments of Governments*

(a) The diplomatic courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention. Where a diplomatic mission receives or dispatches mail via a diplomatic courier, the receiving State shall take all appropriate steps to prevent any infringement of the courier's person, freedom or dignity. (A/31/145, pp. 16-17; A/31/145/Add.1, p. 2; A/33/224, p. 66; A/CN.4/321 and Add.1-7, Czechoslovakia.)

(b) Since violations of the 1961 Vienna Convention continued to occur, it was felt necessary to supplement article 27 thereof by more precise provisions concerning the inviolability of diplomatic couriers, bearing in mind the technology currently employed for customs and border inspections. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 32, and ibid., Sessional fascicle, corrigendum.*)

(c) The Commission should concentrate its attention on steps which would increase the effectiveness of the principle of inviolability of the diplomatic courier. (A/33/224, p. 60.)

4 (a) (i). IMMUNITY FROM ARREST OR DETENTION

(1) *Observations of the Commission*

The existing conventions provide as follows:

(a) 1961 Vienna Convention (article 27, paragraph 5):

5. . . . He [the diplomatic courier] . . . shall not be liable to any form of arrest or detention.

(b) 1963 Vienna Convention (article 35, paragraph 5):

5. . . . He [the consular courier] . . . shall not be liable to any form of arrest or detention.

(c) Convention on Special Missions (article 28, paragraph 6):

6. . . . He [the courier of the special mission] . . . shall not be liable to any form of arrest or detention.

(d) 1975 Vienna Convention (article 27, paragraph 5 and article 57, paragraph 6):

Article 27

5. . . . He [the courier of the mission] . . . shall not be liable to any form of arrest or detention.

Article 57

6. . . . He [the courier of the delegation] . . . shall not be liable to any form of arrest or detention. (1978 Report.)

(2) *Comments of Governments*

The diplomatic courier shall not be liable to any form of arrest or detention. (A/31/145, p. 16; A/31/145/Add.1, p. 2; A/33/224, Annex, p. 64; A/CN.4/321 and Add.1-7, USSR.)

4 (a) (ii). EXEMPTION FROM PERSONAL EXAMINATION OR CONTROL

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) The diplomatic courier shall not be subject to any personal inspection or control of any kind, including inspection or control with the use of technical means. (A/31/145, pp. 6 and 17).

(b) The diplomatic courier, in the performance of his official duties, shall be exempt from the personal examination carried out at airports with a view to ensuring the safety of civil aviation, as well as from examination carried out at a distance by means of technical devices. (A/33/224, p. 67).

(c) The protocol should provide for the exemption of the diplomatic courier from personal examination or control. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 42, and ibid., Sessional fascicle, corrigendum; A/CN.4/321 and Add.1-7, USSR; ibid., Hungary.*)

(d) There is no need to make specific provision for the exemption of the diplomatic courier from personal examination . . . because the task of the courier is of a correspondence rather than of a diplomatic representa-

tive character, and thus one should avoid causing undue difficulties to the host country. (*Ibid.*, Kuwait.)

4 (a) (iii). EXEMPTION FROM INSPECTION OF PERSONAL BAGGAGE

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) The personal baggage of the diplomatic courier shall [in all circumstances] be exempt from inspection, including customs inspection (A/31/145, p. 17; *Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 41st meeting, para. 58, and ibid., Sessional fascicle, corrigendum; A/CN.4/321 and Add.1-7, Czechoslovakia; ibid., USSR; ibid., Hungary.*)

(b) The personal baggage of the diplomatic courier shall be exempt from customs inspection. (A/31/145, pp. 6 and 14).

(c) Since violations of the 1961 Vienna Convention continued to occur, it was felt necessary to supplement article 27 thereof by more precise provisions concerning the inviolability of luggage, bearing in mind the technology currently employed for customs and border inspections. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 32, and ibid., Sessional fascicle, corrigendum.*)

(d) The personal baggage of the diplomatic courier shall be exempt from customs inspection if there are no serious grounds for believing that it contains articles the import of which is prohibited by law or which are subject to the quarantine regulations of the host State. Such inspection shall be carried out only in the presence of the diplomatic courier. (A/33/224, p. 67.)

4 (b). INVIOABILITY OF RESIDENCE

(1) *Observations of the Commission*

No provision is contained in the existing conventions. Emphasis was placed on the need to provide for protection of the place where the courier was staying while performing his functions. (1978 Report.)

(2) *Comments of Governments*

(a) The premises used by the diplomatic courier for residential purposes in the performance of his official duties in the host State or the transit State shall be inviolable. The host State or the transit State is required to take all appropriate steps to protect such premises from any intrusion or damage. (A/33/224, p. 67; A/31/145, p. 17).

(b) The protocol should provide for the inviolability of the residence or temporary official premises occupied by the diplomatic courier in the receiving State and in the transit State. (A/31/145, p. 14; *Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 41st meeting, para. 58, and ibid., Sessional fascicle, corrigendum; A/CN.4/321 and Add.1-7, Czechoslovakia; ibid., Chile, para. 4; ibid., USSR; ibid., Hungary.*)

(c) There is no need to provide for the inviolability of his residence because the task of the courier is of a correspondence rather than of a diplomatic representa-

tive character and thus one should avoid causing undue difficulties to the host country. (*Ibid.*, Kuwait.)

4 (c). INVIOIABILITY OF MEANS OF TRANSPORT

(1) *Observations of the Commission*

No provision is contained in the existing conventions. Emphasis was placed on the need to ensure adequate protection of the means of transport of the courier. (1978 Report.)

(2) *Comments of Governments*

(a) The legitimate security interests of States should be recognized, particularly in regard to the technical operation of their transport facilities. *Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 65th meeting, para. 41, and *ibid.*, *Sessional fascicle*, corrigendum.)

(b) It is necessary to supplement article 27 of the 1961 Vienna Convention by more precise provisions concerning the inviolability of means of transport of the diplomatic courier. (*Ibid.*, *Sixth Committee*, 65th meeting, para. 32, and *ibid.*, *Sessional fascicle*, corrigendum; A/CN.4/321 and Add.1-7, Chile, para. 4; *ibid.*, USSR.)

4 (d). IMMUNITY FROM JURISDICTION

(1) *Observations of the Commission*

No provision is contained in the existing conventions. It was stated that such immunity should be granted to the courier in connexion with the performance of his functions. (1978 Report.)

(2) *Comments of Governments*

(a) The diplomatic courier, in the performance of his official duties in the territory of the host State or the transit State, shall enjoy immunity from the criminal, civil and administrative jurisdiction of that State. The diplomatic courier is not obliged to give evidence as a witness in the host State or the transit State. The immunity of the diplomatic courier from the jurisdiction of the host State and the transit State shall not exempt him from the jurisdiction of the State to which the diplomatic bag belongs. (A/33/224, p. 66)

(b) The protocol should provide for the complete immunity of the courier from the jurisdiction of the State in whose territory he travels. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 41st meeting, para. 58, and *ibid.*, *Sessional fascicle*, corrigendum; A/CN.4/321 and Add.1-7, Czechoslovakia; *ibid.*, USSR.)

4 (e). WAIVER OF IMMUNITIES

(1) *Observations of the Commission*

No provision is contained in existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) The State to which the diplomatic bag belongs may waive, wholly or in part, the immunities of its diplomatic courier who delivers the bag. Such waiver shall always be express. (A/33/224, Annex, p. 66.)

(b) As far as the waiver of such privileges is concerned, the principle set forth in article 31, paragraph 1, of the 1961 Vienna Convention, applying to the diplomatic agent, should remain applicable. (A/CN.4/321 and Add.1-7, Chile, para. 4.)

5. FACILITIES ACCORDED TO THE DIPLOMATIC COURIER

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) The facilities to be accorded to the diplomatic courier are related to the deference and courtesies to be extended by States, in their relations with one another, to the representatives or envoys of other States. Consequently, it will be a question of fact what the specific facilities should consist of, and for this reason a generic approach seems to be called for to the undertaking by States to facilitate, as far as possible, the performance of the functions of the courier (for example, the timely and prompt granting of visas). (A/CN.4/321 and Add.1-7, Chile, para. 5.)

(b) A provision should be elaborated concerning preferential treatment of the diplomatic courier with respect to passport and customs formalities. (*Ibid.*, Federal Republic of Germany.)

(c) For the purpose of the prompt and complete performance of the mission entrusted to him, the diplomatic courier should be able to rely on the undertaking given by States to give him passport visas, if such visas are necessary. A provision embodying this obligation on the part of transit States to permit movement through their territory would constitute an effective protection for the movement of the courier in the performance of his duty. For this purpose, it would be desirable to combine this principle with item 5, concerning the facilities to be accorded to the diplomatic courier. (*Ibid.*, Chile, para. 18.)

6. DURATION OF PRIVILEGES AND IMMUNITIES OF THE DIPLOMATIC COURIER

(1) *Observations of the Commission*

No provision is contained in the existing conventions. However, the following provisions relating to the courier *ad hoc* may be taken into account:

(a) 1961 Vienna Convention (article 27, paragraph 6):

6. . . . the immunities [which a diplomatic courier *ad hoc* enjoys] shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

(b) 1963 Vienna Convention (article 35, paragraph 6):

6. . . . the immunities [which a consular courier *ad hoc* enjoys] shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

(c) Convention on Special Missions (article 28, paragraph 7):

7. . . . the immunities [which a courier *ad hoc* for the special mission enjoys] shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

(d) 1975 Vienna Convention (article 27, paragraph 6, and article 57, paragraph 7):

Article 27

6. . . . the immunities [which a courier *ad hoc* of the mission enjoys] shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

Article 57

7. . . . the immunities [which a courier *ad hoc* of the delegation enjoys] shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

The view was expressed that the jurisdictional immunities *ratione materiae* should continue even after a courier ceased to exercise his functions. (1978 Report.)

(2) *Comments of Governments*

(a) The diplomatic courier shall enjoy the privileges and immunities provided for in the protocol from the time he enters the territory of the host State or the transit State in the performance of his official duties until he leaves that territory. An *ad hoc* diplomatic courier shall enjoy the privileges and immunities provided for in the protocol from the time when he enters the territory of the host State or the transit State until he delivers the diplomatic bag entrusted to him to its destination. (A/33/224, p. 67).

(b) It seems advisable to restate the principle laid down in the four existing multilateral conventions, namely, that the privileges and immunities enjoyed by the diplomatic courier would cease to apply from the moment when he has delivered the diplomatic bag to the consignee. (A/CN.4/321 and Add.1-7, Chile, para. 6.)

(c) The privileges and immunities should apply for the entire duration of his stay in the receiving State, on the understanding that the diplomatic courier delivers a diplomatic bag to the diplomatic mission and also receives a diplomatic bag from the mission and that he performs these two acts without delay and subsequently departs immediately. (*Ibid.*, Federal Republic of Germany.)

7. NATIONALITY OF THE DIPLOMATIC COURIER

(1) *Observations of the Commission*

The following provision appears in the 1963 Vienna Convention (article 35, paragraph 5):

5. . . . Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he [the consular courier] is a national of the sending State, a permanent resident of the receiving State (1978 Report.)

(2) *Comments of Governments*

In view of the fact that, through the diplomatic courier, the sending State extends its official action to the transport and delivery of the diplomatic bag, and of the importance of entrusting such a mission to an official who is one of its own nationals and is duly authorized, the principle set forth in the 1963 Vienna Convention appears sound, namely, that the courier shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. (A/CN.4/321 and Add.1-7, Chile, para. 7.)

8. END OF FUNCTIONS OF DIPLOMATIC COURIER

(1) *Observations of the Commission*

No provision is contained in the existing conventions. It was stated that the termination of a courier's functions

should be the moment when he returned to his home base. (1978 Report.)

(2) *Comments of Governments*

(a) The protocol should contain provisions defining the procedure for terminating the functions of the diplomatic courier, if necessary. (A/31/145, p. 5.)

(b) With regard to the termination of the functions of the diplomatic courier, there are two distinct points, one concerning his function at the international level, and the other concerning his function under internal law. So far as the first point is concerned, the courier's functions would terminate when he delivers the diplomatic bag which he has been instructed to carry and deliver to the consignee; so far as the second point is concerned, his functions would terminate at the time when he reports the completion of his mission in the receiving State to the authority or service which assigned the official mission to him. (A/CN.4/321 and Add.1-7, Chile, para. 8.)

9. CONSEQUENCES OF THE SEVERANCE OR SUSPENSION OF DIPLOMATIC RELATIONS, OF THE RECALL OF DIPLOMATIC MISSIONS OR OF ARMED CONFLICT

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) If diplomatic relations between the State to which the diplomatic bag belongs and the host State or the transit State are broken off or suspended, or in the event of armed conflict between them, the host State and the transit State are required to respect and observe the inviolability of the diplomatic bag within their territory, as well as the privileges and immunities of the accompanying diplomatic courier of the State to which the diplomatic bag belongs. (A/31/145, p. 17; A/33/224, p. 67).

(b) The legal status of the courier should be further defined by applying to the diplomatic bag article 45 (a) of the 1961 Vienna Convention, concerning the severing or suspension of diplomatic relations. According to the generally held legal view, the inviolability of the diplomatic bag was the corollary to the inviolability of the official correspondence, archives and documents of a diplomatic mission. The inviolability of the diplomatic bag and the privileges and immunities of the courier would continue to be observed by the receiving or transit State when the events mentioned in article 45 (a) occurred. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 43, and ibid., Sessional fascicle, corrigendum.*)

(c) The function of the diplomatic courier, in so far as he is accorded privileges and immunities similar to those of the diplomatic agent, is of a procedural rather than a substantively political nature; consequently, the severance or suspension of diplomatic relations, or the recall of missions, should not influence decisively the functions of the courier during his passage through transit States. In strict law, the same would be true even in the event of an armed conflict with such States. In the event of the severance or suspension of diplomatic relations with the receiving State, or the recall of diplomatic missions, the diplomatic courier would act as a liaison between the

sending State and the diplomatic mission agreeing to look after the interests of that State; such situations of bilateral abnormality would not then interfere with the performance of the courier's functions. In the event of armed conflict, the *de facto* situation would prevent the courier from continuing to perform his functions. (A/CN.4/321 and Add.1-7, Chile, para. 9.)

10. GRANTING OF VISAS TO THE DIPLOMATIC COURIER

(1) *Observations of the Commission*

No provision is contained in the existing conventions. It was considered desirable to establish a rule aimed at facilitating the granting of visas where visas were required. It was maintained that full diplomatic status should be given to couriers with respect to visas. (1978 Report.)

(2) *Comments of Governments*

(a) A solution should be found to the question of uniform and simplified procedures for granting of visas to diplomatic couriers. In view of existing practice, a formula obliging the receiving and transit States to grant a diplomatic or special visa to the courier, without any delay and regardless of the type of passport he carried, should be supported. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 43, and ibid., Sessional fascicle, corrigendum.*)

(b) The granting of visas to the diplomatic courier would remain one of the facilities which transit States agree to grant him. (A/CN.4/321 and Add.1-7, Chile, para. 10.)

(c) It does not appear necessary to give the courier the status of a diplomatic agent in the matter of visas. (*Ibid.*, Federal Republic of Germany.)

11. PERSONS DECLARED NOT ACCEPTABLE

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) The host State or the transit State may, without having to justify its decision, inform the State to which the diplomatic bag belongs that the diplomatic courier delivering it is *persona non grata*. However, when the diplomatic courier is in the territory of the host State, it cannot request his recall or the termination of his official duties until the bag entrusted to him has been delivered to its destination. (A/31/145, p. 17; A/33/224, p. 67.)

(b) The protocol should provide for the appropriate right of the receiving State to declare the person of the diplomatic courier unacceptable. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 41st meeting, para. 58, and ibid., Sessional fascicle, corrigendum; A/CN.4/321 and Add.1-7, Czechoslovakia.*)

(c) A provision should be elaborated analogous to article 9 of the 1961 Vienna Convention concerning the declaration of the diplomatic courier as *persona non grata*. (*Ibid.*, Federal Republic of Germany.)

(d) According to the principle laid down in article 9,

paragraph 1, of the 1961 Vienna Convention, the declaration of a person as not acceptable relates directly to the members of the staff of a mission who do not possess diplomatic status. Consequently, the diplomatic courier would not be liable, on these grounds, to recall from the receiving State, since he is neither a member of the staff of the mission, nor connected with it, or with the receiving State, in any permanent manner. On the other hand, owing to the essentially temporary nature of the functions of the courier it would be feasible to appoint as courier a person who has been declared not acceptable, even by the State in question. As has been mentioned earlier, the diplomatic courier does not perform his functions within the mission or office, but outside it, as an official link between the sending State and the mission concerned, and hence he is not involved in the internal operations of the mission. Furthermore, the diplomatic courier's connexion with the sending State's diplomatic or consular mission lasts only for as long as is necessary to deliver the communication or message brought by him; consequently, the declaration of a person as not acceptable, made on an occasion prior to that on which he is sent as a diplomatic courier, would not prevent him from accomplishing his particular mission. Nevertheless, in order to avoid in the future situations which might offend the sensibilities of the receiving State, sending States might undertake not to send as diplomatic couriers persons declared not acceptable by that country. (*Ibid.*, Chile, para. 11.)

12. STATUS OF THE DIPLOMATIC COURIER *AD HOC*

(1) *Observations of the Commission*

The existing conventions provide the following:

(a) 1961 Vienna Convention (article 27, paragraph 6):

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

(b) 1963 Vienna Convention (article 35, paragraph 6):

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

(c) Convention on Special Missions (article 28, paragraph 7):

7. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

(d) 1975 Vienna Convention (article 27, paragraph 6, and article 57, paragraph 7):

Article 27

6. The sending State or the mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

Article 57

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned

shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

It was pointed out that the courier *ad hoc* might have another status, such as that of a diplomatic agent or consular officer, and that such a case was not covered by the existing conventions. It was also pointed out that there was need to define his status during the time when, after delivering a bag in his charge, he had to wait for some time until he was entrusted with another bag. (1978 Report.)

(2) *Comments of Governments*

(a) (i) Article 27, paragraph 5, of the 1961 Vienna Convention provides that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention". Paragraph 6 makes provision for diplomatic couriers *ad hoc* and grants to such a courier the same immunity as that mentioned in paragraph 5 until he has delivered to the consignee the diplomatic bag in his charge. Paragraph 7 covers the case where the diplomatic bag is entrusted to the captain of a commercial aircraft, who is not regarded as a diplomatic courier; the paragraph provides that a member of the mission may take possession of the diplomatic bag directly and freely from the said captain. The question arises whether the two exceptions of paragraphs 6 and 7 or the general rule in paragraph 5 of article 27 of the Vienna Convention are duly justified in international practice. (ii) If the reply is affirmative in the former case, it is suggested that the protocol should clearly lay down the principle that the person carrying or accompanying the bag (diplomatic courier *ad hoc* and/or captain of a commercial aircraft) is independent of the bag itself, so as to ensure that any measure which the receiving State might possibly adopt with respect to the person is not extended to the diplomatic bag and vice versa. (A/33/224, pp. 54-55.)

(b) An *ad hoc* diplomatic courier shall enjoy the privileges and immunities provided for in the protocol from the time when he enters the territory of the host State or the transit State until he delivers the diplomatic bag entrusted to him to its destination. (*Ibid.*, p. 67.)

(c) The multilateral conventions referred to all permit the designation of diplomatic couriers *ad hoc*. They state that, in any event, such a courier's privileges and immunities would be more limited, in that they would cease to apply upon delivery of what was entrusted to him to the consignee. Consequently, the diplomatic courier *ad hoc* should be governed by specific rules, within the general rules applicable to the diplomatic courier, in respect of such questions as his legal status in the interim period elapsing between the delivery of the diplomatic bag and the time when he is entrusted with another. (A/CN.4/321 and Add. 1-7, Chile, para. 12.)

(d) The diplomatic courier *ad hoc* should have the same status as the ordinary diplomatic courier. (*Ibid.*, Federal Republic of Germany.)

13. DEFINITION OF "DIPLOMATIC BAG"

(1) *Observations of the Commission*

No definition of "diplomatic bag" as such is contained in existing conventions. The following provisions, however, may be considered as relevant:

(a) 1961 Vienna Convention (article 27, paragraphs 2 and 4):

2. . . . Official correspondence means all correspondence relating to the mission and its functions.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

(b) 1963 Vienna Convention (article 35, paragraphs 1, 2 and 4):

1. . . . In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including . . . diplomatic or consular bags . . .

2. . . . Official correspondence means all correspondence relating to the consular post and its functions.

4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.

(c) Convention on Special Missions (article 28, paragraphs 2, 3 and 5):

2. . . . Official correspondence means all correspondence relating to the special mission and its functions.

3. Where practicable, the special mission shall use the means of communication, including the bag . . . of the permanent diplomatic mission of the sending State.

5. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

(d) 1975 Vienna Convention (articles 27, paragraphs 2 and 4, and 57, paragraphs 2, 3 and 5):

Article 27

2. . . . Official correspondence means all correspondence relating to the mission and its functions.

4. The packages constituting the bag of the mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the mission.

Article 57

2. . . . Official correspondence means all correspondence relating to the delegation and its tasks.

3. Where practicable, the delegation shall use the means of communication, including the bag . . . of the permanent diplomatic mission, of a consular post, of the permanent mission or of the permanent observer mission of the sending State.

5. The packages constituting the bag of the delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the delegation. (1978 Report.)

(2) *Comments of Governments*

(a) The diplomatic bag is the official bag of the Government of a State or its diplomatic mission, intended for communication between the Government and the diplomatic mission as well as between the diplomatic mission and other missions and consulates of that State, regardless of where they are situated. The diplomatic bag may or may not be accompanied by a diplomatic courier. (A/33/224, pp. 65-66.)

(b) A more precise definition of what was understood by diplomatic bag and the articles that could be carried in it would save diplomatic missions from having to go through complex and varied procedures in order to accredit the diplomatic character of their dispatches and would make it easier for airlines to accord them the preferential treatment they deserved. However, item 13 of the study carried out by the Commission stated that one of the questions on which positive law was rather

unspecific was the definition of the contents of bags, and in item 16 of the study it was stated that no provision existed which clarified the role of the laws of the receiving State in that connexion. Since the contents of diplomatic bags were determined by the diplomatic function itself, restrictions on such contents could be established only in relation to that function, without the regulations of the receiving State impeding or limiting shipments sent in performance of the diplomatic function. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 15th meeting, para. 7, and ibid., Sessional fascicle, corrigendum.*)

(c) It should be noted that Philippe Cahier defined the diplomatic bag as "postal packets or packages bearing external marks of their official character."⁸⁰³ (*Ibid.*, 17th meeting, para. 10, and *ibid.*, *Sessional fascicle, corrigendum.*)

(d) This definition should be linked with the definition of the "diplomatic courier", as noted under item 1. It would, however, be desirable to draft a definition taking account of the provisions of the four multilateral conventions. As a result, the expression "diplomatic bag" would mean all packages which bear visible external marks of their character and permit the official movement of documents or articles intended exclusively for the use of the sending State and of its mission or office abroad. (A/CN.4/321 and Add.1-7, Chile, para. 13.)

(e) A clear definition of the diplomatic bag was given in article 27, paragraph 4 of the 1961 Vienna Convention. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 18th meeting, para. 14, and ibid., Sessional fascicle, corrigendum.*)

14. STATUS OF THE DIPLOMATIC BAG ACCOMPANIED BY DIPLOMATIC COURIER

(1) *Observations of the Commission*

The following provisions in the existing conventions may be considered as relevant:

(a) 1961 Vienna Convention (article 27, paragraph 3):

3. The diplomatic bag shall not be opened or detained.

(b) 1963 Vienna Convention (article 35, paragraph 3):

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reasons to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

(c) Convention on Special Missions (article 28, paragraph 4):

4. The bag of the special mission shall not be opened or detained.

(d) 1975 Vienna Convention (articles 27, paragraph 3, and 57, paragraph 4):

Article 27

3. The bag of the mission shall not be opened or detained.

Article 57

4. The bag of the delegation shall not be opened or detained.

In addition, the provisions quoted under (18) (1) (a) and (19) below may also be relevant.

It was pointed out that the existing conventions did not adequately provide for protection of the diplomatic bag accompanied by a courier in the place where he was staying or on means of transport. (1978 Report.)

(2) *Comments of Governments*

(a) There is no need for amendment or detailed specification of the existing regulation. Should this matter nevertheless be brought up again for discussion, a limitation of the inviolability of diplomatic bags should be sought, whether or not they are accompanied by a courier. Where there are justifiable suspicions of *misuse* of a courier bag or package, the receiving State should have the right to refuse to allow its importation unless the bag or package is opened in the presence of a representative of the sending State and it can be demonstrated to the satisfaction of the receiving State that there is no question of misuse. (A/31/145, p. 11.)

(b) The 1961 Vienna Convention makes no provision for the possibility that the bag might be opened or detained. Nevertheless, since reality is often ahead of the law, it is possible that the receiving State, if it should have serious evidence of some anomaly regarding the contents of the bag and in the extreme case where it fears for its own security, may have to decide to open it. Because such situations occur in fact, the protocol on the diplomatic courier and diplomatic bag should deal with them and set out rules in order to prevent arbitrary action, regarding *inter alia* the following points:

- (i) The serious circumstances or evidence that have to be present in order that the bag may be opened or examined by means of X-rays, as the case may be;
- (ii) The official who is competent to order the opening of the bag;
- (iii) The act of opening the bag. Philippe Cahier suggests that the bag should be opened in the presence of a protocol officer of the Ministry of Foreign Affairs of the receiving State and of a member of the diplomatic mission to which the bag is addressed. This measure seems to us quite appropriate, in the exceptional cases mentioned;
- (iv) Detention of the bag for a short time, pending the arrival of the officials mentioned;
- (v) Procedure in the case of non-appearance of one or other of the officials mentioned.

In any case, we consider that the bag should be inspected only for the purpose of checking the physical contents of the packets, and with the least possible delay in order not to hinder diplomatic communications, for as is expressly stated in article 27, paragraphs 2 and 4, official correspondence means "all correspondence relating to the mission and its functions" and "the packages constituting the diplomatic bag . . . may contain only diplomatic documents or articles intended for official use". (A/33/224, pp. 53-54.)

(c) The diplomatic bag, whether accompanied or not accompanied by a diplomatic courier, is inviolable and shall not be opened or detained, nor shall any person acquaint himself with its contents by means of technical devices without opening the bag. All packages constituting the diplomatic bag, whether accompanied or not accompanied by a diplomatic courier, shall bear visible external marks indicating their character and the Government to which they belong and shall contain only

⁸⁰³ P. Cahier, *Le droit diplomatique contemporain* (Institut universitaire de Hautes Etudes internationales, publication No. 40) (Geneva, Droz, 1962), p. 213.

diplomatic documents and articles intended for official use. (*Ibid.*, p. 66.)

(d) The protocol should provide for the status of the diplomatic bag, whether accompanied or not accompanied by diplomatic courier, emphasizing the inviolability of the diplomatic bag and the obligation of both the receiving State and the transit State to take all necessary measures to ensure its inviolability. (*Ibid.*, p. 60; *Official Records of the General Assembly, Thirty-third session, Sixth Committee*, 18th meeting, para. 11, and 41st meeting, para. 58; and *ibid.*, *Sessional fascicle*, corrigendum; A/CN.4/321 and Add.1-7, Czechoslovakia.)

(e) With regard to the inviolability of the diplomatic bag, although article 27, paragraph 3, of the 1961 Vienna Convention prohibited the opening or detaining of the diplomatic bag, its wording could give the receiving State a pretext for opening it if the latter entertained serious doubts concerning its content or safety. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 17th meeting, para. 10, and *ibid.*, *Sessional fascicle*, corrigendum.)

(f) This item concerns the security measures to be taken by States in respect of packages constituting a diplomatic bag. One of the factors to be considered is the principle that the bag may not be opened or detained; in addition, provision should be made for whatever measures are to be taken by the transit and receiving States for the adequate protection of the diplomatic bag, as referred to under item 18 and 19. (A/CN.4/321 and Add.1-7, Chile, para. 14.)

15. STATUS OF THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

15 (a). GENERAL⁸⁰⁴

(1) *Observations of the Commission*

The provisions quoted and referred to under item (14) above are also relevant to the status of the diplomatic bag not accompanied by diplomatic courier. (1978 Report.)

(2) *Comments of Governments*

(a) As far as the diplomatic bag being sent unattended was concerned, the 1961 Vienna Convention contained only two provisions, namely, paragraphs 3 and 4 of article 27. Paragraph 3, setting forth the principle of inviolability of the diplomatic bag, required some amendments, since modern techniques made it unnecessary to open the diplomatic bag in order to ascertain its contents. The relevant provision of the Polish-Austrian Consular Convention of 2 October 1974 stipulated that the consular bag was not subject to being opened, to control or detention. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 65th meeting, para. 57, and *ibid.*, *Sessional fascicle*, corrigendum.)

(b) The host State or the transit State is required, while the diplomatic has is in its territory, to take all necessary measures to ensure the inviolability of the bag and to ensure that it reaches its destination as soon as possible. Questions of the procedure to be followed in dispatching and receiving a diplomatic bag not accom-

panied by a diplomatic courier shall be settled by special agreements concluded between the States concerned. (A/33/224, p. 66.)

(c) The protocol should stipulate that the security of the bag was the responsibility of the State of transit or the receiving State. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 17th meeting, para. 21, and *ibid.*, *Sessional fascicle*, corrigendum.)

(d) The use of the diplomatic bag not accompanied by diplomatic courier was particularly widespread in developing countries, for economic reasons, and its inviolability must be ensured except in cases where there was grave suspicion as to its contents. (*Ibid.*, *Sixth Committee*, 18th meeting, para. 33, and *ibid.*, *Sessional fascicle*, corrigendum.)

(e) In the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the following points should be taken into account: the serious circumstances or evidence that had to be present in order that the bag might be opened or examined by means of X-rays; the official who was competent to order the opening of the bag; the act of opening the bag (Philippe Cahier suggested that it should be opened in the presence of a protocol officer of the Ministry of Foreign Affairs of the receiving State and a member of the diplomatic mission to which the bag was addressed); detention of the bag for a short time, pending the arrival of those officials; procedure in the case of non-appearance of one or other of the officials; and a requirement that the bag should be inspected only for the purpose of checking the physical contents of the packets, and with the least possible delay so as not to hinder diplomatic communications. (*Ibid.*, *Sixth Committee*, 17th meeting, para. 11, and *ibid.*, *Sessional fascicle*, corrigendum.)

(f) It appears necessary that all the rights and obligations connected with the dispatch of the diplomatic bag not accompanied by diplomatic courier should be regulated in detail. In this connexion, it is of paramount importance to ensure the inviolability of the diplomatic bag not accompanied by diplomatic courier. This could be accomplished, for example, by provisions guaranteeing the immediate delivery by the receiving State of the incoming diplomatic bag not accompanied by diplomatic courier and the instantaneous clearance of the outgoing diplomatic bag not accompanied by diplomatic courier immediately prior to the departure of the means of transport for the diplomatic bag. Regulations on the type and colour of the diplomatic bag not accompanied by diplomatic courier could also serve to ensure as direct and immediate a transfer as possible of the bag from the means of transport to the authorized member of the diplomatic mission, and vice versa. (A/CN.4/321 and Add.1-7, Federal Republic of Germany.)

(g) Particular attention should be given to the problems arising from the gap which exists between the justified need of the world community for security from terrorist activities, in particular in civil aviation, on the one hand, and the equally justified request for the inviolability of the diplomatic pouch, on the other hand. A concrete problem that could be studied in this context would be direct access to the apron of international airfields when delivering or receiving diplomatic pouches transported by pilots. (*Ibid.*, Austria.)

(h) It should be noted that States are using diplomatic couriers less and less frequently and that diplomatic bags

⁸⁰⁴ See also comments and observations under item 14 above, which may be relevant but are not repeated here.

are now usually sent overland, by air or by sea without being entrusted to a courier. In many States, the packages and parcels constituting the diplomatic bag are sent by post. They are then treated in the same way as letters or parcels sent by ordinary or registered mail. It might be useful to envisage provisions ensuring that diplomatic bags sent by post arrive quickly and safely under all circumstances. (*Ibid.*, Switzerland.)

(i) The unaccompanied bag should be given the same measure of protection by transit States and the receiving State as is accorded to the bag accompanied by diplomatic courier. But the provisions of paragraphs 1-4 of article 27 of the 1961 Vienna Convention apply to both accompanied and unaccompanied bags. Further provision for bags unaccompanied by courier is made by paragraph 7 of that article. (*Ibid.*, United Kingdom.)

15 (b). THE DIPLOMATIC BAG ENTRUSTED TO THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR OF A SHIP

(1) *Observations of the Commission*

The existing conventions provide the following:

(a) 1961 Vienna Convention (article 27, paragraph 7):

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

(b) 1963 Vienna Convention (article 35, paragraph 7):

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

(c) Convention on Special Missions (article 28, paragraph 8):

8. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

(d) 1975 Vienna Convention (article 27, paragraph 7, and article 57, paragraph 8):

Article 27

7. The bag of the mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the mission. By arrangement with the appropriate authorities of the host State, the mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 57

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities of the host State, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft. (1978 Report.)

(2) *Comments of Governments*

(a) One of the problems ripe for consideration was a more detailed elaboration of provisions regarding the status of the diplomatic courier, or a person to whom the diplomatic bag had been entrusted, as well as the unaccompanied shipment of the diplomatic bag, which was becoming a more frequent practice, especially on the part of smaller States. With regard to the two latter practices, the provisions of the 1961 Vienna Convention were far too general. Article 27, paragraph 7, of that Convention, dealing with cases in which the diplomatic bag was entrusted to the captain of a commercial aircraft, who was not considered as a diplomatic courier, should be elaborated in greater detail. In that connexion, the speaker recalled that, as long ago as 1958, the view had been expressed that it might be advisable to consider extending the personal inviolability of the diplomatic courier to the captain or member of the crew of a commercial aircraft carrying the diplomatic bag; that immunity would exist only for the duration of the journey and until the bag was delivered. (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 65th meeting, para. 57, and ibid., Sessional fascicle, corrigendum.*)

(b) Article 27, paragraph 7, of the 1961 Vienna Convention provides for the taking of possession of the diplomatic bag from the captain of the aircraft but makes no reference to its delivery to the captain of the aircraft, which may give rise to technical difficulties. (A/33/224, p. 58.)

(c) (i) Article 27, paragraph 5, of the 1961 Vienna Convention provides that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention". Paragraph 6 makes provision for diplomatic couriers *ad hoc* and grants to such a courier the same immunity as that mentioned in paragraph 5 until he has delivered to the consignee the diplomatic bag in his charge. Paragraph 7 covers the case where the diplomatic bag is entrusted to the captain of a commercial aircraft, who is not regarded as a diplomatic courier; the paragraph provides that a member of the mission may take possession of the diplomatic bag directly and freely from the said captain. The question arises whether the two exceptions of paragraphs 6 and 7 or the general rule in paragraph 5 of article 27 of the Vienna Convention are duly justified in international practice. (ii) If the reply is affirmative in the former case, it is suggested that the protocol should clearly lay down the principle that the person carrying or accompanying the bag (diplomatic courier *ad hoc* and/or captain of a commercial aircraft) is independent of the bag itself, so as to ensure that any measure which the receiving State might possibly adopt with respect to the person is not extended to the diplomatic bag, and *vice versa*. (*Ibid.*, pp. 54-55.)

(d) It is desirable to specify the rules applicable to the diplomatic bag in this case if it is felt that, in such circumstances, there is a greater need for the protection and free transit of the packages constituting the bag. The principle established in the existing multilateral conventions should therefore be upheld, in the sense that the diplomatic bag should be entrusted to the highest ranking person in charge of the means of transport being used to carry it, namely the captain of the ship or aircraft concerned. Upon its arrival at the port or airport of entry in the receiving State, the diplomatic bag would be

handed over to the mission official duly authorized for that purpose, who would take direct physical possession of the packages. (A/CN.4/321 and Add. 1-7, Chile, para. 15.)

(e) The possibility of entrusting a diplomatic bag to the captain of a commercial aircraft, in accordance with article 27, paragraph 7, of the 1961 Vienna Convention, usually arises only in the case of a diplomatic bag of the State to which the airline company belongs. The diplomatic bags of other States must therefore be sent as air freight, and are treated as such upon departure and arrival. In order to avoid the delays that generally result from such a situation, consideration should be given to provisions for swifter forwarding of diplomatic bags sent as air freight, more particularly by exempting them from customs formalities. (*Ibid.*, Switzerland.)

16. RESPECT FOR THE LAWS AND REGULATIONS OF THE RECEIVING STATE

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) The protocol should stipulate the duty of the diplomatic courier to observe the laws and regulations of the receiving State. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 41st meeting, para. 58, and *ibid.*, *Sessional fascicle*, corrigendum; A/CN.4/321 and Add.1-7, Czechoslovakia.)

(b) Unquestionably, the diplomatic courier must observe the laws and regulations of the receiving State. Without prejudice to the privileges and immunities to which he is entitled, the diplomatic courier should endeavour not to contravene the laws of the receiving State; while this obligation is expressly stipulated in article 41, paragraph 1, of the 1961 Vienna Convention, in respect of all persons enjoying privileges and immunities, including the duty not to interfere in the internal affairs of that State, there is no reason why the principle should not be reiterated in the future rules concerning the diplomatic courier. (*Ibid.*, Chile, para. 16; *ibid.*, Federal Republic of Germany.)

17. OBLIGATIONS OF THE RECEIVING STATE

17 (a). GENERAL

(1) *Observations of the Commission*

The existing conventions provide the following:

(a) 1961 Vienna Convention (article 27, paragraph 5):

5. The diplomatic courier, . . . shall be protected by the receiving State in the performance of his functions.

(b) 1963 Vienna Convention (article 35, paragraph 5):

5. . . . In the performance of his functions he [the consular courier] shall be protected by the receiving State.

(c) Convention on Special Missions (article 28, paragraph 6):

6. The courier of the special mission, . . . shall be protected by the receiving State in the performance of his functions.

(d) 1975 Vienna Convention (article 27, paragraph 5, and article 57, paragraph 6):

Article 27

5. The courier of the mission . . . shall be protected by the host State in the performance of his functions.

Article 57

6. The courier of the delegation . . . shall be protected by the host State in the performance of his functions. (1978 Report.)

(2) *Comments of Governments*

(a) Receiving States of diplomatic missions are obliged to offer every possible assistance to diplomatic couriers in the performance of their duties. (A/31/145, p. 13.)

(b) The host State is required to take all appropriate steps to prevent any attack on the person, freedom or dignity of the diplomatic courier. (A/33/224, Annex, p. 66; *Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 41st meeting, para. 58, and *ibid.*, *Sessional fascicle*, corrigendum.)

(c) The primary obligation of the receiving State may be described briefly as being to afford to the diplomatic courier the guarantees necessary for the enjoyment of his privileges and immunities, which are inherent in his function. As the relevant multilateral conventions indicate, the diplomatic courier shall be protected by the receiving State. Consequently, rather than drawing up a list of the specific secondary obligations which give effect to the principal obligation, it would be better to give a general definition of this duty. (A/CN.4/321 and Add.1-7, Chile, para.17.)

(d) The host State is required, while the diplomatic bag is in its territory, to take all necessary measures to ensure the inviolability of the bag and to ensure that it reaches its destination as soon as possible. (A/33/24, p. 66.)

(e) It is in our interest to have an international agreement by which the protection of the bag could be made the sole responsibility of the receiving State or any other State through which it passes. (*Ibid.*, p. 61.)

17 (b). OBLIGATIONS OF THE RECEIVING STATE IN THE EVENT OF DEATH OF OR ACCIDENT TO THE DIPLOMATIC COURIER PRECLUDING HIM FROM THE PERFORMANCE OF HIS FUNCTIONS

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) In the event of the sudden death of a diplomatic courier or of an accident that prevents him from performing his official duties, the host State shall, as soon as possible, take steps to notify the State to which the diplomatic bag belongs and to transfer the diplomatic bag to the official representative of the State to which the diplomatic bag belongs. (A/33/224, p. 67.)

(b) In the event of the diplomatic courier's death or if some accident should prevent him from carrying out his functions, the future rule should be designed to ensure the protection of the packages constituting the diplomatic bag until they are handed over to another courier. (A/CN.4/321 and Add.1-7, Chile, para. 17.)

18. OBLIGATIONS OF THE TRANSIT STATE

18 (a). GENERAL

(1) *Observations of the Commission*

The relevant conventions provide as follows:

(a) 1961 Vienna Convention (article 40, paragraph 3):

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit, the same inviolability and protection as the receiving State is bound to accord.

(b) 1963 Vienna Convention (article 54, paragraph 3):

3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.

(c) Convention on Special Missions (article 42, paragraphs 3 and 4):

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. Subject to the provisions of paragraph 4 of this article, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord under the present Convention.

4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the special mission, members of their families or couriers, and has raised no objection to it.

(d) 1975 Vienna Convention (article 81, paragraph 4):

4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the host State is bound to accord under the present Convention. They shall accord to the couriers of the mission, of the delegation or of the observer delegation, who have been granted a passport visa if such visa was necessary, and to the bags of the mission, of the delegation or of the observer delegation in transit the same inviolability and protection as the host State is bound to accord under the present Convention.

The question was raised whether the status of the diplomatic courier, in particular his privileges and immunities, should be dealt with in respect of transit States also. It was pointed out that the existing conventions provided no obligation for a transit State to grant visas to diplomatic couriers but that once the couriers were admitted to the territory of the transit State, they should enjoy the necessary protection. (1978 Report.)

(2) *Comments of Governments*

(a) The transit State is required to take all appropriate steps to prevent any attack on the person, freedom or dignity of the diplomatic courier. (A/33/224, p. 66; *Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 41st meeting, para. 58, and ibid., Sessional fascicle, corrigendum.*)

(b) For the purpose of the prompt and complete performance of the mission entrusted to him, the diplomatic courier should be able to rely on the undertaking given by States to give him passport visas, if such visas are necessary. A provision embodying this obligation on the

part of transit States to permit movement through their territory would constitute an effective protection for the movement of the courier in the performance of his duty. For this purpose, it would be desirable to combine this principle with item 5, concerning the facilities to be accorded to the diplomatic courier. (A/CN.4/321 and Add.1-7, Chile, para. 18.)

(c) Diplomatic couriers and diplomatic bags which happened to be in a third State in transit should enjoy the same protection and inviolability in that State as they were bound to be accorded by the receiving State, in accordance with article 40, paragraphs 3 and 4, of the 1961 Vienna Convention. That would ensure that the provisions applying to the receiving State were also applied to third States. (*Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 17th meeting, para. 14, and ibid., Sessional fascicle, corrigendum.*)

(d) The transit State is required, while the diplomatic bag is in its territory, to take all necessary measures to ensure the inviolability of the bag and to ensure that it reaches its destination as soon as possible. (A/33/224, p. 66; *Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 18th meeting, para. 11, and ibid., Sessional fascicle, corrigendum.*)

(e) It is in our interest to have an international agreement by which the protection of the bag could be made the sole responsibility of the receiving State or any other State through which it passes. (A/33/224, p. 61.)

18 (b). OBLIGATION OF THE TRANSIT STATE IN THE EVENT OF DEATH OF OR ACCIDENT TO THE DIPLOMATIC COURIER PRECLUDING HIM FROM THE PERFORMANCE OF HIS FUNCTIONS

(1) *Observations of the Commission*

No provision is contained in the existing conventions. (1978 Report.)

(2) *Comments of Governments*

(a) In the event of the sudden death of a diplomatic courier or of an accident that prevents him from performing his official duties, the transit State shall, as soon as possible, take steps to notify the State to which the diplomatic bag belongs and to transfer the diplomatic bag to the official representative of the State to which the diplomatic bag belongs. (A/33/224, p. 67.)

(b) In the event of the diplomatic courier's death or of some accident that prevents him from performing his functions, the future rule should be designed to ensure the protection of the packages constituting the diplomatic bag until they are handed over to another courier. (A/CN.4/321 and Add.1-7, Chile, para. 18.)

19. OBLIGATIONS OF THE THIRD STATE IN CASES OF "FORCE MAJEURE"

(1) *Observations of the Commission*

The existing conventions provide as follows:

(a) 1961 Vienna Convention (article 40, paragraph 4):

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

(b) 1963 Vienna Convention (article 54, paragraph 4):

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to *force majeure*.

(c) Convention on Special Missions (article 42, paragraph 5):

5. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and the bags of the special mission, when the use of the territory of the third State is due to *force majeure*.

(d) 1975 Vienna Convention (article 18, paragraph 5):

5. The obligations of third States under paragraphs 1, 2, 3 and 4 of this article shall also apply to the persons mentioned respectively in those paragraphs and to the official communications and bags of the mission, of the delegation or of the observer delegation when they are present in the territory of the third State owing to *force majeure*. (1978 Report.)

(2) Comments of Governments

(a) In cases of *force majeure* (forced landing of an aircraft or breakdown of other means of transport), the State in whose territory the diplomatic courier or diplomatic bag happens to be shall respect the provisions of the protocol concerning the privileges and immunities of the diplomatic courier and the status of the diplomatic bag. (A/33/224, p. 55; *ibid.*, p.67: *Official Records of the General Assembly, Thirty-third Session, Sixth Committee, 17th meeting, para. 14, and ibid., Sessional fascicle, corrigendum.*)

(b) If, in consequence of *force majeure* or of some fortuitous event, the diplomatic courier is compelled to make use of the territory of a third State, it is reasonable to infer that the protection of that State should be extended, for as long as necessary, to the person of the courier and to the diplomatic bag which he is accompanying. (A/CN.4/321 and Add.1-7, Chile, para. 19.)

D. Additional items to be studied

1. Facilities accorded to the diplomatic courier with respect to his entry and departure from the territory of the receiving State.

2. Facilities accorded to the diplomatic courier for movement within the territory of the receiving State and the transit State in the performance of his functions.

3. Facilities accorded to the diplomatic courier for

communicating with the sending State and its diplomatic mission in the territory of the receiving State for all official purposes.

4. Exemption from national, regional or municipal dues and taxes.

5. Exemption from personal service and public service of any kind.

6. Obligation of the diplomatic courier not to undertake any professional or commercial activity on the territory of the receiving State or the State of transit.

7. Suspension of the functions of the diplomatic courier by the competent authorities of the sending State.

8. Application of the principle of non-discrimination with respect to the diplomatic courier, the accompanied and non-accompanied bag.

E. Conclusions and recommendations

163. A brief review of sections C and D above has proved that there are many issues on which no provision is contained in the existing conventions and several issues on which, although there are some relevant provisions in the existing conventions, because of the general nature of such provisions, further elaboration is desirable.

164. In the light of the foregoing considerations, the Commission reached the following conclusions regarding the future work to be undertaken on the subject:

(1) The Secretariat should continue with the preparation of a comprehensive follow-up report, on the pattern of the latest working paper,⁸⁰⁵ analysing the written comments which may be forthcoming as well as the views which may be expressed by Governments during the thirty-fourth session of the General Assembly.

(2) The Commission should appoint a Special Rapporteur on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, who will be entrusted with the preparation of a set of draft articles for an appropriate legal instrument.

165. At the 1580th meeting, held on 31 July 1979, the Commission appointed Mr. Alexander Yankov Special Rapporteur for the topic.

⁸⁰⁵ See foot-note 789 above.

Chapter VII

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

166. At its first session, in 1949, the Commission drew up a provisional list of 14 topics selected for codification, including one entitled "Jurisdictional immunities of States and their property".⁸⁰⁶ In drawing up that provisional list, the Commission had before it a memorandum prepared by the Secretary-General, entitled *Survey of international law in relation to the work of codification of the International Law Commission*.⁸⁰⁷ Included in the *Survey* was a separate section on "Jurisdiction over foreign States", in which it was stated that the subject covered "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces".⁸⁰⁸

167. With a view to bringing its long-term programme of work up to date, taking into account the General Assembly's recommendations and the international community's current needs, the Commission requested the Secretary-General in 1970 to submit a new working paper as a basis for the selection of another list of topics that might be included in its long-term programme.⁸⁰⁹ The Secretary-General submitted a working paper entitled "Survey of international law"⁸¹⁰ in 1971, which included a section on "Jurisdictional immunities of foreign States and their organs, agencies and property".⁸¹¹

168. During the Commission's consideration of its long-term programme of work at its twenty-fifth session, in 1973, the 1971 *Survey* served as a basis for discussion. Among the topics repeatedly mentioned in the discussion was that of the jurisdictional immunities of foreign States and of their organs, agencies and property. The Commission decided that it would give further consideration to the various proposals and suggestions at future sessions.⁸¹²

169. In 1977, at its twenty-ninth session, the Commission considered possible additional topics for study following the implementation of the current programme of work, and included a section thereon in its report.⁸¹³ The topic "Jurisdictional immunities of States and their property" was recommended for selection in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance as

well as its suitability for codification and progressive development.⁸¹⁴

170. The General Assembly, having considered the report of the Commission on the work of its twenty-ninth session, adopted on 19 December 1977 resolution 32/151, paragraph 7 of which reads as follows:

[The General Assembly]

7. Invites the International Law Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topics of international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property.

171. At its thirtieth session, in 1978, the Commission set up a Working Group to consider the question of the future work of the Commission on the topic and to report thereon to the Commission. The Working Group was composed as follows: Mr. Sompong Sucharitkul (Chairman), Mr. Abdullah El-Erian, Mr. Laurel B. Francis and Mr. Willem Riphagen.⁸¹⁵

172. The Commission considered the report of the Working Group at its 1524th and 1527th meetings, on 24 and 27 July 1978, and on the basis of the recommendations contained therein, decided to:

(a) include in its current programme of work the topic "Jurisdictional immunities of States and their property";

(b) appoint a Special Rapporteur for this topic;

(c) invite the Special Rapporteur to prepare a preliminary report at an early juncture for consideration by the Commission;

(d) request the Secretary-General to address a circular letter to the Governments of Member States inviting them to submit by 30 June 1979 relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence;

(e) request the Secretariat to prepare working papers and materials on the topic, as the need arises and as requested by the Commission or the Special Rapporteur for the topic.⁸¹⁶

173. In addition, the Commission took note of the report of the Working Group and decided to include a section thereof in the relevant chapter of the Commission's report.⁸¹⁷ It also appointed Mr. Sompong Sucharitkul Special Rapporteur on the topic "Jurisdictional immunities of States and their property".⁸¹⁸

174. Taking note of the Commission's preliminary work regarding the study of, *inter alia*, jurisdictional immunities of States and their property, the General

⁸⁰⁶ *Yearbook* . . . 1949, p. 281, document A/925, para. 16.

⁸⁰⁷ United Nations publication, Sales No. 1948.V.1 (1).

⁸⁰⁸ *Ibid.*, para. 50.

⁸⁰⁹ *Yearbook* . . . 1970, vol. II, p. 309, document A/8010/Rev.1, para. 87.

⁸¹⁰ *Yearbook* . . . 1971, vol. II (Part Two), p. 1, document A/CN.4/245.

⁸¹¹ *Ibid.*, pp. 18–21, paras. 67–79.

⁸¹² *Yearbook* . . . 1973, vol. II, pp. 230 and 231, document A/9010/Rev.1, paras. 173 and 174.

⁸¹³ *Yearbook* . . . 1977, vol. II (Part Two), pp. 129 and 130, document A/32/10, paras. 107–111.

⁸¹⁴ *Ibid.*, p. 130, para. 110.

⁸¹⁵ *Yearbook* . . . 1978, vol. II (Part Two), p. 152, document A/33/10, para. 179.

⁸¹⁶ *Ibid.*, p. 153, document A/33/10, para. 188.

⁸¹⁷ *Ibid.*, para. 189 and annex to chap. VIII, sect. D.

⁸¹⁸ *Ibid.*, para. 190.

Assembly, by its resolution 33/139 of 19 December 1978, recommended that the Commission "should continue its work on the remaining topics in its current programme", which included the topic under consideration.

175. Pursuant to the Commission's request noted above,⁸¹⁹ the Legal Counsel of the United Nations addressed a circular letter dated 18 January 1979 to the Governments of Member States, inviting them to submit by 30 June 1979 relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence.

176. At its current session, the Commission had before it a preliminary report (A/CN.4/323)⁸²⁰ on the topic submitted by the Special Rapporteur. The report contained five parts. The Introduction stated the purpose of the report, sought to identify the types of relevant source materials on the topic and its appropriate contents, and recalled previous decisions of the Commission and resolutions of the General Assembly forming a basis for the study. Chapter I gave a historical sketch of international efforts towards codification, including those of the League of Nations Committee of Experts, the International Law Commission, regional legal committees, and professional and academic circles. Chapter II grouped under four headings the various types of possible source materials to be examined, namely, the practice of States in the form of national legislation, judicial decisions of municipal courts, and governmental practice; international conventions; international adjudication; and opinions of writers. Chapter III gave a rough analytical outline of the possible contents of the law of State immunity, covering a number of initial questions: the problem of defining certain concepts; the general rule of State immunity, including the extent of its application; consent as an element of the rule and some possible exceptions; immunity from attachment and execution; other procedural and related questions. Chapter IV underlined the possibility and practicability of the eventual preparation of draft articles on the topic.

177. The topic was discussed by the Commission at the current session at its 1574th and 1575th meetings, held on 23 and 24 July 1979. It was indicated by the Special Rapporteur in introducing his report that, being purely preliminary in nature, it was designed to present an overall picture of the topic, without proposing any solution for each or any of the substantive issues identified. The Special Rapporteur noted that, in response to the aforementioned request for relevant materials⁸²¹ the Governments of eight Member States had forwarded such information as at 23 July 1979.

178. Most members of the Commission took part in the discussion of the report. A consensus emerged to the effect that for the immediate future the Special Rapporteur should continue his study, concentrating on general principles and thus confining the areas of initial interest to the substantive contents and constitutive elements of the general rules of jurisdictional immunities of States. It was also understood that the question of the extent of, or limitations on, the application of the rules of

State immunity required an extremely careful and balanced approach, and that the exceptions identified in the report were noted merely as possible limitations, without any assessment or evaluation of their significance in State practice.

179. It was pointed out in the discussion that relevant materials on State practice should be consulted as widely as possible, including the practice of socialist countries and developing countries. It was also emphasized that another potential source of materials could be found in the treaty practice of States, which indicated consent to some limitations in specified circumstances.

180. In terms of priorities to be accorded in the treatment of the topic, it was agreed that the Special Rapporteur should continue his work on immunities of States from jurisdiction, leaving aside for the time being the question of immunity from execution of judgement. The expression "jurisdictional immunities" was understood to cover exemptions from the exercise of various types of governmental power by the territorial authorities, including the judicial power and the power exercised by the executive and other administrative authorities. Those exemptions did not, however, in general amount to substantive immunities from legislative provisions.

181. The Commission also noted the special nature of the topic under discussion, which, more than other topics hitherto studied by it, touched on the realm of internal law as well as on that of private international law. A note of caution was sounded, to the effect that the primary task of the Special Rapporteur was the search for rules of public international law on State immunities. In that task, he would inevitably have to examine, *inter alia*, the judicial or other practice of States as evidence of such rules. Several important questions of a procedural nature would also have to be looked into to complete the study. In that connexion, the scope of the topic could be so delineated as to exclude from the study certain matters such as the "act of State" doctrine and questions of purely internal law.

182. Another point noted was the widening functions of the State, which had accentuated the complexities of the problem of State immunities. Controversies had existed in the past concerning the divisibility of the functions of the State or the various distinctions between the activities carried on by modern States in spheres of activity formerly confined to individuals, such as trade and finance. Such distinctions had been attempted in order to indicate the circumstances or areas in which State immunity could be invoked or accorded. No generally accepted criterion had been found. The greatest care was called for in the treatment of that particular area of the topic.

183. The Commission decided to seek further information from the Governments of Member States of the United Nations in the form of replies to a questionnaire to be circulated. States knew best their own practice, wants and needs in the sphere of immunities in respect of their activities. The rules of State immunities should operate equally for States claiming or recovering immunities, and for States from which like immunities were sought from the jurisdiction of their judicial or administrative authorities. The views and comments of Governments could provide an appropriate indication of the direction in which the codification and progressive development of the international law of State immunities should proceed.

⁸¹⁹ See para. 172 above.

⁸²⁰ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

⁸²¹ See para. 175 above.

Chapter VIII

REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS

184. By General Assembly resolution 32/48 of 8 December 1977, entitled "Review of the multilateral treaty-making process", the Secretary-General was requested "to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties". Also in that resolution, the Assembly, bearing in mind "the important contribution of the International Law Commission to the preparation of multilateral treaties during the past twenty-nine years", provided for participation of the Commission in the review in question. The Commission was invited, as were Governments, to submit its observations on the subject by 31 July 1979, for inclusion in the Secretary-General's report.⁸²²

185. Pursuant to that invitation, the Commission placed on the agenda of its thirtieth session an item entitled "Review of the multilateral treaty-making process".⁸²³ At its 1486th meeting, held on 25 May 1978, the Commission set up a Working Group composed of Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Juan José Calle y Calle, Mr. Frank X. J. C. Njenga, Mr. Christopher Walter Pinto and Mr. Alexander Yankov to consider the preliminary questions raised by resolution 32/48 and to make recommendations to the Commission on action to be taken in response to the General Assembly's invitation.⁸²⁴

186. At the meetings of the Working Group in 1978, there were exchanges of views on the way in which the Commission could best respond to the General Assembly's invitation. The Commission, at its 1526th meeting, on 26 July 1978, adopted the report of the Working Group and, as recommended by the Group, decided to include certain paragraphs of that report in its report to the General Assembly on the work of its thirtieth session.⁸²⁵

187. As indicated in its 1978 report to the General Assembly,⁸²⁶ the Commission considered that a review of the multilateral treaty-making process constituted a very important undertaking which required serious consideration and thought. In the light of that fact, and of the Commission's role in the progressive development of international law and its codification pursuant to its Statute, the Commission welcomed the opportunity to make a contribution to the review of the question. As to the preliminary conclusions then reached, the report stated, *inter alia*, (a) that the Commission's observations would necessarily be more in the nature of an appraisal, after a careful evaluation of its own performance and of its potential; (b) that the Commission's productive ca-

capacity depended primarily upon two factors: first, the work that the Commission could accomplish during a 12-week annual session, and the work that its members, particularly the special rapporteurs, could accomplish at other times of the year; and secondly, the analysis of materials, selection of documentation, and preparation of studies by the Codification Division of the Office of Legal Affairs in the sphere of work of the Commission on the various topics on its agenda; and (c) that an assessment of the technical and procedural aspects of treaty-making, as practised by the Commission, would have to be set in a wider context, taking into account the subject-matter of the topics chosen for codification and progressive development, and involving a study of the process of selection of topics and of the interplay between the work of the Commission and that of other treaty-making forums.

188. During the consideration, at the thirty-third session of the General Assembly, of the Commission's report on the work of its 1978 session, many representatives of Member States spoke in the Sixth Committee on the preliminary observations made by the Commission on that topic.⁸²⁷

189. At the current session the Commission placed on its agenda the item "Review of the Multilateral treaty-making process" and at its 1546th meeting, on 6 June 1979, reconstituted the Working Group set up at its previous session, having enlarged its membership. The Working Group was composed as follows: Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Leonardo Diaz González, Mr. Laurel B. Francis, Mr. Frank X. J. C. Njenga, Mr. Christopher Walter Pinto, Mr. Senjin Tsuruoka, Mr. Nikolai A. Ushakov, Sir Francis Vallat and Mr. Alexander Yankov.

190. The Working Group held five meetings between 13 June and 23 July 1979. An informal preparatory working paper compiled by the Secretariat, entitled "The role of the United Nations International Law Commission in the multilateral treaty-making process", was considered by the Working Group at its first meetings. At its fourth meeting the Working Group had before it another working paper, entitled "Draft report of the Working Group", submitted by its Chairman. At its fifth meeting the Working Group adopted that working paper, together with some conclusions, as the "Report of the Working Group" (A/CN.4/325),⁸²⁸ which was submitted to the Commission for its consideration and approval.

191. All the members of the Commission had an opportunity of taking part in the discussions on the report of the Working Group, and at the 1580th meeting of the

⁸²² *Yearbook* . . . 1978, vol. II (Part One), document A/CN.4/310.

⁸²³ *Yearbook* . . . 1978, vol. II (Part Two), p. 148, document A/33/10, para. 161.

⁸²⁴ *Ibid.*, para. 162.

⁸²⁵ *Ibid.*, p. 149, para. 163.

⁸²⁶ *Ibid.*, paras. 164-168.

⁸²⁷ See *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 259 and 260.

⁸²⁸ Reproduced in *Yearbook* . . . 1979, vol. II (Part One).

Commission, held on 31 July 1979, the Chairman of the Commission placed on record the decision of the Commission to approve the report and to transmit, in accordance with General Assembly resolution 32/48, the observations of the Commission on the review of the multilateral treaty-making process contained therein to the Secretary-General, for inclusion in the report on the techniques and procedures used in the elaboration of multilateral treaties to be prepared by the Secretary-General pursuant to that resolution.

192. Those observations were presented in nine sections, as follows:

- A. The International Law Commission as a United Nations body;
- B. Object and functions of the International Law Commission;
- C. Programme of work of the International Law Commission;
- D. Role of the International Law Commission and its contribution to the treaty-making process through the preparation of draft articles;
- E. Consolidated method and techniques of work of the International Law Commission as applied in general to the preparation of draft articles;
- F. Other methods and techniques employed by the International Law Commission;
- G. Relationship between the General Assembly and the International Law Commission;
- H. Elaboration and conclusion of conventions on the basis of draft articles prepared by the International Law Commission following a General Assembly decision to that effect;
- I. Conclusions.

The observations are not reproduced in the present report in view of the Commission's decision to transmit them to the Secretary-General for inclusion in the report to be submitted by him to the General Assembly pursuant to General Assembly resolution 32/48.

193. The observations transmitted by the Commission to the Secretary-General show that the techniques and procedures provided for in the Statute of the Commission, as they have evolved in practice during a period of three decades, are well adapted to the object stated in article 1 and further defined in article 15 of its Statute, namely, "the progressive development of international law and its codification". They have proved, as a whole, to be appropriate to the performance by the Commission of the tasks entrusted to it and, in particular, to its contribution to the treaty-making process through the preparation of draft articles which, following a decision of the General Assembly to that effect, provide the basis for the elaboration and adoption by States of instruments that progressively develop and codify international law.

194. Important law-making conventions, such as the four Conventions on the Law of the Sea of 1958,⁸²⁹ the

Convention on the Reduction of Statelessness of 1961,⁸³⁰ the Vienna Convention of 1961 on Diplomatic Relations,⁸³¹ the Vienna Convention on Consular Relations of 1963,⁸³² the Convention of 1969 on Special Missions,⁸³³ the Vienna Convention of 1969 on the Law of Treaties,⁸³⁴ the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,⁸³⁵ the Vienna Convention of 1975 on the Representation of States in Their Relations with International Organizations of a Universal Character,⁸³⁶ and the Vienna Convention of 1978 on Succession of States in Respect of Treaties,⁸³⁷ have already been elaborated and concluded by States on the basis of draft articles prepared by the Commission. In addition, the Commission is at present engaged in the preparation of draft articles on other topics on its programme, which could eventually provide a basis for the elaboration and adoption by States of further law-making conventions in the future.

195. The general recognition of the quality of the Commission's work, and the degree of support and acceptability that its draft articles receive in the Sixth Committee and in conferences of plenipotentiaries, appear to support the conclusion that the techniques and procedures provided for in the Statute of the Commission, as they have evolved in practice, are well suited to the tasks entrusted to the Commission by the General Assembly. It must be added that these techniques and procedures—which provide opportunities for Governments to make comments and observations either direct or through their representatives in the General Assembly, and for examination by the Commission before the adoption of a final set of draft articles on a given topic—are flexible enough to allow the Commission to make, within its general framework, such adjustments as the specific features of a topic or other circumstances may demand.

⁸³⁰ *Human rights – a compilation of international instruments* (United Nations publication, Sales No. E.78.14.2), p. 76.

⁸³¹ United Nations, *Treaty Series*, vol. 500, p. 95.

⁸³² *Ibid.*, vol. 596, p. 261.

⁸³³ General Assembly resolution 2530 (XXIV), annex.

⁸³⁴ *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.

⁸³⁵ General Assembly resolution 3166 (XXVIII), annex.

⁸³⁶ *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. 207.

⁸³⁷ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.

⁸²⁹ Convention on the Territorial Sea and the Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205); Convention on the High Seas (*ibid.*, vol. 450, p. 11); Convention on Fishing and Conservation of the Living Resources of the High Seas (*ibid.*, vol. 559, p. 285); Convention on the Continental Shelf (*ibid.*, vol. 499, p. 311).

Chapter IX

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Appointment of Special Rapporteurs

196. At its 1580th meeting, on 31 July 1979, the Commission appointed Mr. Leonardo Díaz González Special Rapporteur for the topic "Relations between States and international organizations (second part of the topic)", to succeed Mr. Abdullah El-Erian, who had resigned on his election to the International Court of Justice.

197. It may be recalled that at the present session the Commission also appointed Mr. Willem Riphagen Special Rapporteur for the topic "State responsibility" and Mr. Alexander Yankov Special Rapporteur for the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".⁸³⁸

B. Programme and methods of work of the Commission

198. At its 1549th meeting, held on 11 June 1979, the Commission decided to establish a Planning Group of the Enlarged Bureau for the present session. The Group was composed of Mr. C. W. Pinto (Chairman); Mr. Leonardo Díaz González; Mr. Laurel B. Francis; Mr. Frank X. J. C. Njenga; Mr. Paul Reuter; Mr. Stephen M. Schwebel; Mr. Abdul Hakim Tabibi; Mr. Doudou Thiam; Mr. Senjin Tsuruoka; Mr. Nikolai Ushakov; Sir Francis Vallat; and Mr. Alexander Yankov. The Group was entrusted with the task of considering the programme and methods of work of the Commission and of reporting thereon to the Enlarged Bureau. The Planning Group met on 15, 22 and 27 June and 9 July 1979. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

199. On the recommendation of the Planning Group, the Enlarged Bureau recommended that the Commission include paragraphs 200 to 210 below in its report to the General Assembly on the work done at the thirty-first session. At its 1581st meeting, held on 1 August 1979, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of those recommendations, adopted the following paragraphs.

200. Bearing in mind the general objectives and priorities which the Commission, with the approval of the General Assembly, has established at previous sessions, and the recommendations contained in General Assembly resolution 33/139 of 19 December 1978, as well as the progress achieved with the topics under study at the current session, including completion of the first reading of draft articles on succession of States in respect of matters other than treaties, the Commission should at its thirty-second session, in 1980, devote its attention primarily to the consideration of other topics specifically

referred to in that resolution, namely, State responsibility, the question of treaties concluded between States and international organizations or between two or more international organizations, the law of the non-navigational uses of international watercourses, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

201. On the topic "State responsibility", the Commission should at its thirty-second session complete its consideration of draft articles on circumstances precluding wrongfulness and review those draft articles which, in accordance with the decision taken by the Commission at its thirtieth session, were submitted to Governments,⁸³⁹ in the light of their comments. The Commission will thereby complete the first reading of the draft articles constituting part I of the draft on this topic, taking into account the views expressed in debates in the General Assembly and the comments of Governments.

202. With respect to the topic "Question of treaties concluded between States and international organizations or between two or more international organizations", the Commission, having made substantial progress at the current session, may be in a position to complete its first reading of the draft articles on the topic, so that they may be communicated as a whole, through the Secretary-General, to Governments and to the international organizations concerned for comments.

203. On the topic "The law of the non-navigational uses of international watercourses", the Commission, having held an initial discussion on the first report submitted by the Special Rapporteur and the draft articles contained therein, should continue its work at the thirty-second session.

204. Continuing, pursuant to the recommendation of the General Assembly in its resolution 33/139, the study concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, with a view to the possible elaboration of an appropriate legal instrument, the Commission decided to appoint a Special Rapporteur on the topic and to entrust him with the preparation of a set of draft articles for such an instrument.

205. In order to carry out the programme of work outlined in paragraphs 201–204 above, the Commission intends to devote most of its time in 1980 to considering the four topics referred to in those paragraphs. As to the allocation of time at its thirty-second session for the topics in question, the Commission would take the appropriate decisions at the beginning of that session when arranging for the organization of its work.

206. The remaining time would be devoted to the

⁸³⁸ See paras. 73 and 165 above.

⁸³⁹ See *Yearbook . . . 1978*, Vol. II (Part Two), pp. 77–78, document A/33/10, para. 92.

consideration of other topics on the Commission's current programme, notably:

(a) "Jurisdictional immunities of States and their property", on which the Commission completed at the current session the examination of the preliminary report submitted by the Special Rapporteur and on which it is likely to receive, at the thirty-second session, a set of draft articles to be prepared by him;

(b) "International liability for injurious consequences arising out of acts not prohibited by international law", on which the Commission is likely to receive an initial report from its Special Rapporteur requiring full consideration of the basic elements of this topic; and

(c) "Relations between States and international organizations (second part of the topic)", for which the Commission appointed a Special Rapporteur at the current session.⁸⁴⁰

207. Bearing in mind the relevant recommendations of the General Assembly, the Commission, at its thirty-first session, had an opportunity of making a comprehensive review of its methods of work and procedures, while preparing its observations on the item "Review of the multilateral treaty-making process" as requested in General Assembly resolution 32/48 of 8 December 1977. Chapter VIII of the present report concerns the work of the Commission on that item. As indicated in that chapter, the observations of the Commission on the review of the multilateral treaty-making process submitted pursuant to General Assembly resolution 32/48 were transmitted to the Secretary-General for inclusion in the report on the techniques and procedures used in the elaboration of multilateral treaties, to be prepared by him pursuant to that resolution.

208. As in the past, the Commission intends to keep constantly under consideration the possibility of further improving its present methods of work and procedures—particularly in the light of the consideration by the General Assembly of the present report and of the observations referred to above⁸⁴¹—with a view to the timely and effective fulfilment of the tasks entrusted to it. The Commission expresses the hope that the necessary staff and facilities will continue to be available to it at the level required to fulfil the tasks with which it is entrusted.

209. The Commission also wishes to point out that the demands made on the time of members—particularly the Special Rapporteurs and officers of the Commission—as a result of their commitments outside the Commission have increased in recent years to such an extent that they may become an impediment to the normal working of the Commission. It therefore expresses the hope that Governments and institutions with which members of the Commission are or may be associated will themselves wish to take account of the need to enable members, in particular those who are Special Rapporteurs and officers of the Commission, to have adequate time available for the fulfilment of their responsibilities to the Commission.

210. The Commission held an exchange of views on the level of the honoraria paid to its members, including its Special Rapporteurs, for the performance of their tasks. The Commission noted that honoraria payable to members of organs and subsidiary organs of the United

Nations had been under study by the General Assembly since its thirtieth session, and took into account the reports of the Secretary-General (A/C.5/31/2, A/C.5/33/54) and the Advisory Committee on Administrative and Budgetary Questions (A/33/7/Add.39), as well as other related documents and the debates of the Fifth Committee on the subject. The Commission noted further that, while the subsistence allowance of members had been adjusted periodically to reflect in some measure the changes in the cost of living, no corresponding adjustment had been made in their honoraria for the past 20 years. The Commission wishes to bring this matter to the attention of the General Assembly.

C. Relations with the International Court of Justice

211. At its 1546th meeting, the Commission received a visit by a delegation of the International Court of Justice, headed by its President, Sir Humphrey Waldock, who was accompanied by Judge T. O. Elias, Vice-President of the Court, and Judge P. Morozov.

212. In his welcoming statement, the Chairman of the Commission stressed the complementarity of the functions of the Court and the Commission and the interlocking of the results of their work, as well as the natural bond between the two bodies, which pursued the common ultimate object of promoting peace and security and international co-operation based on the rule of law. He further underlined the contribution made to the development of the co-operation between the two bodies by the fact that many members of the Commission, as well as jurists appointed to other bodies participating in the work of codification and progressive development of international law undertaken by the United Nations, had subsequently become members of the Court.

213. Sir Humphrey Waldock said that the success of the Commission's work was not to be measured solely in terms of the conventions it produced, but also by the importance of its reports in consolidating legal opinion and furthering the general consensus in many branches of international law. He also emphasized the importance of the relationship of interplay between the Commission and the Court. Just as the Commission had helped to point the way for the Court on such matters as the continental shelf and certain aspects of the law of treaties, so the pronouncements of the Court had provided the basis for the Commission's codification and development of some important areas of the law.

D. Co-operation with other bodies

1. *Inter-American Juridical Committee*

214. The Inter-American Juridical Committee was represented at the thirty-first session of the Commission by Mr. Alberto Herrarte González, who addressed the Commission at its 1566th meeting, held on 6 July 1979.

215. Mr. Herrarte González said that the Committee attached utmost importance to its co-operation with the Commission, because of the significance for the progressive development of international law of the topics considered by the Commission and the scholarship each of its members brought to the study of those topics. With regard to the recent work of the Committee, he said that the Second Inter-American Specialized Conference on Private International Law, held at Montevideo in April

⁸⁴⁰ See para. 196 above.

⁸⁴¹ Para. 207.

and May 1979, had approved eight multilateral conventions drafted by the Committee on the following subjects: conflicts of laws concerning cheques; conflicts of laws concerning commercial companies; extraterritorial validity of foreign judgements and arbitral awards; execution of preventive measures; proof of and information on foreign law; general rules of private international law; domicile of natural persons in private international law; and letters rogatory. Mr. Herrarte González further stated that, as every year, the members of the Committee would take an active part in the course on international law to be given in Rio de Janeiro under the Committee's auspices. Lastly, he informed the Commission that the main items on the agenda for the forthcoming session of the Committee were: torture as an international crime; transnational corporations and a code of conduct; revision of the Inter-American conventions on industrial property; legal aspects of co-operation in transfer of technology; the principle of self-determination and its sphere of application; measures to promote the accession of non-autonomous territories to independence within the American system; jurisdictional immunities of States; and settlement of disputes relating to the law of the sea.

216. The Commission, having a standing invitation to send an observer to the sessions of the Inter-American Juridical Committee, requested its Chairman, Mr. Milan Šahović, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

2. *Asian-African Legal Consultative Committee*

217. Mr. Abdul Hakim Tabibi attended the twentieth session of the Asian-African Legal Consultative Committee, held at Seoul (Republic of Korea) in February 1979, as an observer for the Commission and made a statement before the Committee.

218. The Asian-African Legal Consultative Committee was represented at the thirty-first session of the Commission by its Deputy Secretary-General, Mr. Ki Nemoto, who addressed the Commission at its 1568th meeting, held on 13 July 1979.

219. Mr. Nemoto said that the Committee, having now a membership of 38 Governments, provided the Asian-African region with a unique forum in the sphere of international law. It was engaged in activities in five different branches of law, apart from its examination of the work of the Commission. The Committee had placed great emphasis in recent years on a study of the law of the sea, with a view to assisting Member Governments in preparing their positions on that matter. Furthermore, a Standing Sub-Committee had been working for several years on standard contracts for transactions in various goods. The two regional centres for commercial arbitration recently established at Cairo and Kuala Lumpur had concluded, or were about to conclude, agreements for co-operation with the IBRD International Centre for Settlement of Investment Disputes. An expert group on environmental questions, which was convened in December 1978 and attended by delegations from 24 Governments and observers from the International Law Commission and UNEP, had decided to give urgent attention to the common problems of human settlements, land use, mountain ecology, industrialization and marine pollution. In the matter of regional economic co-operation, the Committee had agreed to prepare model

clauses for joint ventures for facilitating and accelerating the harnessing of the resources of the region. Lastly, Mr. Nemoto stressed that the support and co-operation of the Commission was indispensable to the Committee in playing a constructive role in the region.

220. The Commission, having a standing invitation to send an observer to the sessions of the Committee, requested its Chairman, Mr. Milan Šahović, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

3. *European Committee on Legal Co-operation*

221. Mr. Milan Šahović attended the thirtieth session of the European Committee on Legal Co-operation, held at Strasbourg (France) in November-December 1978, and made a statement before the Committee.

222. The European Committee on Legal Co-operation was represented at the thirty-first session of the Commission by Mr. Hans-Peter Furrer, Chief of Division I of the Directorate of Legal Affairs of the Council of Europe, who addressed the Commission at its 1576th meeting, held on 25 July 1979.

223. Mr. Furrer said that the work of the Committee had been concentrated mainly on two major topics: immunity of States and peaceful settlement of disputes. On the first topic, the Committee had taken up the 1972 European Convention on State Immunity, considering the prospects for its ratification. That Convention appeared to represent the will of a considerable number of European States on the subject, since it had been ratified by four States and seven others had adopted favourable attitudes towards its ratification. As to the peaceful settlement of disputes, the Committee had reviewed the 1957 European Convention of 29 April 1957, which had been applied in very few cases despite the existence of disputes. Although certain members of the Parliamentary Assembly of the Council of Europe had taken the initiative in suggesting a revision of the Convention, that suggestion had not found support in the European Committee on Legal Co-operation. Among other activities of the Committee, he mentioned the preparation of a new draft convention for the protection of individuals with regard to automatic processing of personal data; a new draft convention on recognition and enforcement of decisions relating to the custody and on restoration of custody of children; and work relating to territorial asylum and refugees. Lastly, he noted that in May 1979 the Committee of Ministers of the Council of Europe had drafted a framework convention for transfrontier co-operation among local authorities in Europe, which was the first multilateral treaty by which several States authorized their local or regional authorities to enter into treaty relations with their counterparts in a neighbouring State in such fields as regional, rural and urban development, improvement of infrastructure and protection of the environment.

224. Mr. Furrer announced that the next session of the Committee would be held at Strasbourg from 26 to 30 November 1979 and expressed the hope that it would be possible for the Commission to be represented by an observer. The Commission, having a standing invitation to send an observer to the sessions of the Committee, requested its Chairman Mr. Milan Šahović, to attend that session of the European Committee on Legal Co-

operation or, if he was unable to do so, to appoint another member of the Commission for that purpose.

E. Date and place of the thirty-second session

225. The Commission decided to hold its next session at the United Nations Office at Geneva from 5 May to 25 July 1980.

F. Representation at the thirty-fourth session of the General Assembly

226. The Commission decided that it should be represented at the thirty-fourth session of the General Assembly by its Chairman, Mr. Milan Šahović.

G. International Law Seminar

227. Pursuant to part I, paragraph 10, of General Assembly resolution 33/139 of 19 December 1978, the United Nations Office at Geneva organized, during the thirty-first session of the Commission, a session – the fifteenth – of the International Law Seminar, for advanced students of this subject and for junior government officials who normally deal with questions of international law in the course of their work.

228. A selection committee met under the chairmanship of Mr. Quijano-Caballero, Director of External Relations and Inter-Agency Affairs at the United Nations Office at Geneva. It comprised three other members, former participants in the Seminar: Mrs. Diklić-Trajković (Permanent Mission of Yugoslavia), Mr. Omer (Secretariat; Afghanistan) and Mr. Kantar (Permanent Mission of Turkey).

229. Twenty-two participants were selected from among more than 60 candidates; three were unable, for various reasons, to come to Geneva; but two fellowship holders under the United Nations/UNITAR Fellowship Programme in International Law participated in the session.

230. Participants had access to the facilities of the United Nations Library and were able to attend a film show given by the United Nations Information Service. They were given the basic documents necessary for following the discussions of the Commission and the lectures of the Seminar, and were also able to obtain, or to purchase at reduced cost, United Nations documents which are unavailable or difficult to find in their countries of origin.

231. Between 5 and 22 June 1979, the Seminar held 11 meetings devoted to lectures followed by discussions.

232. The following seven members of the Commission

gave their service as lecturers: Mr. Laurel B. Francis (Commodity producers' association within the framework of the new economic order), Mr. Frank X. J. C. Njenga (United Nations: The law of the sea Conference), Mr. Nikolai Ushakov (The most-favoured-nation clause), Mr. C. W. Pinto (The development of customary international law through United Nations conferences), Mr. Paul Reuter (Narcotic drugs and international law), Mr. Sompong Sucharitkul (The crystallization of norms relating to the jurisdictional immunities of States and their property) and Sir Francis Vallat (The Vienna Convention on Succession of States in respect of Treaties). In addition, Mr. L. Ferrari-Bravo, the Chairman of the Sixth Committee of the General Assembly, spoke on the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, and Mr. T. van Boven, Director of the Division of Human Rights, spoke on United Nations efforts to promote and protect human rights. The Director of the Seminar, Mr. P. Raton, gave an introductory talk on the Commission and its work and, to replace a lecturer who was prevented from attending, a lecture on the privileges and immunities of international organizations and their officials.

233. As in the past, none of the cost of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants. The Governments of Austria, Denmark, Finland, the Federal Republic of Germany, Kuwait, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. These fellowships, ranging in value from US \$750 to more than US \$10,000, were awarded to ten candidates. With the award of fellowships it is possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from participating solely by lack of funds. Of the 327 participants, representing 102 nationalities, accepted since the beginning of the Seminar, fellowships have been awarded to 137. It is to be hoped, therefore, that the aforementioned Governments will continue their efforts and that other Governments will be able to contribute to this generous action. Particular thanks are due to the Norwegian Government, which has tripled its contribution since the previous session. It is the invariable practice of the organizers of the Seminar to inform donor Governments of the beneficiaries' names, and the beneficiaries themselves are always told who has provided their fellowship.

234. The Commission wishes to express its thanks to Mr. R. Raton and his assistant, Mrs. A. M. Petit, for their efficient organization of the Seminar.

CHECK LIST OF DOCUMENTS OF THE THIRTY-FIRST SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/316	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 8 above (A/34/10, para. 15).
A/CN.4/317	Filling of casual vacancies: Note by the Secretariat	Text reproduced in vol. II (Part One).
A/CN.4/317/Add.1 and Corr.1 and Add.2	<i>Idem</i> —Addenda to the note by the Secretariat: list of candidates and curricula vitae	Mimeographed.
A/CN.4/318 and Add.1–4	Eighth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur: The internationally wrongful act of the State, source of international responsibility (<i>continued</i>)	Text reproduced in vol. II (Part One).
A/CN.4/319	Eighth 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 and commentary (<i>continued</i>)	<i>Idem</i> .
A/CN.4/320 and Corr.1	First report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur	<i>Idem</i> .
A/CN.4/321 and Add.1–7	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: Comments of States	<i>Idem</i> .
A/CN.4/322 and Corr.1 and Add.1 and 2	Eleventh report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur: Draft articles relating to succession to State archives, with commentaries	<i>Idem</i> .
A/CN.4/323	Preliminary report on the topic of jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem</i> .
A/CN.4/324	Law of the non-navigational uses of international watercourses: Replies of Governments to the Commission's questionnaire	<i>Idem</i> .
A/CN.4/325	Report of the Working Group on review of the multilateral treaty-making process	<i>Idem</i> .
A/CN.4/L.289	Draft articles on State responsibility: Text of article 28 proposed by Mr. Tsuruoka	Replaced by A/CN.4/L.289/Rev.1.
A/CN.4/L.289/Rev.1	<i>Idem</i>	Text reproduced in the summary record of the 1536th meeting (vol. I), para. 2.
A/CN.4/L.290	<i>Idem</i> : Text of article 28 proposed by Mr. Jagota	<i>Idem</i> , 1535th meeting (vol. I), para. 16.
A/CN.4/L.291	<i>Idem</i> : Text of article 29 proposed by Mr. Tsuruoka	<i>Idem</i> , 1540th meeting (vol. I), para. 4.
A/CN.4/L.292	<i>Idem</i> : Text of article 29 proposed by Mr. Jagota	<i>Idem</i> , 1542nd meeting (vol. I), para. 28 (and paras. 30 and 31).
A/CN.4/L.293	<i>Idem</i> : Text of article 29 proposed by Mr. Ushakov	<i>Idem</i> , 1544th meeting (vol. I), para. 5.
A/CN.4/L.294	<i>Idem</i> : Text of article 30 proposed by Mr. Jagota	<i>Idem</i> , 1545th meeting (vol. I), para. 18.
A/CN.4/L.295	<i>Idem</i> : Text of article 30 proposed by Mr. Yankov	<i>Idem</i> , 1545th meeting (vol. I), para. 24.
A/CN.4/L.296	Draft articles on treaties concluded between States and international organizations or between international organizations: Text of article 46 proposed by Mr. Ushakov	<i>Idem</i> , 1552nd meeting (vol. I), para. 15.
A/CN.4/L.297 and Add.1	Draft articles on State responsibility: Texts adopted by the Drafting Committee—articles 28–32 and title of chapter V of the draft	<i>Idem</i> , 1567th meeting (vol. I), para. 1, and 1579th meeting (vol. I), para. 1.
A/CN.4/L.298	Succession of States in respect of matters other than treaties—draft articles relating to succession to State archives: Text of articles X, Y and Z proposed by Mr. Tsuruoka	<i>Idem</i> , 1564th meeting (vol. I), para. 30.
A/CN.4/L.299	Draft articles on succession of States in respect of matters other than treaties: Texts adopted by the Drafting Committee—articles 2–8, X and 12–25, and titles of the corresponding parts and sections of the draft	Replaced by A/CN.4/L.299/Rev.1.
A/CN.4/L.299/Rev.1	<i>Idem</i> : Texts adopted by the Drafting Committee—articles 1–23 and titles of the corresponding parts and sections of the draft	Texts reproduced in the summary record of the 1568th meeting (vol. I), para. 3.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.299/ Rev.1/Add.1	<i>Idem</i> : Draft articles relating to succession to State archives—articles A and C adopted by the Drafting Committee	<i>Idem</i> , 1570th meeting (vol. I), para. 3.
A/CN.4/L.300	Draft articles on treaties concluded between States and international organizations or between international organizations: Texts adopted by the Drafting Committee—articles 39–60 and titles of the corresponding parts and sections of the draft	<i>Idem</i> , 1576th meeting (vol. I), para. 2
A/CN.4/L.301 and Corr.1	Draft report of the International Law Commission on the work of its thirty-first session: Chap. I	Mimeographed. For the final text, see A/34/10 (p. 1 above).
A/CN.4/L.302 and Add.1–4	<i>Idem</i> : chap. II	<i>Idem</i> .
A/CN.4/L.303 and Add.1–6	<i>Idem</i> : chap. III	<i>Idem</i> .
A/CN.4/L.304	<i>Idem</i> : chap. IV	<i>Idem</i> .
A/CN.4/L.305	<i>Idem</i> : chap. V	<i>Idem</i> .
A/CN.4/L.306	<i>Idem</i> : chap. VI	<i>Idem</i> .
A/CN.4/L.307	<i>Idem</i> : chap. VII	<i>Idem</i> .
A/CN.4/L.308	<i>Idem</i> : chap. VIII	<i>Idem</i> .
A/CN.4/L.309 and Add.1	<i>Idem</i> : chap. IX	<i>Idem</i> .
A/CN.4/L.310	Report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	Text reproduced, as amended at the 1580th meeting (vol. I), in A/34/10, chap. VI (p. 170 above).
A/CN.4/SR.1530– SR.1583	Provisional summary records of the 1530th to 1583rd meetings of the International Law Commission	Mimeographed. For the final text, see vol. I.

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